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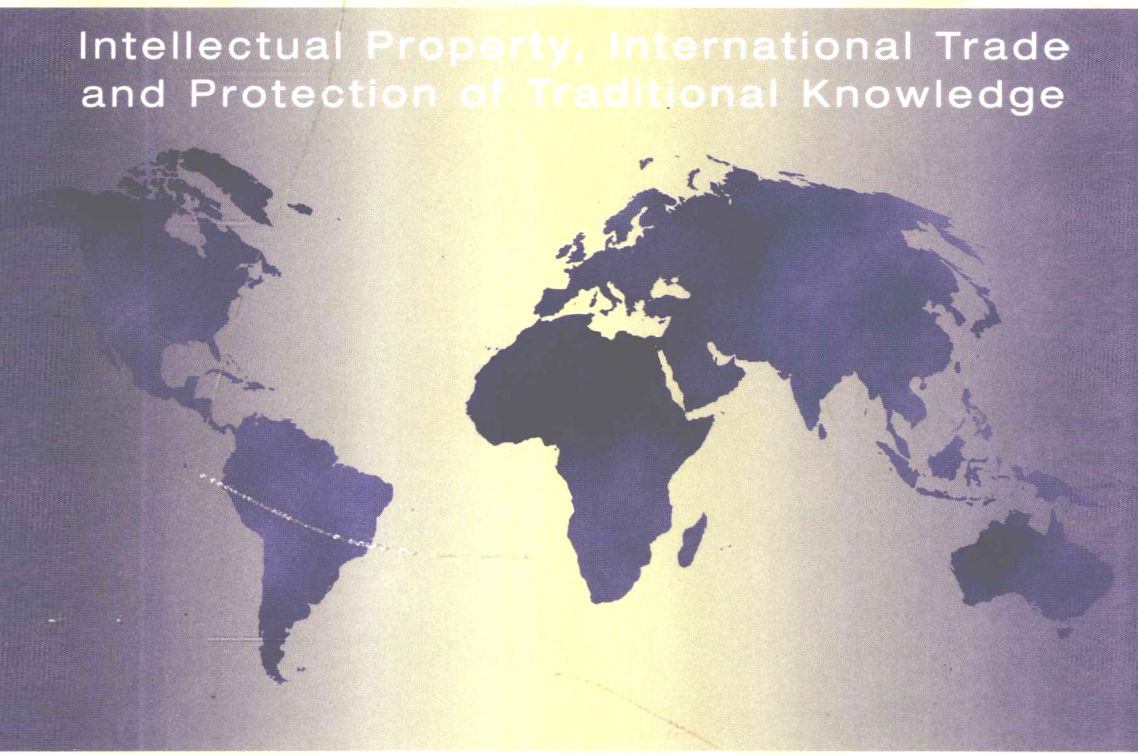
COMMUNITY RESOURCES

Intellectual Property, International Trade and Protection of Traditional Knowledge



Johanna Gibson

GLOBALIZATION AND LAW

Community Resources

Intellectual Property, International Trade and Protection of Traditional Knowledge

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Johanna Gibson

Contents

Introduction

Community Resources: Coming to Terms

> Community is bare, but it is imperative.[1]

Indigenous and traditional cultural production and knowledges present commercial potential in the context of international trade, and particular cultural and social value that is specific to local communities. In the past, the appropriation of that knowledge, deemed "natural" and for the benefit of all, was justified on the basis that such knowledge was not necessarily comprehended as creative or personal, as it were, within the dominant legal and social discourse.[2] However, recently the denial of "ownership" has been refuted and calls have been made for the protection of that knowledge, not only as a matter of property, but also, and more importantly as a matter of intrinsic importance to the dignity and cohesion of traditional and Indigenous communities. Inevitably, those calls seem to resonate within intellectual property systems, informed particularly by the potential value of trade in traditional knowledge.

The international standardisation of intellectual property protection has been criticised as a potentially unjust generalisation of protection, almost inevitably in conflict with local needs.[3] On the one hand, there is what is perceived to be an international course towards the economic analysis and conceptualisation of the resources in this knowledge and material, according to a western norm,[4] in what might be understood as a drive towards increasing efficiency, and thus certainty and control in international trade.[5] Intellectual property rights were rendered concerns of international trade in the Uruguay Round of the General Agreement on

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[1] Nancy (2000): 36.

[2] Gray (1996): 30.

[3] Graham Dutfield notes this conflict between intellectual property regimes in developing and developed countries, and capacity building in developing countries in Dutfield (2003): 29.

[4] The globalisation of intellectual property rights has been identified as emphasising the economic analysis of rights, in which a western perspective dominates the international standards. For a discussion of this emphasis in the context of the TRIPS negotiations, see Gervais (2003b).

[5] The drive towards greater efficiency is coupled with notions of increased certainty and risk-management. The notion of "risk" and international regulation of knowledge and information is considered in more detail later and traced throughout this work.

Tariffs and Trade (GATT),[6] when the World Trade Organization (WTO)[7] was established, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)[8] was concluded, acceptance of which is mandatory for any country wishing to be a member of the WTO.[9] The assimilation of traditional knowledge within intellectual property models suggests, therefore, an (implicit) deference to international trade relationships.

On the other hand, the interests of communities in preserving and managing resources on a cohesive local basis, while respecting the global diversity of communities and their self-governance, is at best compromised and at worst rendered impossible under this generalising economy of commodities. This conflict has now escalated into an international discussion towards the resolution of these apparently competing interests, formally under the administration of the World Intellectual Property Organization's (WIPO)[10] Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC).[11]

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[6] Information on GATT and the GATT Council may be found at http://www.wto.org/english/tratop_e/gatt_e/gatt_e.htm.

[7] More detail of the WTO is available at the web-site http://www.wto.org/english/thewto_e/thewto_e.htm.

[8] The text of TRIPS may be found at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

[9] Thus, intellectual property rights and enforcement continue to be an important part of the ongoing trade rounds of the WTO, particularly in the Ministerial Declaration of the Fourth Session, adopted on 14 November 2001, in Doha (Doha Declaration): WT/MIN(01)/DEC/1 (20 November 2001). The Doha Declaration was adopted with the mandate to address a variety of issues concerning international trade and economic development, including the marginalisation of least-developed countries. Negotiations take place within the Trade Negotiations Committee and its subsidiaries, with other work occurring within WTO councils and committees, including the World Intellectual Property Organization (WIPO) Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) discussed later in Chapter 4, and see also Chapter 6. See also footnotes 10 and 11 below. The text of the Declaration may be found at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.pdf.

[10] WIPO was established in 1967 with the task of the administration of intellectual property treaties and conventions signed by member nations.

[11] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), was established in the 26th (12th Extraordinary Session) of the WIPO General Assembly, held in Geneva, 25 September to 3 October 2000 to consider and advise on appropriate actions concerning the economic and cultural significance of tradition-based creations, and the issues of conservation, management, sustainable use, and sharing of the benefits from the use of genetic resources and traditional knowledge, as well as the enforcement of rights to traditional knowledge and folklore. The text of this Session can be found at http://www.wipo.org/eng/document/govbody/wo_gb_ga/pdf/ga26_6.pdf.

The IGC is specifically assigned the task of looking at the intellectual property aspects of access and traditional knowledge, in the context of international instruments, national laws of member states, and current debate over balancing interests between commercialising traditional knowledge, on the one hand, and protecting it against commercialisation, on the other. But are these two sets of interests really in genuine competition as such? Broadly speaking, the system of intellectual property protection, exploitation, dissemination, and commercialisation is increasingly founded upon an economic analysis of reward, personal control, and commercial agreement, as it were, between the right-holder and the society at large.[12] In contrast, adequate protection of traditional knowledge is not necessarily compatible with requirements of dissemination but rather, depends upon restriction of access, ideally regulated through the free and prior informed consent of the community according to its shared values and relationship to the knowledge in question.[13]

To date most applications of protection have been merely defensive, through exclusions from the creation of intellectual property,[14] without recognising community authority with respect to the way in which that knowledge is accessed, disseminated, and used. A key concern is that while traditional knowledge is presumed to be sacred and cultural knowledge, for which certain "exclusions" from intellectual property protection would be adequate,[15] this kind of defensive

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[12] See the analysis in Dutfield (2003): Chapter 2.

[13] The significance of prior informed consent was identified in the important Final Report of the Commission on Intellectual Property Rights (CIPR), *Integrating Intellectual Property Rights and Development Policy*, Chapter 4. This fundamental principle will be examined throughout towards understanding its operation within the model proposed in Chapter 9.

[14] Examples of defensive mechanisms include moves towards the documentation of traditional knowledge, for example, to assist its recognition as prior art (see the discussion in Chapter 4 of the developments in international patent classification tools for traditional knowledge, as part of the discussions of the Special Union for the International Patent Classification), the exclusion from trade mark registration of marks likely to cause cultural offence (for instance, the specific application of trade mark law in New Zealand, as discussed in Chapter 4), and certification marks. For a discussion of authenticity and certification marks in the Australian context, see Wiseman (2001); Gough (2000); Wiseman (2000); Wells (1996b); Golvan & Wollner (1991). Defensive mechanisms form a major part of discussions in the IGC, and continue to do so in the Seventh Session (discussed further in Chapter 4). Similarly, the recent United Nations Development Programme (UNDP) Human Development Report also unreservedly recommends documentation, maintaining that it is frequently essential to achieve protection and "does not prejudice rights": UNDP (2004): 95. However, documentation is not unproblematic in its application as Chapter 4, in particular, will consider.

[15] The basis of this approach is the argument that cultural symbols would be appropriately protected through recognition as "national" emblems or royal insignia, and thus excluded from trade mark registration. For example, the Zia Indians of New Mexico

archiving and "safeguarding" continues the historical and classical anthropological effect[16] upon Indigenous and traditional communities, documenting knowledge as a kind of "ethnographic present,"[17] but not facilitating community autonomy with respect to that knowledge. While defensive approaches are an aspect of mechanisms of protection, they are nevertheless paternalistic and persistent in the historicising of the value of knowledge. Repeatedly implied in this approach is an informal distinction between the validation of conventional knowledge production and the invalidation of community resources through the denial of full governance with respect to that knowledge. Such governance may include commercialisation and licensing where compatible with the shared values of community, suggesting that intellectual property must not be disregarded completely, but must be understood in the context of an adequate and relevant characterisation of community resources. In other words, "traditional knowledge" is "historical" for the purposes of anthropological record, but the community must begin to realise "authority" over that knowledge other than as an anthropological object itself. The community, therefore, gains no access to the politico-legal sphere in the current framework, such access being critical to effective local autonomy and of major importance to the present discussion.

It will become clear in this work that an effective realisation of "community resources" will depend upon the efficacy of the concept at international law, and its acceptance will follow the equitable balancing of interests that characterises the application of international legal principles. Indeed, international intellectual

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sought to make symbols unable to be trademarked: Lopez (1999). However, this approach fails to capture a broad quantity of knowledge (words, for example) as well as ignores the fact that communities wish to retain (and should be entitled to do so) the right to license material where appropriate (as became apparent to the Zia Indians). Ignoring this right continues the presumption that traditional knowledge is historical and "antiquated" knowledge in the public domain. Protection therefore proceeds from the notion of preservation of that history, rather than genuine recognition of customary management by living communities.

[16] This is of course with reference, in particular, to 19th-century anthropology and the perceived relationship with colonial efforts, as distinct from recent critical anthropology which seeks to problematise and dismantle dominant relationships between the privileged anthropological eye and the natural, organic, anthropological object. For instance, see the work of critical anthropologists, including Clifford Geertz, James Clifford, Marilyn Strathern, and Vered Amit. In particular, see Strathern (1999); Geertz (1973); Geertz (1983); Clifford (1986): 98-121; Amit & Rapport (2002). See also the concerns with the relationship between imperialist endeavour and anthropology in Masolo (1994) and Mudimbe (1988).

[17] Note James Clifford's comments on the tendency of early anthropology to presume and idealise an "ethnographic present" as "a static, pre-contact, traditional culture," in Clifford (2003): 9.

property law proposes a balance that is explicit in the TRIPS Agreement,[18] whether or not that balance is being achieved.[19] What do the interests, of what are importantly diverse Indigenous and traditional communities, have in common in order to justify the construction of the solution as a balancing[20] of competing interests?[21] This balancing principle was set out in the initial documents of the IGC which stated:

> The equity of intellectual property rights is discussed not only in the balance between the rights of the creator and society as the user of his creation, but also in the balance of rights between the creator and society as the provider of heritage resources which he utilizes in his creation. This is the case especially where the provider has conserved the common heritage for generations under in-situ conditions, i.e. in the surroundings where the resource developed its distinctive properties. This principle concerning the equity of intellectual property is now applied in the discussions on genetic resources, traditional knowledge and folklore.[22]

Arguably, the means by which this resolution is sought serves merely to protract the problem, in that the subject-matter of protection continues to be interpreted as one of property, and in particular, intellectual property. Furthermore, in polarising

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[18] Article 7, "Obligations," provides that protection should be achieved "in a manner conducive to social and economic welfare, and to a balance of rights and obligations." Full text available at http://www.wto.org/english/docs_e/legal_e/27-trips.pdf.

[19] In a recent presentation, Lawrence Lessig argued that current debates regarding the implementation of TRIPS standards and the implications for developing countries can be understood in terms of the need to return to the question of balance that is built into the TRIPS Agreement. Lessig (2004b).

[20] This solution is understood according to the equitable principle of balancing interests at international law, which will become important to the ultimate proposals in this work, which suggest a consideration of proportionality and balancing harm.

[21] The rhetoric of "balance" occurs throughout the literature: in particular, see Steiner C (1998). In recent presentations, as discussed, Lessig has made similar calls for a renewed respect for such balance (2004b). This rhetoric betrays a conceptual commonality with arguments in rights to land, as well as arguments about the balance between users and producers. In other words, culture is presented as a kind of finite exclusive right that will intrude upon the private economic rights in inexhaustible intellectual property. The notion of "balancing" interests between restriction of knowledge (right-holders) and its dissemination (users) is also seen within the WTO. In its introduction to the TRIPS Agreement, the WTO site explains that "it should also be noted that the exclusive rights given are generally subject to a number of limitations and exceptions, aimed at fine-tuning the balance that has to be found between the legitimate interests of right holders and of users": http://www.wto.org/english/tratop_e/trips_e/intell_e.htm. See the statements of the IGC in the Third Session, Final Report on National Experiences with the Legal Protection of Folklore WIPO/GRTKF/IC/3/10 (25 March 2002): 34. See also Annex 1: 13.

[22] WIPO/GRTKF/IC/1/3 (16 March 2001): 4.

the interests in this "balance" between traditional knowledge and commercial private interests, private intellectual property concerns continue to be vested with economic, commercial, rational, and broader social worth, while traditional knowledge carries with it notions of the natural, non-commercial, common heritage of sharing and history,[23] without negotiating the fundamental incompatibilities, such as issues of access and commercialisation.[24]

The protection of these resources towards a fair and equitable recognition of community interests is presumed by the IGC to be necessary, but the fundamental nature or quality of that protection is problematically conflated with those economic interests in the outside exploitation of the resources.[25] That is, discussions of the appropriate means by which to protect such interests have been dominated by this adherence to the efficiency of an international intellectual property model for those seeking access to traditional knowledge. Further, this occurs frequently without concern for the need to achieve effective recognition of communities themselves to manage resources internally, including accessing commercialisation of those resources:

> Many of those involved in these issues consider matters of genetic resources, traditional knowledge and folklore to be linked to the laws and practices covering intellectual property use and protection. Indeed, there is already some overlap between the intellectual property system and more "informal" means of protection in these areas. For these reasons WIPO is working closely with its member States to clarify the intellectual property dimensions of these subjects.[26]

This might suggest that a multi-dimensional approach is necessary, with the WIPO discussions of intellectual property being merely one element of the necessary response to traditional knowledge protection.[27] However, to date the concerns have been dominated by intellectual property, reducing or simplifying the difference and dissent in knowledge production and community values to that of "information" in trade, to the extent that the specific value in that knowledge is not necessarily

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[23] Odek explains that traditional knowledge is constructed as lowly "common heritage," while "European creative genius" bestows upon that 'common heritage,' as it were, "the exalted status of 'property'": Odek (1994): 155.

[24] For a useful outline of some fundamental conflicts between traditional knowledge and intellectual property protection, see Coombe (2001): 275; Barron (2002); Mugabe et al (2001). This problematic is discussed in detail in Chapters 2 and 3.

[25] See the discussion of the globalisation of intellectual property laws and the interests of developing countries in Pretorius (2002); Sell (2003); Dutfield (2003): 195-205 in particular. See also Drahos & Braithwaite (2002).

[26] WIPO. Emerging Issues in IP. Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.
http://www.wipo.int/about-ip/en/studies/publications/genetic_resources.htm#.

[27] Yu (2003).

apparent or realised by this kind of framework. Indeed, the construction of knowledge[28] within the framework of international trade has been rejected by some, arguing that these are issues best defined democratically by societies themselves rather than defined through the TRIPS Agreement as intellectual property.[29] In particular, the recognition of the social and community worth in cultural diversity and community integrity[30] is not necessarily, or indeed necessary, within the ambit of such a model.

It must be questioned whether intellectual property frameworks can conceive of the true subject matter, or whether such assimilation of traditional knowledge within intellectual property discourse unavoidably and problematically translates the meaning of the subject matter and the objectives of protection to conform with that framework.[31] Indeed, the question must be asked whether the protection against misappropriation of traditional knowledge can be realistically achieved through a system that facilitates and ultimately legitimates that very misappropriation of the traditional knowledge of communities in the first place, through intellectual property protection of the "spoils" and through institutionalised blindness to the process. Intellectual property laws make the misappropriation possible, by judging traditional knowledge according to criteria that make its protection unlikely, and by creating exclusive rights in the works derived, despite the ethical questions that may be raised about the way in which that "intellectual property" was created. Intellectual property is indeed the means by which much of this misappropriation is validated. Can traditional knowledge protection, as end, justify these means and can these means ever really achieve adequate, appropriate, and relevant solutions?

Indigenous and traditional communities are often opposed to the assimilation of their knowledge within intellectual property models:

> We know the current proliferation of debate regarding the protection of traditional knowledge and genetic resources that is taking place in various UN fora is centered on mechanisms for exploitation, not protection. These discussions focus on the use of Western Intellectual Property Rights to be used as the mechanisms for the protection of Indigenous knowledge. These mechanisms are not only inadequate, but dangerous.

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[28] Specifically this refers to the construction of knowledge, as distinct from commodified information. This distinction is introduced later in this chapter and considered in more detail in Chapter 2. Broadly speaking, it indicates an incompatibility between the communal relationships to shared knowledge, and the implied understanding and communication in that knowledge, as distinct from a necessary abbreviation of meaning through the commodification of knowledge as information for trade.

[29] Shiva (2004).

[30] These principles are examined in Chapter 1, where the basis for community resources as the subject matter of protection is set out.

[31] As later discussions will show, this translation is necessary for intellectual property law, and not just merely inevitable.

> Indigenous peoples who have participated in the CBD, WIPO, and other UN processes, have consistently asserted our proprietary, inherent, and inalienable rights over our traditional knowledge and biological resources. Those who wish to impose intellectual property rights over our traditional knowledge and resources, if successful, will transform our knowledge and resources into individually owned, alienable commodities, subject to IPR protection for a short period of time.[32]

Indigenous groups have rejected these constructions imposed upon their knowledge resources, and have called for *sui generis* protection that recognises the customary laws of communities[33] and the need for traditional management of the unique quality, relationships, and values embedded in those resources:

> We ask the Permanent Forum to intervene in the various UN fora to ensure that truly sui generis systems of protection of Indigenous peoples are protected. These sui generis systems are based on our customary laws and traditional practices. Our existing protection systems are legitimate on their own right and any new mechanisms for protection, preservation and maintenance of traditional knowledge and associated biological resources must respect and be complementary to such existing systems and not undermine or replace them.[34]

For instance, copyright protection may not apply to traditional knowledge where the material is deemed unoriginal and in the public domain, or where the misappropriation is a legitimate adaptation under copyright law. Nevertheless, this may constitute an offensive taking from the community in question through the inappropriate use of cultural symbols, dress, and artistic methods.[35] The equivalent

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[32] IPCB (2004b). Collective Statement of Indigenous Peoples on the Protection of Indigenous Knowledge. UN Permanent Forum on Indigenous Issues. Third Session, New York, 10-21 May 2004. Agenda item 49(e): Culture.

[33] Critical to the model ultimately proposed is the customary law of communities. Referred to throughout this work, use of the phrase "customary law" will indicate the laws of custom of traditional and Indigenous communities, as distinct from customary international law. Customary law is the inviolable and integral law of a community established over the history of that community, critical to its identity, binding members of a community, and therefore also identifying and cohering community. Arguably the recognition of the customary laws of Indigenous and traditional communities, as will be established, is the only genuine way in which to achieve community authority with respect to traditional knowledge.

[34] IPCB (2004b).

[35] Owen Morgan provides a useful analysis of the relevance of offence in his discussion of the taking of Māori words and the legislative response in the New Zealand Trade Marks Act 2002: Morgan (2003). See the discussion of cultural offence in WIPO/GRTKF/IC/6/6 (30 November 2003): 24. See also the references to offence caused by the patenting of traditional knowledge in the final report of the Commission on

of patent protection is unlikely because of the problems associated with fulfilling requirements of novelty and inventiveness, but the patenting of material derived from traditional knowledge in medicines and plants is possible by virtue of the failure to fulfil these very same criteria. Thus traditional knowledge may be "patentable," as it were, without any requirement to disclose the origin or to provide attribution to the community,[36] because of lack of novelty, inventiveness, and because of publication through the "communal"[37] and traditional means by which knowledge is developed in Indigenous and traditional communities. Even current trends[38] towards requiring the disclosure of origins in traditional knowledge misunderstand the critical relationship between the community and its knowledge resources, and the offence and harm caused by the assumption that such taking is fundamentally just.[39] Similarly, trade mark protection is not readily available other than through efforts to "exclude" certain material from trade mark registration.[40] Any efforts within these models (including disclosure of origin in patterns,

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Intellectual Property Rights, *Integrating Intellectual Property Rights and Development Policy*. See CIPR (2002): 81-83.

[36] It should be noted that changes to this law are the current subject of discussions in the Union of the International Patent Classification, and significant in the agenda of the Seventh Session of the IGC. These changes are designed to take account of traditional knowledge as prior art, and to disclose the origin of the patent and to provide for the revocation of "bad" patents where applicable. Efforts to document traditional knowledge in order to prevent "bad" patents will also be examined in Chapter 4, with reference to international patent classification and the IGC Toolkit, WIPO/GRTKF/IC/4/5 (20 October 2002).

[37] The word communal is problematic in that it too suggests that the ownership is somehow uniform. However, later discussion will trouble this notion of "communal" ownership, indicating the importance of the term community resources. Community, as the discussion will show, is not necessarily "communal" in the common sense of the term as an undifferentiated sharing collective, but "communal" in the sense of traditional and Indigenous philosophies of communalism. For instance, see the discussion throughout in Gyekye (1995).

[38] In particular, see the development of protection on an international level in the documents of the WIPO IGC. All documents of the WIPO IGC are available at http://www.wipo.int/tk/en/igc/documents/index.html.

[39] In other words, the taking will occur in the context of scientific progress and the advance of civilisation, and so on, making it appear to be inherently just. Thus, discussions are invariably towards a way to facilitate cooperation with that taking, in the form of traditional knowledge protection. Bruno Latour challenges the way in which scientific discourse draws upon this revolutionary difference between tradition and modern science in Latour (1987): Chapter 6.

[40] Problems persist in relying on exclusions of emblems and symbols, in that these must be fixed and repeatable for protection. Such defensive mechanisms cannot capture methods in cultural expressions (such as dot painting). See also footnote 14. Note the New Zealand approach to trade mark protection in Chapter 4.

certification and authenticity marks, and so on) depend upon a presumption of the importance of safeguarding the knowledge as cultural artifact, rather than recognising community and respecting customary law.

Thus, efforts at "protecting" traditional knowledge, as will be discussed in more detail later,[41] largely presume the objective to be the defence of that knowledge against misappropriation, through safeguarding that knowledge and its origin within an ethic of sharing it as global resource, rather than realising positive rights in traditional knowledge development and management according to the customary law of the community. The *sui generis* system proposed in this work, however, acknowledges the existence and significance of "local" customary law, and the rights of Indigenous and traditional groups to manage resources according to custom within a transnational (as distinct from the "nationalistic" international model) system. While the legitimacy for the recognition of customary law may be located in several international instruments and sources,[42] those instruments operate as distinct perspectives upon a particular issue for Indigenous and traditional peoples,[43] suggesting a delineation of concerns that may not be helpful in the context of community resources. Separate approaches may undermine the potential cooperation within a single international instrument, upon the recognition of Indigenous and traditional community rights to practise their customary law, with regard to all these separately identified and operable issues. The numerous instruments distil the concerns of Indigenous and traditional communities according to the taxonomy of issues identified within the international context of development, efficiency, and trade. Therefore, the present work maintains that the protection of traditional knowledge, and the concept of community resources, must be realised through a truly multi-dimensional approach to achieving the legitimacy of custom, of which intellectual property in cultural products may be one aspect

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[41] The conflict with intellectual property systems is examined in detail in Chapter 2, which considers the theoretical basis, Chapter 3, and Chapter 4, which examines current efforts within the WIPO IGC to create an international system of protection.

[42] Regard for customary law is set out in several international instruments, including the International Labour Organization (ILO) Convention No 169, Article 8, which refers explicitly to customary law, and builds upon the ILO Convention No 107 on Indigenous and Tribal Populations, which makes similar provisions in Article 7. The Right to Self-Determination, examined in more detail in Chapter 8 in this context, is provided for in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in Article 1 of each instrument; The Declaration on the Right to Development in the Preamble, and Articles 1 and 5; and The Vienna Declaration on Human Rights and Programme of Action in Article 2. The United Nations Draft Declaration on the Rights of Indigenous Peoples is explicit in Article 9.

[43] The concern with categorising protection in this way occurs throughout the literature. See Mugabe (2001): 11.

within customary management of knowledge by communities, as distinct from defining protection according to established criteria of western legal systems.[44]

Rather than presume the priority of (cultural diversity in) the community as the subject matter of protection, this work undertakes an analysis of the justification for community as the organising principle of protection in Chapter 1. In doing so, this chapter establishes the critical basis for the very different subject matter of the rights – that of community resources – that ultimately must be established through *sui generis* legal standards to be applied in an international context. "Community" emphasises cultural diversity and establishes the centrality of the traditional or customary relationship between community members and between the community and its resources as the subject matter for protection. The concept of community resources is developed to overcome the presumption of property and the economic value of information that inheres in such terms as "traditional knowledge." However, community is not to be made the object of formal regulation, but rather the subject of recognition, the site of contestation, of culture. The framework proposed does not set out to characterise particular communities and, indeed, it would be problematic for this work to do so. The term, community resources, will be developed as a concept of the generative relationships between people and resources, rather than as fixed and discrete objects of knowledge (as presumed by intellectual property models of "traditional knowledge"). It is this dynamic and organic relationship, made coherent through cultural practices, knowledge, and resources, for which protection is ultimately sought.

The concept of "ownership" that is central to intellectual property law and enforcement (and thus, the effectiveness or relevance of the rights created by that law) is unavoidable in this discussion. This is despite the fact that intellectual property is not about ownership in the sense of absolute dominion, but about the creation of certain rights to act in a certain way and to limit the actions of others, all in relation to an intellectual product. Nevertheless, this centrality of ownership and property has taken hold, and this chapter examines the tension between owners and creators in relation to this problem.

Ownership, broadly speaking, becomes the "ethical" turning-point of the debate, where traditional communities are effectively marginalised by the application of this concept in intellectual property law, because of an inability to demonstrate ownership according to the criteria laid down by individualistic property laws. Chapter 1 argues that it is inaccurate to claim there is no proprietary system or entitlement, as it were, within Indigenous or traditional communities. To do so is to deny Indigenous and traditional practices and relationships of custodianship. It is to deny the community's right to respect through its knowledge (as culture rather than as an informational commodity) if that community is unable to access and practise traditional systems and customs of custodianship and

[44] The dynamics and actualisation of this *sui generis* system, as developed throughout, are explored in Chapter 9.