



Indigenous Heritage and Intellectual Property

*Genetic Resources, Traditional
Knowledge and Folklore*

Edited by Silke von Lewinski



Kluwer Law International

**Indigenous Heritage and
Intellectual Property**
**Genetic Resources, Traditional Knowledge
and Folklore**

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ABBREVIATIONS

ACPA	Anticybersquatting Consumer Protection Act
ACT	Australian Capital Territory
ADNDRC	Asian Domain Name Dispute Resolution Centre
AfP	Archiv für Presserecht (Archive for Press Law)
AGPS	Australian Government Publishing Service
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AIPO	African Intellectual Property Organization
AIPPI	Association Internationale pour la Protection de la Propriété Intellectuelle (International Association for the Protection of Intellectual Property)
AJIL	American Journal of International Law
ALAI	Association Littéraire et Artistique Internationale (International Literary and Artistic Association)
ALR	Australian Law Reports
Am. Indian L. Rev.	American Indian Law Review
Am. University L. Rev.	American University Law Review
Art.	Article
Arts & Ent. L. Rev.	Arts and Entertainment Law Review
ASEAN	Association of South East Asian Nations
ATSIC	Aboriginal and Torres Strait Islander Commission
Aust. Year Book Int'l L.	Australian Year Book of International Law
BC	Berne Convention for the Protection of Literary and Artistic Works
BRAC	Bangladesh Rural Advancement Committee
CA	Cour d'Appel (Court of Appeal)
CASRIP	Center for Advanced Study of Intellectual Property
Cass. (civ.)	Cour de cassation
CBD	Convention on Biological Diversity
CCIPRS	Collective Community Intellectual Property Rights
cf.	Compare
CIPR	Canadian Intellectual Property Review
CGIAR	Consultative Group on International Agricultural Research
CITP	Charter of the Indigenous-Tribal Peoples of the Tropical Forests
CLR	Commonwealth Law Reports

Abbreviations

COICA	Coordinating Body of the Indigenous Peoples of the Amazon Basin
COP	Conference of the Parties
Cop. Bull.	Copyright Bulletin
CPI	Code de la Propriété Intellectuelle (Code of Intellectual Property, France)
CRBL	Costa Rican Biodiversity Law, no. 7788 of the Legislative Assembly of the Republic of Costa Rica
CSE	Centre for Science and Environment
CSIR	Council of Scientific Research of India
CTMR	Community Trade Mark
DIAND	Department of Indian Affairs and Northern Development
DIGERPI	Dirección General del Registro de la Propiedad Industrial (General Directorate of the Registrar of Industrial Property)
doc.	document
EBU	European Broadcasting Union
EC	European Communities
ECJ	European Court of Justice
ECOSOC	United Nations Economic and Social Council
ed.	editor
eds.	editors
EIPR	European Intellectual Property Review
ENB	Earth Negotiations Bulletin
EPC	European Patent Convention
EPO	European Patent Office
et al.	<i>et alia</i>
et seq.	<i>et sequen</i>
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FAO Undertaking	International Undertaking on Plant Genetic Resources for Food and Agriculture of the Food and Agriculture Organization of the United Nations
FCR	Federal Court Reports (Australia)
FFMs	Fact-Finding Missions
FLR	Federal Law Reports
fn.	footnote
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
Gaz. Pal.	Gazette du Palais
GRULAC	Group of Latin American and Caribbean Countries
GRUR	Gewerblicher Rechtsschutz und Urheberrecht (Industrial Property Protection and Copyright)

GRUR Int.	Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil (Industrial Property Protection and Copyright – International Issue)
IARCs	International Agricultural Research Centres
ICCs	Indigenous Cultural Communities
i.e.	<i>id est</i>
IFF	Intergovernmental Forum on Forests
ILM	International Legal Materials
IPJ	Intellectual Property Journal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGC	Intergovernmental Committee
IIC	International Review of Industrial Property and Copyright Law
ILO	International Labour Organization
INDECOPI	Institute National de Defensa de la Competencia y de la Protección de la Propiedad Intellectual
Ind. Prop.	Industrial Property
INN	International Non-Proprietary Names
INTERGU	Internationale Gesellschaft für Urheberrecht (International Society for Authors' Rights)
IP	Intellectual Property
IPs	Indigenous Peoples
IPC	International Patent Classification
IPR	Intellectual Property Reports (Australia)
IPRs	Intellectual Property Rights
J. Intell. Prop. L.	Journal of Intellectual Property Law
JPO	Japanese Patent Office
LDA	Legge 22 aprile 1941 n. 633. Protezione del diritto di autore e di altri diritti connessi al suo esercizio (Italian Copyright Law)
LDCs	Least Developed Countries
loc. cit.	at the quoted place
Ltd	limited
McGill L.J.	McGill Law Journal
Media & Arts L. Rev.	Media and Arts Law Review
MERCOSUR	Mercado Común del Sur
MFN (clause)	Most Favoured Nation (clause)
MIRCENS	Microbial Research Centres
Mitt.	Mitteilungen der Deutschen Patentanwälte
MTAs	Material Transfer Agreements
NAFTA	North American Free Trade Agreement

Abbreviations

NAGPRA	Native American Graves Protection and Repatriation Act
NCIP	National Commission on Indigenous Peoples
NGO	Non-Governmental Organization
NIAAA	National Indigenous Arts Advocacy Association
No.	Number
OJEC	Official Journal of the European Communities
OAU	Organization of African Unity (now African Union)
op. cit.	in the work quoted
p.	page
para.	paragraph
PCT	Patent Cooperation Treaty
PIC	Prior Informed Consent
PLT	Draft Patent Law Treaty
PIPPRA	Philippine Indigenous Peoples Rights Act
RIDA	Revue internationale du droit d'auteur (International Review of Authors' Rights)
SCIT	Standing Committee on Information Technologies
SCP	Standing Committee on the Law of Patents
Stan. L. & Pol'y Rev.	Stanford Law and Policy Review
TGI	Tribunal de grande instance
TK	Traditional Knowledge
TLDs	Top-Level Domains
TMR	Trade Marks Reporter
TNCs	transnational corporations
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights
U. Balt. Intell. Prop. J.	University of Baltimore Intellectual Property Law Journal
UBC Law Rev.	University of Berkeley in California Law Review
UDHR	Universal Declaration of Human Rights
UDRP	Uniform Dispute Resolution Policy
UK	United Kingdom
UNCED	United Nations Conference on Earth and Development
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNFCCC	United Nations Framework Conventional Climate Change
UNIDROIT	Institute for the Unification of Private Law
UNSW Law Journal	University of New South Wales Law Journal
UPOV	International Union for the Protection of New Varieties of Plants
U.S.C.	United States Code
U.T.Fac. L.Rev.	University of Toronto Faculty of Law Review

v.	<i>versus</i>
Va. L. Rev.	Virginia Law Review
VARA	Visual Artists' Rights Act
VCH	Verlag Chemie
Vol.	Volume
Wash UJL & Pol'y	Washington University Journal of Law and Policy
WCT	WIPO Copyright Treaty
WGIP	Working Group on Indigenous Populations
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WPPT	WIPO Performances and Phonograms Treaty
WSSD	World Summit on Sustainable Development
WTO	World Trade Organization

NOTES ON CONTRIBUTORS

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PART I. INTRODUCTION

Silke von Lewinski

For the past few years, the topic of genetic resources, traditional knowledge and folklore¹ has entered the ambit of intellectual property discussions. These new discussions have started due to a combination of several factors. In particular, Western-style industries have increasingly had recourse to genetic resources and traditional knowledge, in the broad sense, being felt as belonging to indigenous peoples. They have often used such knowledge and resources in order to develop products and to exploit them in world markets. Whereas Western researchers and artists or musicians acted similarly in the nineteenth century, today's exploitation takes place on a considerably larger scale.² This is due to the fact that today's markets are mostly global, with growing competition and an ever-increasing need for new products to be introduced to the market at ever-shorter intervals. This situation is dependent on new "raw" materials such as new melodies, rhythms, designs, techniques, genetic materials, medical remedies, and so on. The so-called "New Age" movement,³ including the search by Western civilizations for lost values and renewed spirituality in indigenous cultures, not least in order to borrow the related power,⁴ reflects the importance of indigenous knowledge to date. So-called "ethnic" products have become ever more fashionable – an airline has even decorated its aeroplanes with aboriginal designs.

In most cases, industries exploit indigenous knowledge and resources without asking for consent and without sharing the benefits of such exploitation with the indigenous peoples. To date, this behaviour is mostly in compliance with the existing intellectual property law according to which most indigenous knowledge is in the public domain (as defined by intellectual property law). At the same time, it is not astonishing that indigenous peoples have claimed that such behaviour is unfair and lacks due respect. Among the reasons for the divergence of these views are different concepts of what the public domain should be and the different importance of heritage: for indigenous peoples, the living heritage is important for the entire life, the identity and self-determination to a much higher degree than for Western civilizations.

Finally, other reasons for the rise of this topic in the international arena are the increased awareness of indigenous peoples, their self-organization and the activities of

¹ The term "folklore" will be used in this study as a synonym for "traditional cultural expressions", since it has been most widely used. The authors do not intend to give this term any negative connotation. See also *Lucas-Schloetter*, Part III Sec. 4 I. 4.

² *Simpson*, *Indigenous Heritage and Self-Determination* (Copenhagen, 1997), 52; *Lucas-Schloetter*, Part III Sec. 4 I. 1.

³ *Sandler*, *Music of the Village in the Global Market Place: Self-Expression, Inspiration, Appropriation or Exploitation?* Dissertation, University of Michigan, 2001, p. 81 et seq.

⁴ *Sandler* (fn. 3), at 93.