

Preface

Indigenous Innovation: New Dialogues, New Pathways

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The subject of this timely and stimulating volume is potentially confronting, and certainly provokes new ways about thinking about old subjects. Trade, intellectual property and indigenous knowledge systems — the value systems, the cultural contexts, the very world views that these three simple terms can evoke are often assumed to be dramatically, fundamentally at odds with one another: worlds apart. Yet the past decade, especially, has seen the growth and maturing of a remarkable dialogue between these seemingly remote world views.

Perhaps the most heartening, and ultimately the most consequential, development has been the process of mutual learning fostered by an extensive international debate — above all, the greater acknowledgement of indigenous peoples in policy debates on intellectual property (IP) issues, and the deepening respect for their cultures and knowledge systems that has flowed, perhaps inevitably, from the opening up of new pathways for the exchange of ideas and the sharing of communities' experience. Respect for the distinctive character, and recognition of the inherent dignity and worth, of indigenous cultures and knowledge systems are surely at the heart of any endeavour — practical, legal, political, conceptual — to build stronger links, to reconcile differences, to create new means of advancing the rights and interests of the custodians and practitioners of traditional knowledge systems.

With this greater respect and acknowledgement comes a clearer, wider recognition that traditional knowledge systems are indeed innovative, dynamic and directly relevant to practical needs; that collective and cumulative forms of innovation and creativity have value and worth in themselves; that indigenous

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peoples do trade and do engage with the wider community, have done so for millennia, and today simply seek to do so on terms that are more equitable and culturally attuned.

Yet the same traditional knowledge debate can also lead the IP policy community to reflect deeply about the central tenets of the IP system, its core principles and cultural assumptions, indeed its very legitimacy and fundamental policy rationale. The traditional knowledge debate may in time be seen as a tonic for the policy domain of IP, helping to open up a more informed, more inclusive, more broadly based discourse on the role, the principles and the legitimacy of the IP system. Critics of IP from the indigenous perspective have helped open up a more pluralistic view about the nature of what the IP system can and should be, whom it should benefit and how. While some criticism has been intensive, and some formal positions expressed in debates can seem irreconcilable, this dialogue has required us to unearth some of the foundational principles of IP and go back to basics. Why is there such a system of law, what is it for, does its actual practice line up with its objectives, what are its policy roots and essential principles, what are the embedded values in the system; and, most challenging, perhaps, do we need to revisit those values and think about the evolution of a more pluralistic system or at least a system that is more representative of or practically responsive to the diverse needs, interests and values of peoples across the globe, in particular indigenous peoples and local communities?

Equally, however, dialogue and the sharing of experience have shown more positive and culturally appropriate forms of IP protection that transcend the constraints, limitations and embedded values that its critics attributed to the IP system. First is the assumption that 'IP' is inherently atomistic, is concerned about private rights for individuals and commercial firms, and lacks a collective or communal character. Secondly, there's the assumption that it is inherently time bound, alien to the intergenerational context of traditional knowledge systems, with a short-term focus linked to commercial cycles, at best a single generational perspective. Thirdly, there's the assumption that IP is a form of commodification, that in operation it takes a rich cultural intellectual tradition, captures its commercial value — isolates the easily exploited expressions of a tradition of ancient wisdom, culture and spirituality— and crudely turns them into a commodity to be traded on global markets. Each of these assumptions manifests a perception of the IP system and perhaps a predominant set of practices, rather than articulating its essence and its core principles.

For those working within traditional knowledge systems, or in other policy domains, it is very helpful and timely to revisit such assumptions about the IP system, assumptions that may be self-imposed limitations and unwitting impediments to new avenues for promoting and defending the interests of indigenous peoples and local communities. This is the essential challenge:

to explore fundamental ideas about IP that are not constrained by these limitations, but rather offer practical pathways to meeting, in part at least, the needs and expectations articulated by indigenous communities. The United Nations Declaration on the Rights of Indigenous Peoples has, in setting out the rights of peoples as such, articulated their entitlements concerning IP. And forms of IP that are communal or collective in character do currently exist, and have their place within the formal system; some even need to be implemented under the WTO's TRIPS Agreement — consider performer's rights, protection of confidential traditional knowledge, collective marks and geographical indications, and the suppression of acts of unfair competition such as false claims of indigenous authenticity. But the actual operation and further possibilities of these legal mechanisms are explored comparatively little in policy debate, and much practical learning is needed about how that collective characteristic can be mapped across to the collective legal personality or the cultural identity of indigenous peoples. Further, there are indeed mechanisms in the current IP system that can transcend a single generation or product cycle — it is not a concept inherently alien to the IP system for rights to endure beyond a limited tenure, even if most IP rights are deliberately time-bound. There are ways of ensuring an equitable and fair form of IP that does evolve with time and does take account of intergenerational factors. The third point of critique is perhaps the most challenging and confronting: yet IP need not be about commodification or, ironically 'propertisation' as such. What is the essence of the IP mechanisms? What is the essential legal character of an IP 'right'? Your IP right is not, at core, an entitlement for you to enter the market yourself; rather, its central characteristic is that it empowers you to object to my 'commodification' of what is yours — your knowledge, your cultural work or your distinctive sign. In principle, its basic legal function is not to promote illegitimate or unauthorized commodification of that which someone else has originated, but rather to provide a legal means to prevent such commodification. So, properly arranged, organised, understood and exercised, there is a notion of IP in the broadest sense that amounts to giving indigenous communities a say, a degree of leverage over their knowledge, over their distinctive signs and symbols, over their cultural works.

Thus IP mechanisms can — in principle at least — offer three general modes for giving practical effect to the expectations of indigenous peoples. One is the capacity to object to illicit commodification of their material: a right to object if someone misappropriates traditional knowledge and seeks to trivialise it as a commercial product. The second aspect is the notion of recognition, the moral rights aspect, essentially a right to object when use of material is derogatory or insulting, taking reference from this aspect of copyright in particular. The third aspect is the right to set the terms for how others make use of protected materials, such as traditional works and traditional knowledge — this last aspect

has drawn most attention in the debate over the interplay — current, actual and desired — between traditional knowledge systems and the international trade system, notably in the calls for better defined linkages between the operation of the patent system and the circumstances and conditions of access to traditional knowledge and genetic resources. Much concern has been expressed about inappropriate choices, about the wishes and values and interests of indigenous peoples being set aside altogether; but there are also interesting positive opportunities for communities that do wish to make use of their distinctive cultural materials and traditional knowledge in an international context to develop economic, scientific and cultural partnerships beyond the community.

Reflecting on these options recalls an important practical imperative when considering the interactions between the IP system and traditional knowledge systems: the point is surely not for an external expert with a laptop and a set of fixed ideas to intrude into the domain of the traditional community, to tell them how to organise their interests, how to manage their own existing knowledge systems. Rather, ideally, at least, it is the other way round: the point is to learn from the community about what their interests, and aspirations are as a community, and construct mechanisms to enable those values, interests, aspirations to be carried beyond the community as it interacts with not only its immediate neighbours but also potentially with partners and the general public across the globe. Ultimately the most important aspect of the IP system is not, after all, the absorbing policy and legal debate that continues to unfold internationally, but rather the challenge of developing implementation strategies and the application of practical tools that deliver the expected benefits in a workable manner that is appropriate for the community itself — yielding in actual practice the implicit promise of the general principles and objectives of the IP system.

So, if the focus should be on the specific context of local communities, and on the practical use of IP tools at the grass roots level, what then to make of the international dimension? How to bridge between the intrinsically local and the fully global is surely the defining challenge of the debate about traditional knowledge, IP and trade. Once again, we have seen a broadening of perspective and a wider sense of the interests engaged by multilateral IP and trade systems. Surveying the array of recent international debates and negotiations dealing with these intersecting policy domains, one can discern a widespread push for the recalibration of what can be considered the 'terms of trade' for knowledge resources — redefining the distribution, on what is argued to be a more equitable basis, of the benefits that result from the use of knowledge resources as feedstocks for trade and commerce. Several international negotiations seek to rebalance the relationship between those who can provide access to traditional knowledge and genetic resources — the gatekeepers and custodians — and

those who seek to benefit from access to those materials. Understanding and redefining the relationship between the providers of access, the custodians of traditional knowledge systems and genetic resources on the one hand, and the downstream users of this material on the other, is a more productive and enabling way of considering the IP issues. It offers an opportunity to move beyond the conventional structurings of IP policy, which divide the world into static binary caricatures separating right holders and content consumers — North and South, private and public, haves and have-nots — and instead to explore a more pluralist and fluid set of rights, interests and responsibilities in the light of the intellectual and cultural riches of indigenous peoples and traditional communities. This recalibration of the equitable terms of access to traditional knowledge resources has been evident in the work of the Convention on Biological Diversity (CBD). The Nagoya Protocol under the CBD is a significant milestone in this development, not least through its more extensive recognition of traditional knowledge as such and the obligation for foreign jurisdictions to respond to breaches of access rules in the country of origin. A pivotal instance, too, is the work currently under way in the World Intellectual Property Organization (WIPO) Intergovernmental Committee (IGC) to develop international legal instruments on traditional knowledge, traditional cultural expressions and genetic resources. This active process offers the prospect of a major advance in recognising the entitlement of custodians and holders to set the terms of access and use of their traditional knowledge, traditional cultural expressions and genetic resources. A similar recalibration of interests has been apparent in the work of the World Trade Organization (WTO). Driven in particular by a coalition of like-minded developing countries, one of the principal trade-related IP issues discussed as an implementation issue under the aegis of the Doha Declaration concerns whether, and if so how, the patent system should take account of or otherwise link to the obligations that a user of traditional knowledge and genetic resources assumes when accessing and exploiting these materials.

While the TRIPS Agreement is focused entirely on conventional forms of IP, its conclusion and implementation within the context of trade law and policy presaged a broadening of the array of interests and active players engaged with the international law and policy of IP. Its perceived reach and impact have also precipitated critical analysis about the role and limitations of the IP system in the form of a series of ‘TRIPS and...’ debates: TRIPS and food, biodiversity, development, human rights, health and so on.

While other vital questions such as patents and access to medicines have pressed forward in international IP policy debates since TRIPS came into force in 1995, it is the traditional knowledge debate that has been the most searching, the most far reaching, and ultimately the most insightful as to the essential character

and rationale of the IP system. Its significance is apparent from the trajectory the debate has taken over the past decade. Concerns about possible tensions between traditional knowledge and IP have emerged, in turn:

- first, as a point of resistance to conventional IP norms — a critical and defensive position;
- secondly, as a point of pressure for reform and for resituating the system — a revisionist position; and
- thirdly, as embodying social and economic concerns that form part of the interests which are positively asserted in trade fora — a position asserting positive trade interests.

The initial tenor of the debate was essentially critical and sceptical of the relevance and appropriateness of the IP system for traditional knowledge systems. Critics assumed the IP system to be diametrically at odds with traditional knowledge systems, and argued that it was little more than a tool of misappropriation and illicit commodification: that IP is atomistic, concerns only private individual rights, takes a narrow, culturally specific approach, and lacks applicability to intergenerational and collective forms of innovation and creativity. This critical agenda saw traditional knowledge systems as in need of protection *from* IP, and ruled out the search for solutions within the IP system as inherently inappropriate. The second phase — building on a richer, broad-based dialogue about the essential principles of IP law and legal mechanisms — identified positive avenues for the fulfilment of the needs and expectations of indigenous peoples and other traditional communities. The 2007 recognition, in the UN Declaration on the Rights of Indigenous Peoples, of the right of indigenous peoples to ‘maintain, control, protect and develop their intellectual property over ... cultural heritage, traditional knowledge, and traditional cultural expressions’ marked a significant insight into IP within the indigenous context. Partly this development entailed making practical use of IP mechanisms to provide immediate solutions, but at a policy level this shift in emphasis saw concerns about traditional knowledge acting as a point of pressure for reform, and for resituating the system — almost literally recentring the system on a wider geographical and social base to recognise the needs and context of knowledge-holders beyond the scope of those conventionally perceived as having an interest in the IP system. The traditional knowledge perspective provided a fresh perspective for the reconsideration, reform and refocusing of the IP system. The work of the WIPO IGC, drawing on the existing array of IP principles, adapting and applying them to traditional knowledge, and developing further cognate principles, is the epitome of this second stage.

The third phase, a kind of systemic consolidation of the second stage, is characterised by traditional knowledge forming part of the concrete interests

that some countries bring to the table when they debate and negotiate on a fair and equitable IP system and seek to settle the conditions of international trade. For instance, the 2008 Economic Partnership Agreement between the CARIFORUM states and the European Union (EU) included a significant section on genetic resources, traditional knowledge and folklore. The later EU-Central America association agreement also recognised the significance of these issues, and the 2011 Multiparty Trade Agreement between the EU, Colombia and Peru included more detailed provisions. In 2008, a broad coalition of developing countries and European countries proposed that as part of the WTO's Doha Work Programme, WTO members should agree to amend the TRIPS Agreement 'to include a mandatory requirement for the disclosure of the country providing/source of genetic resources, and/or associated traditional knowledge ... in patent applications'. While the scope and practical impact of these measures is currently uncertain (and ongoing work on the link between the TRIPS Agreement and the CBD has not yielded substantive results to date), the immediate point to observe is that developing countries are now identifying interests in this domain as one element what, to them, should comprise an overall comprehensive deal on a host of trade issues.

This recalibration of interests can be seen from at least four perspectives:

- empirical: the evidence of patent statistics and the development of new standards, metrics and classification tools recognising aspects of traditional knowledge;
- jurisprudential: the forms of innovation, 'skill in the art', that are recognised by the patent system, and the assumptions about innovation and creativity that lie within ostensibly 'technical' standards;
- the practice of trade negotiations: the emergence of traditional knowledge as a concrete strategic trade interest;
- development policy: traditional knowledge systems as a contribution to sustainable, culturally appropriate development strategies.

Empirically, patent statistics provide evidence of a sustained increase in the efforts of researchers in the developing world to capture the benefits of traditional knowledge systems that are rooted in their own countries. Without entering into analysis of the nature and impact of such research programmes and patenting activities, they do at least illustrate how some developing countries are exercising their interests in their heritage of genetic resources and traditional knowledge systems. Jurisprudentially, the concerns that drive the traditional knowledge debate have had some influence on the character of IP law. Often cited in this context are the Australian Federal Court cases in the field of copyright which gave recognition to the customary law background and cultural context of indigenous artistic creativity, and the interests of the

community that stands behind a traditional artist. We see more recently a series of initiatives to build recognition of traditional knowledge and traditional creativity directly into IP law. Examples include the 2005 revision to the Patent Law of India, which explicitly excludes from patentability certain forms of traditional knowledge out of concern that they are inappropriate subject matter for patents; and the New Zealand Trade Marks Act of 2002 which gave explicit protection to Māori culture under the broader principle of avoiding offensive registration of trade marks, with the guidance of a Māori Trade Marks Advisory Committee which forms part of the registration process.

The trade and development dimension of this recalibration of interests is apparent in the negotiations and policy debates touched on earlier. It is striking that the two clusters of issues regarding the TRIPS Agreement that are being actively considered under the aegis of the Doha work programme — TRIPS and the CBD, and geographical indications — both have significance for traditional knowledge systems. The TRIPS-CBD debate specifically pivots on the question of what recognition, if any, the patent system might be required to give to the circumstances of access to, and use of, traditional knowledge and genetic resources. And geographical indications have been explored as one tool for ensuring recognition in international markets of the distinctive qualities of indigenous products when traded with the consent and involvement of communities. When local and indigenous communities do choose to develop wider commercial relationships, protection of distinctive signs and traditional names is often one of the important entry points into the international trading system. The two clusters of issues both have a bearing on the development interests of developing countries, and both concern the claims of indigenous peoples and local communities for their interests to be appropriately protected. Another example of this recalibration of interests is the recommendation under the WIPO development agenda that the WIPO IGC should indeed accelerate its work towards an international instrument on the protection of traditional knowledge. Accordingly, we have seen a major rebasing of the interests that countries bring to the table. Ideas, concepts and concerns that were perhaps considered tangential or barely relevant to the IP system a little more than a decade ago are now central to work being done by two of the main international institutions — WIPO itself and the WTO. And from the human rights perspective, it is striking that the one multilateral human rights instrument that explicitly recognises rights over IP as such is the Universal Declaration on the Rights of Indigenous Peoples. This recognition is surely a remarkable sign of a more pluralistic understanding of what IP is and whose interests should be recognised within an IP system — an indication of a broader and more inclusive framework than was conceived of some two decades ago when the main elements of the TRIPS Agreement were concluded.

One of the most challenging and fascinating questions that has arisen in this debate, raising deep jurisprudential issues, concerns the recognition of indigenous customary law in the framework of enhanced protection of traditional knowledge and cultural expressions. There has been a consistent call for this form of recognition by a number of indigenous representatives in international discussions. It is a question that raises policy, academic and theoretical issues, but also highlights the difficulties of establishing a fully international form of recognition and protection of traditional knowledge systems which is workable and effective, yet remains true to, and a legitimate expression of, the local, customary context of such systems. Some advocates contend that an overarching comprehensive system of recognition and protection of indigenous knowledge will always be incomplete, will always be subject to some unease or uncertainty, unless it is able to give some form of recognition to the customary law that defines custodianship rights, responsibilities or other obligations over traditional knowledge, that defines what amounts to appropriate use and inappropriate use of traditional knowledge. The challenge is to take what is a matter of law, practice and custom intrinsically embedded in the life of a community and have that recognised in an international or foreign context — ‘foreign’ in two senses: literally, in a jurisdiction potentially across the other side of the earth; and in the sense of not having an understanding of deeper values, spirituality, customs and traditions that are embedded in the traditional knowledge system. If an ignorant or malign external third party enters into an indigenous community, into the traditional customary context, and appropriates aspects of traditional knowledge in violation of customary law or practices, what would it mean for an effective legal system to apply in a foreign jurisdiction so as to recognise the breach of customary law or practices? If customary law is to provide any kind of guidance, its very diversity needs to be recognised.

An illuminating element of the international debate has been the willingness and the capacity of indigenous and local communities to step forward directly and explain to IP policy makers the practical role of customary law and practices within their communities' use and custodianship of traditional knowledge systems, and the rich diversity of custom, law and practice that are embedded within communities' lives. Yet this very diversity underscores the inevitable constraints that will be struck when seeking recognition of customary law beyond the original community. Some options may, however, merit exploration and speculation. The pivotal issue in the traditional knowledge debate has, after all, been how to recalibrate, and then to monitor and police, the conditions of access to traditional knowledge. When I enter a community, or deal with it, I may, as a direct undertaking on my part, agree to be bound by certain customary constraints as a condition of access to traditional knowledge, potentially constituting one element of the mutually agreed terms governing downstream use and application of traditional knowledge and genetic resources. This process

would both educate and sensitise me as to what my liabilities and responsibilities are, and would also bind me in a direct legal sense to recognise what constraints I need to recognise in my downstream use of that material. This is not to advocate any particular approach, but to reflect on some pathways that might yet be explored. The customary law issue is emblematic of the wider challenges addressed in this volume — it raises fundamental legal and policy questions, alongside basic practical questions, about what tools and mechanisms will be of actual use and benefit to indigenous peoples and local communities as they seek to promote and defend their interests beyond the traditional circle. Sustainable, effective solutions will ultimately need to reconcile legal, policy and practical demands so as to yield an inclusive and sound legal and policy platform, the basis for the effective deployment of practical tools for the more immediate benefit and interests of communities. The wealth and diversity of insights in this volume — joining together indigenous, IP and trade policy perspectives — offer invaluable ideas for how this might be achieved. The volume exemplifies the kind of dialogue and mutual learning that must underpin true progress in this vitally important but still challenging domain of policy debate, normative development, and the application of law in practice.