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Indigenous Heritage and Intellectual Property

*Genetic Resources, Traditional
Knowledge and Folklore*

2nd Edition

Edited by Silke von Lewinski



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

Second Edition

Dr. Silke von Lewinski



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Preface

From the end of the 1990s, intellectual property issues around genetic resources, traditional knowledge and folklore have been discussed in different forums as well as in doctrine and other literature with continued intensity and interest. While the possible defensive and positive protection in this context continues to be a marginal topic within the overall field of intellectual property law, it has gained much profile by itself and an advanced level of understanding among those who are interested in intellectual property and genetic resources, traditional knowledge and folklore; the generally available knowledge is considerably broader and more sophisticated than around ten years ago.

Since the first edition of this book did not contain a preface, the background for this book is illustrated here. Even before the WIPO Intergovernmental Committee was established and had its first meeting in 2001, Professor Dr. Gerhard Schrickler, then a director of the Max Planck-Institute, sensed the importance of this topic and asked the undersigned to 'do a project' thereon. In view of the existing literature at the time, she decided that a systematic analysis of the issues involved in intellectual property and indigenous heritage was still lacking and proposed the publication of this book, based on a comprehensive structure so as to show the problems to be solved, possible solutions on the basis of existing law, possible tailor-made solutions, and the position of the involved individual issues in a broader context. In addition, she suggested a brainstorming workshop with selected experts in this very field, in particular, Russel Barsh; it was organized by the Max Planck-Institute in November 2000 at Castle Ringberg. Its results were not recorded or published, but they simply served as a basis for the authors of the book and facilitated their task, which was quite different from dealing with any "classical" intellectual property topic.

From the outset, the book publication was planned as a project of the Max Planck-Institute, so that exclusively staff members of the Institute (as well as Peter Tobias Stoll and Anja von Hahn, then of the Max Planck-Institute for Comparative Public Law and International Law in Heidelberg) were designated as co-authors.

It seems that this book filled a gap with its approach of a systematic, neutral and as comprehensive as possible discussion of the relevant issues. Indeed, already one and a half years after the publication of the first edition, the publisher approached the undersigned with the idea of elaborating a second edition. When the co-authors began to work on

updating their contributions, it became clear that major developments within the short time had taken place, in particular regarding the sections on genetic resources, traditional knowledge and folklore (Part III, Sections 1, 2 and 4). At the same time, some of the co-authors of the first edition had changed the focus of their work to pursue their careers in different directions. Therefore, Anja von Hahn did not participate in the second edition, but is still a co-author of Part II, which remains considerably influenced by her work. For Matthias Leistner and Michael Hassemer, a new co-author for the book had to be found – not an easy task, given the limited time left and the considerable effort needed. Finally, the undersigned was very glad that Antony Taubman was ready to take over this task, all the more so since he not only had started out as an academic but, thereafter, for many years has been involved in the topic of genetic resources and traditional knowledge at WIPO; in order to fully bring these contributions up to date, he basically had to rewrite them. This fact alone shows how fast developments have taken place, even if they mainly concern the state of debates rather than the adoption of legal instruments.

We hope that this second edition facilitates users' access to the most recent state of knowledge in the field. At the same time, we note that specialized, in-depth studies that would go beyond the scope of this book remain necessary, in particular as regards issues of customary law and a possible recognition of the legal personality of indigenous and traditional communities. The concept of the book, including its structure, is explained in Part I (Introduction). The manuscripts for most contributions were finalized at the beginning of 2007, while the sections on genetic resources and traditional knowledge were finished in August 2007.

Silke von Lewinski
Munich, August 2007

Abbreviations

ACPA	Anti-cyber-squatting Consumer Protection Act
ACT	Australian Capital Territory
ADNDRC	Asian Domain Name Dispute Resolution Centre
AfP	<i>Archiv für Presserecht</i> (Archive for Press Law)
AGPS	Australian Government Publishing Service
AIATSIS	Australian Institute of Aboriginal and Torres Strait Islander Studies
AILR	Australian Indigenous Law Reporter
AIPO	African Intellectual Property Organization
AIPPI	<i>Association Internationale pour la Protection de la Propriété Intellectuelle</i> (International Association for the Protection of Intellectual Property)
AJIL	American Journal of International Law
ALAI	<i>Association Littéraire et Artistique Internationale</i> (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
ARIPO	African Regional Intellectual Property Organization
Art., Arts	Article, Articles
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
B.U. Int'l L. J.	Boston University International Law Journal
CA	<i>Cour d'Appel</i> (Court of Appeal)
Cardozo J. Int'l & Comp. L.	Cardozo Journal of International and Comparative Law

CAS RIP	Center for Advanced Study on Intellectual Property, University of Washington School of Law
Cass. (civ.)	<i>Cour de cassation</i>
CBD	Convention on Biological Diversity
CCIPRS	Collective Community Intellectual Property Rights
<i>cf.</i>	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
COICA	Coordinating Body of the Indigenous Peoples of the Amazon Basin
Colum. J.L. & Arts	Columbia Journal of Law and the Arts
COP	Conference of the Parties
Cop. Bull.	Copyright Bulletin
CPI	<i>Code de la Propriété Intellectuelle</i> (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 Trademark Regulation
DIAND	Department of Indian Affairs and Northern Development
DIGERPI	<i>Dirección General del Registro de la Propiedad Industrial</i> (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
edn	Edition
eds	Editors
EIPR	European Intellectual Property Review
ENB	Earth Negotiations Bulletin
EPC	European Patent Convention
EPO	European Patent Office
<i>et al.</i>	<i>et alia</i>
<i>et seq.</i>	<i>et sequen</i>
EU	European Union
FAO	Food and Agriculture Organization of the United Nations
FAO ITPGRFA	FAO International Treaty on Plant Genetic Resources for Food and Agriculture

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
Fordham Intell. Prop., Media & Ent. L.J.	Fordham Intellectual Property, Media and Entertainment Law Journal
FTAA	Free Trade Area of the Americas
GATT	General Agreement on Tariffs and Trade
Gaz. Pal.	<i>Gazette du Palais</i>
GI	Geographical Indication
GRTKF	Genetic Resources, Traditional Knowledge and Folklore
GRULAC	Group of Latin American and Caribbean Countries
GRUR	<i>Gewerblicher Rechtsschutz und Urheberrecht</i> (Industrial Property Protection and Copyright)
GRUR Int.	<i>Gewerblicher Rechtsschutz und Urheberrecht – Internationaler Teil</i> (Industrial Property Protection and Copyright – International Issue)
IARCs	International Agricultural Research Centres
ICCs	Indigenous Cultural Communities
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IGC	Intergovernmental Committee
ICOM	International Council of Museums
ICTSD	International Center for Trade and Sustainable Development
i.e.	<i>id est</i>
IFF	Intergovernmental Forum on Forests
IGC	WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore
IIC	International Review of Industrial Property and Copyright Law
ILB	Indigenous Law Bulletin
ILM	International Legal Materials
ILO	International Labour Organization
Int. J. Cult. Prop	International Journal of Cultural Property
IPJ	Intellectual Property Journal
INDECOPI	<i>Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual</i>
Ind. Prop.	Industrial Property

INN	International Non-Proprietary Names
INTERGU	<i>Internationale Gesellschaft für Urheberrecht</i> (International Society for Authors' Rights)
IP	Intellectual Property
IPs	Indigenous Peoples
IPC	International Patent Classification
IPR	Intellectual Property Reports (Australia)
IPRs	Intellectual Property Rights
ITPGRFPA	International Treaty on Plant Genetic Resources for Food and Agriculture
IUCN	The World Conservation Union
J. Cop. Soc'y USA	Journal of the Copyright Society of the USA
J. Intell. Prop. L.	Journal of Intellectual Property Law
J. Intell. Prop. R.	Journal of Intellectual Property Rights
J. Marshall Rev. Intell. Prop. L.	The John Marshall Review of Intellectual Property Law
JPO	Japanese Patent Office
J. World Intell. Prop.	The Journal of World Intellectual Property
LDA	<i>Legge 22 aprile 1941 n. 633. Protezione del diritto di autore e di altri diritti connessi al suo esercizio</i> (Italian Copyright Law)
LDCs	Least Developed Countries
<i>loc. cit.</i>	at the quoted place
Ltd	Limited
McGill L.J.	McGill Law Journal
Media & Arts L. Rev.	Media and Arts Law Review
MEP	Member of European Parliament
MERCOSUR	<i>Mercado Común del Sur</i>
MFN (clause)	Most Favoured Nation (clause)
Minn. Intell. Prop. Rev.	Minnesota Intellectual Property Review
MIRCENs	Microbial Research Centres
Mitt.	<i>Mitteilungen der Deutschen Patentanwälte</i>
MTAs	Material Transfer Agreements
NAFTA	North American Free Trade Agreement
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
OAPI	<i>Organisation Africaine de la Propriété Intellectuelle</i>
OAU	Organization of African Unity (now African Union)
<i>op. cit.</i>	in the work quoted
p.	Page
para.	Paragraph

PCT	Patent Cooperation Treaty
PGRFA	Plant Genetic Resources for Food and Agriculture
PIC	Prior Informed Consent
PLT	Draft Patent Law Treaty
PIPRA	Philippine Indigenous Peoples Rights Act
RIDA	<i>Revue internationale du droit d'auteur (International Review of Authors' Rights)</i>
SAARC	South Asian Association for Regional Cooperation
SCIT	Standing Committee on Information Technologies
SCP	Standing Committee on the Law of Patents
SIPO	Chinese State Intellectual Property Office
SPLT	Substantive Patent Law Treaty
SRISTI	Society for Research Initiatives for Sustainable Technologies
Stan. L. & Pol'y Rev.	Stanford Law and Policy Review
TCE	Traditional Cultural Expression
TCM	Traditional Chinese Medicine
TGI	<i>Tribunal de grande instance</i>
TK	Traditional Knowledge
TLDs	Top-Level Domains
TMR	Trademarks Reporter
TMs	Trademarks
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	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
UNFCC	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
USPTO	United States Patent and Trademark Office
U.T.Fac. L.Rev.	University of Toronto Faculty of Law Review
v.	versus
Va. L. Rev.	Virginia Law Review

VARA	Visual Artists' Rights Act
VCH	<i>Verlag Chemie</i>
Vol.	Volume
Wash UJL & Pol'y	Washington University Journal of Law and Policy
WCT	WIPO Copyright Treaty
WG-ABS	Working Group on Access and Benefit Sharing
WG8J	Working Group on Article 8j of the CBD
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
Yale Hum. Rts. & Dev. L.J.	Yale Human Rights and Development Law Journal

Notes on Contributors

Anja von Hahn, Dr. iur., LL.M. (New York University), is a former member of German delegations to meetings of the Convention on Biological Diversity and former research assistant at the Max Planck Institute for Comparative Public Law and International Law, Heidelberg. She wrote her doctoral thesis on 'Traditional Knowledge of Indigenous and Local Communities between Intellectual Property Rights and the Public Domain' (in German, English summary). Anja von Hahn is currently working at the legal department of BASF Aktiengesellschaft and mainly specializes in environmental law.

Roland Knaak, Dr. iur. (University of Munich), is Head of Department at the Max-Planck-Institute for Intellectual Property, Competition and Tax Law; attorney at law in Munich; author of books and articles mainly in the law of trademarks, trade names, geographical indications, and unfair competition; lecturer in intellectual property law at the University of Zurich; and president of the German Institute for the Protection of Geographical Indications in Cologne.

Annette Kur, Dr. iur., is Head of Department at the Max-Planck-Institute for Intellectual Property, Competition and Tax Law in Munich; adjunct professor at Munich University and at the Swedish School of Economics, Helsinki (Finland); overseas faculty member of the University of Santa Clara Law School; and associate professor at the University of Stockholm. She was a Hauser Global professor at New York University in fall 2006, and is president of ATRIP (International Association for the Advancement of Teaching and Research in Intellectual Property) 2007–2009.

Matthias Leistner, Prof. Dr. iur., LL.M. (Cambridge), is Professor of Law (Chair for Civil Law, Intellectual Property Law and Competition Law) at the University of Bonn, Member of the Faculty of the Munich Intellectual Property Law Center (MIPLC), and former Head of Department at the Max-Planck-Institute for Intellectual Property, Competition and Tax Law, Munich. His research fields include German and European copyright law, unfair competition law and general civil law. His special interest lies in internet-related law problems. He has published three books and numerous articles on respective issues. His email address is: m.leistner@ip.mpg.de

Silke von Lewinski, Dr. iur., is Head of Department, Max-Planck-Institute for Intellectual Property, Competition and Tax Law (MPI) Munich. She is a frequent copyright expert to the European Commission; delegate at the WIPO Diplomatic Conferences 1996 and 2000 for the EC and Germany, respectively; and legislative expert to governments in European and Asian technical assistance programs. Her recent book publications include: *Europäisches Urheberrecht* (Vienna, 2001) (with Walter *et al.*; 2nd edn in English with Oxford University Press (OUP) in preparation); *The WIPO Treaties 1996* (London, 2002) (with Reinbothe); and *International Copyright Law and Policy* (OUP, forthcoming in 2008). She is adjunct Professor at Franklin Pierce Law Center, Concord, NH, US, and at MIPLC and at George Washington University Munich IP Summer Program (with a course on the topic of this book) and has been a visiting professor at numerous universities in France, Canada, at the University of Melbourne and Visiting Scholar at Columbia University, New York. She has represented the MPI at the WIPO IGC on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore since its inception.

Agnès Lucas-Schloetter, *Docteur en droit* (University of Paris I, Panthéon-Sorbonne), is a former Senior Researcher at the Max-Planck-Institute for Intellectual Property, Competition and Tax Law, Munich. She is now Lecturer at the Ludwig-Maximilian University, Munich. Author of *Droit moral et droits de la personnalité. Etude de droit comparé français et allemand* (Presses Universitaires d'Aix-Marseille, 2002); and (with H. Beverley-Smith and A. Ohly) of *Privacy, Property and Personality: Civil law Perspectives on Commercial Appropriation* (Cambridge University Press, 2005).

Peter-Tobias Stoll, Dr. iur., Professor of Law, Georg August University of Göttingen; Head, Department on International Economic Law and Environmental Law of the Institute of International and European Law of the University. He is a former member of German delegations to meetings of the Convention on Biological Diversity and a former senior research fellow, Max-Planck-Institute for Comparative Public Law and International Law, Heidelberg. His research topics include international economic and environmental law, biodiversity and biotechnology.

Antony Taubman is currently Director (a/g), Global IP Issues Division (including Traditional Knowledge and Life Sciences programs), World Intellectual Property Organization (WIPO). He contributes in a personal capacity to this volume; no views expressed should be attributed to WIPO, its Secretariat or its Member States. He has held a range of academic, diplomatic and official posts in the field of IP, and more generally in international relations, and practiced as a patent attorney in the 1980s. His tertiary education has included science, philosophy, classical Greek, international relations and IP law. The chapters he has authored for this volume draw extensively on research undertaken at the College of Law, Australian National University and the Australian Centre for Intellectual Property in Agriculture (ACIPA).

Table of Contents

<i>Abbreviations</i>	xix
<i>Notes on Contributors</i>	xxv
Part I. Introduction <i>Silke von Lewinski</i>	1
Part II. Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law <i>Peter-Tobias Stoll and Anja von Hahn</i>	7
Section 1. Indigenous Peoples in International Law	7
Section 2. Indigenous Peoples: Definition Issues	10
I. The Term 'Indigenous': An Approximation	11
II. The Recognition of Indigenous Peoples as 'Peoples'	15
Section 3. Some Essential Characteristics of Indigenous Cultures	17
I. Collective Rights	17
II. Indigenous Peoples and Their Land	18
III. Indigenous Heritage: Indigenous and Traditional Resources	19
Section 4. Relevant Human Rights Norms in the Context of Indigenous Knowledge and Indigenous Resources	21
I. General Human Rights Norms Relevant to the Protection of Indigenous Knowledge and Indigenous Resources	21
1. Human Rights Standards for the Protection of Intellectual Property	21
2. Other Relevant Standards in the Context of Indigenous Resources and Traditional Knowledge	23
II. Specific Human Rights Instruments for the Protection of Indigenous Peoples	24
1. ILO Convention No. 169	25

	2. Draft Declaration on the Rights of Indigenous Peoples	26
	3. The Proposed American Declaration	29
Section 5.	Indigenous Peoples in International Environmental Law	30
	I. The Convention on Biological Diversity	31
	1. 'Indigenous and Local Communities'	32
	2. The General Concept	32
	(a) Dependence of Indigenous and Local Communities on Biological Resources	32
	(b) The Concept of Benefit-Sharing	32
	3. Art. 8(j) of the CBD as the Key Operative Provision	33
	(a) Art. 8(j) in Context: <i>in situ</i> Conservation of Biological Diversity as a State Obligation and the National Law Limitation	34
	(b) Subject and Contents	34
Section 6.	Ongoing Discussions: Recent Developments in International Forums Regarding Indigenous Resources and Traditional Knowledge	35
	I. The World Intellectual Property Organization	36
	II. Traditional Knowledge in the Context of the WTO	37
	III. The Convention on Biological Diversity	38
	IV. The Food and Agriculture Organization of the United Nations: The International Undertaking on Plant Genetic Resources and the Concept of Farmers' Rights	41
	1. 'Farmers' Rights' and Indigenous Peoples	42
	2. The Concept of Farmers' Rights	43
	3. Farmers' Rights, Traditional Knowledge and Intellectual Property	43
	V. The United Nations Conference on Trade and Development	44
	VI. The World Health Organization	45
Section 7.	Recent Developments at the Regional and National Levels with Regard to the Protection of Indigenous Resources and Traditional Knowledge	45
Section 8.	Statements, Declarations, Charters, Resolutions, and Recommendations by Indigenous Peoples	49
Section 9.	Conclusion	52
	Bibliography	52
Part III.	Analysis of Different Areas of Indigenous Resources	59
Section 1.	Traditional Knowledge	59
	<i>Antony Taubman and Matthias Leistner</i>	
	I. Findings at the Factual Level	59
	1. Recognizing the Characteristics of Traditional Knowledge	59
	2. Sources of Factual Information	64

3.	Terms and Definitions	68
	(a) Choice of Terminology	69
	(aa) General	69
	(bb) Addressing Indigenous Knowledge in Particular	69
	(b) Subject Matter to be Covered: Characterizing Traditional Knowledge	71
	(aa) Holistic Approach	71
	(bb) Diversity	72
	(cc) Self-Referential Aspect of Defining TK	73
	(dd) The Role of a Definition of TK	74
	(ee) Linkage with Traditional Community and Dynamic, Intergenerational Quality	77
	(c) Scope of Legally Protected TK	78
4.	TK and IP Protection in an Holistic Context	81
5.	Needs and Expectations for the Protection of Traditional Knowledge	82
	(a) Positive Protection	83
	(b) Defensive Protection	85
6.	The Focus on the Point of Access	87
	(a) General	87
	(b) Initiatives for Documentation Measures – Advantages and Disadvantages	87
7.	The Role of Customary Law	89
8.	Use of Certification and Collective Marks and Geographical Indications	90
II.	Existing Legal Provisions Regarding the Protection of Traditional Knowledge	92
	1. TK as Subject Matter for Intellectual Property Rights	92
	(a) International Level	92
	(aa) Patents	93
	(1) Positive Protection of TK Innovations through the Patent System	95
	(i) TK as Inherent Subject Matter for Patent Protection	95
	(ii) Cultural and Legal Constraints on Use of Patent System by TK Holders	97
	(iii) Inventorship in a Traditional Context	97
	(iv) Application of Patentability Standards in the Context of TK Systems	100

(2) Defensive Protection in the Patent System: the PCT and IPC	104
(i) Recognition of TK in the Patent System	104
(ii) International Patent Classification	104
(iii) Patent Cooperation Treaty	104
(iv) WIPO Recommendations on the Recognition of TK	105
(v) The Dilemma of Pyrrhic Protection	106
(bb) Geographical Indications and Certification Marks	107
(cc) Suppression of Unfair Competition	109
(dd) <i>Sui Generis</i> Protection	111
(b) Regional Level	113
(aa) Andean Community	113
(bb) European Patent Convention	114
(1) Novelty and Inventive Step under the EPC	114
(2) Cases on Patenting TK-Related Inventions	115
(cc) Regional Models for Protection	120
(dd) Bilateral Agreements	120
(c) National Level	121
(aa) Patent Law	121
(1) General Considerations and Some Cases: TK under National Patent Law	121
(2) Positive Protection of TK under National Law	123
(3) Defensive Protection of TK against Illegitimate Patenting	124
(i) <i>Per se</i> Exclusions of TK from Patentability under National Law	124
(ii) Enhanced Disclosure Mechanisms under National Law	126
(bb) Trademarks, Public Certification Systems and Geographical Indications	127
(1) Collective Marks and Certification Marks (Annette Kur)	127
(2) Public Certification Systems (Annette Kur)	129