Editorial – Intellectual Property Law and Indigenous Traditional Knowledge

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Introduction

Indigenous peoples throughout the world have lived through various eras and forms of European colonisation. It is arguable that, on the international stage in the past decade, a new era of colonisation has emerged as Indigenous peoples face the steady appropriation of their molecular essences, their knowledge of molecular essences and processes of all life forms, and other forms of appropriation of their many elements of their traditional knowledge and cultural heritage. Indigenous peoples today face increasing external pressures and demands from governments, organisations and corporations as they are perceived as potential sources of solutions for global issues related to restoring the earth's ecological balance and for resourcing a shifting world economic base.

Locking Indigenous Traditional Knowledge into a Western IP Paradigm – An Historical Overview

It is axiomatic that the historical development of the concept and regimes of intellectual property law evolved in tandem with European colonisation. Continuous advancements and inventions in European science and technology throughout the colonisation eras contributed to a growing perceived need to protect individual property interests in science and technology.

Intellectual property, of course, comprises a range of different titles and forms of protection characterised by the granting of certain time-limited rights over the control or use made of intellectual property products. Within European-based normative frameworks, the basic role and function of the intellectual property regime has been to protect both private property rights and to promote public rights of access to socially valued resources through a careful balancing act.

The right to development and intellectual property represents a balancing of the private right of the creators or inventors to the protection of their intellectual property against the right of the community to enjoy the benefits of the sum of human art and knowledge. For the most part, however, IP national laws and international treaties have tended to favour the protection of the creators' or inventors' private rights.

Intellectual property rights have always been primarily developed, enacted and enforced at the national leve1. Beginning in the 19th century, international protection of intellectual property was in the form of bilateral agreements between states. However, as scientific development and technologies increased, bilateral agreements were replaced by international conventions.[1]

In 1967, the World Intellectual Property Organisation (WIPO) was created through treaty,[2] and was established as the UN specialised agency responsible for the promotion of the global protection of intellectual property through cooperation among Member States and, where appropriate, in collaboration with other international organisations,[3] and for the administration of the various multilateral treaties dealing with intellectual property.[4] In 1994, WIPO's exclusive domain was altered by the creation of the World Trade Organisation (WTO), an international organisation with a mandate that included administering trade-related aspects of intellectual property within one of the GATT treaties: namely, the TRIPs Agreement.

As late as 1995, WIPO maintained this position and requested that references to WIPO be deleted from the draft principles and guidelines for the protection of Indigenous cultural heritage prepared by the Special Rapporteur. By the time of the submission of the 1996 Supplementary Report, however, WIPO had changed its position and indicated that it was now going to jointly organise an international symposium with UNESCO on the preservation and legal protection of folklore (that was to presumably cover issues related to protection of Indigenous heritage). In April 1997, WIPO jointly hosted the World Forum on the Protection of Folklore with UNESCO in Thailand, and the

forum was seen as a watershed in both WIPO's and UNESCO's acknowledgement that the question of the protection of the heritage of Indigenous peoples was within both their mandates.[5]

The 1998-1999 biennium was the beginning of WIPO's systemic response to meeting emerging global issues relating to genetic resources and traditional knowledge. As part of its background for its Program and Budget, WIPO outlined three challenges facing the intellectual property system in a rapidly changing world:

- Accelerating technological advancement has created new global issues impacting on the intellectual property system.
- Integration of the world economical, ecological, cultural, trading and information systems requires more active exploration of intellectual property issues at a global level, complementing WIPO's national and regional activities.
- The pervasiveness of intellectual property in the fabric of human activity and aspiration, and the universal character of IPRs, and a call for an exploration of new ways by which the intellectual property system can serve as an engine for social, cultural and economic progress for the world's diverse populations.[6]

In the 1998-1999 biennium, WIPO expressly articulated a single, simple objective – namely, to identify and explore the intellectual property needs and expectations of new beneficiaries including the holders of traditional knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development. The Main Program identified four key areas where rapid modern technological and social changes were exerting stress on the existing intellectual property system, and identified WIPO's tasks in considering how those areas needed to be addressed in order to ease pressures and to advance the IP system:

- IPRs for New Beneficiaries.
- Biological Diversity and Biotechnology.
- Protection of Expressions of Folklore.
- Beyond Territoriality.

WIPO's subprogram (IPRs for New Beneficiaries) outlined its mandate and set of activities relating to the intellectual property needs and expectations of new beneficiaries including the holders of traditional knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development. WIPO stated that it had been called upon by various international agencies and forums to provide technical advice and information on intellectual property matters where these arise in relation to certain groups which had had little or no effective access to the IP system, for instance the United Nations Commission on Human Rights (Sub-Commission on Prevention of Discrimination and Protection of Minorities) and the Conference of the Parties to the Convention of Biological Diversity (Workshop on Traditional Knowledge and Biological Diversity).

The work of WIPO in the 1998-99 biennium focused on issue identification, fact-finding, research and consultation in preparation for its responsibilities of setting new directions for global intellectual property policy and law. WIPO identified six main activities through which it proposed to carry out its tasks with respect to intellectual property rights for new beneficiaries including the holders of Indigenous knowledge and innovations. Tasks specifically related to issues affecting Indigenous peoples included conducting nine fact-finding missions to various regions of the world for the purpose of identifying the intellectual property needs and expectations of holders of traditional knowledge and hosting two round-tables on the topic of Intellectual Property and Traditional Knowledge. The Final Report from the fact-finding missions acknowledged that "while the needs of traditional knowledge [TK] holders have been referred to in other international fora, there has been to date no systematic global exercise by international organisations to document and assess, first-hand, the IP-related [intellectual property] needs of TK holders."[7]

WIPO fact-finders focused on traditional knowledge holders as the intended beneficiaries of their work. From WIPO's perspective, traditional knowledge is a subset of the broader concept of heritage, and Indigenous knowledge was a subset of traditional knowledge.[8] Traditional knowledge holders have been defined as "all persons who create, originate, develop and practice traditional knowledge in a traditional setting and context".[9] WIPO has emphasised that Indigenous communities, peoples and nations are traditional knowledge holders, but qualified this by stating that not all traditional knowledge holders are Indigenous. Thus, the argument is mounted that its

intended beneficiaries included Indigenous peoples as part of a larger body of traditional knowledge holders.

The WIPO Final Report uses the following comprehensive definition of traditional knowledge that conforms closely with their mandate of promoting IPRs in creations of the human mind under Article 2(viii) of the *Convention Establishing the World Intellectual Property Organization*, 1967:

> *...refer[s] to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. "Tradition-based" refers to knowledge systems, creations, innovations and cultural expressions which have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; have generally been developed in a non-systematic way; and, are constantly evolving in response to a changing environment.*
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> *Categories of traditional knowledge include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; "expressions of folklore" in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and movable cultural properties.*[10]

From WIPO's perspective, traditional knowledge does not include such items as human remains, languages in general and "cultural heritage" in the broad sense. Notably, in their "Summary, Reflections and Conclusions", many fact-finding mission participants disagreed with that stance, stating that the definition of traditional knowledge should include certain forms that fell outside the scope of potential intellectual property subject matter, including: spiritual beliefs, dispute-resolution processes and methods of governance, languages, human remains, and biological and genetic resources in their natural state, knowledge or information *per se*.

At its 26th (12th Extraordinary) General Assembly held from 25 September to 3 October 2000, WIPO Member States established a special body to discuss intellectual property issues related to genetic resources, traditional knowledge and folklore. Since then, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) has held many sessions in Geneva, where it has focused on three primary themes:

- Access to genetic resources and benefit sharing.
- The protection of traditional knowledge, whether or not associated with those resources.
- The protection of expressions of folklore.

More than a decade later, WIPO Member States have recognised the growing implications and challenges of biotechnology advances and genetic resources upon economics, trade and intellectual property concepts and mechanisms of protection on a global scale. The changing organisational approach of WIPO to its duties and activities has reflected – at least in principle – the growing international recognition of the interrelationship between biotechnology advances, genetic resources, traditional knowledge and intellectual property. For Indigenous peoples, however, the reality of the international intellectual property system is that WIPO simply serves the needs and interests of its Member States.

Indigenous peoples, once again lacking the international status necessary to have a voice within the WIPO regime, have had no, or very little, participation or input into the terms of existing IP treaties or the articulation of emerging global intellectual property policies. As with other international organisations, it may be argued that most Indigenous groups reject having to be approved by Member States as non-governmental organisations in order to participate in WIPO meetings as observers.

Like other international organisations, WIPO's conceptual approach to emerging global issues essentially reflects a state-centred agenda (driven as it is by Member States). The relationship between biotechnology advances, genetic resources and traditional knowledge was originally identified within the context of Member States' discussions at WIPO General Assemblies. Accordingly, Indigenous knowledge is seen as merely a subset of traditional knowledge, not as an area worthy of distinct treatment. Although Indigenous peoples have positive opportunities to have their traditional knowledge needs and interests addressed within

WIPO, WIPO's formal responses still remain limited to those available to traditional knowledge holders as a whole.

Notwithstanding, the establishment of the IGC has been a generally positive development, even though participation is limited to Member States and to accredited non-governmental organisations. The work of IGC still offers some promising implications, particularly in terms of examining *sui generis* mechanisms of protecting traditional knowledge under the existing international intellectual property regime.

Along the way, some Indigenous groups have taken advantage of the opportunity to participate in the sessions, albeit within a limited capacity. However, while Indigenous peoples have lobbied with a measure of success to have sections deal specifically with their issues, included within the major international environmental treaty (CBD), they have not had similar opportunities with international IP treaties. Essentially, this means that Indigenous peoples have had to rely on existing IP treaties and their processes as the only potential sources for the protection of their heritage and traditional knowledge.[11] International IP law as a potential source of protection of Indigenous heritage and knowledge is useful in the short-term as a response to immediate and immense pressures on the integrity and viability of Indigenous heritages. But, moreover, the international IP system can only be seen as potentially effective in the long-term if *sui generis* systems of protection under the existing IP regime can be implemented. Not surprisingly, Indigenous peoples remain reluctant to commit wholeheartedly to pursuing the protection of their heritage and traditional knowledge under a regime that approaches heritage and knowledge as concepts of property, when such concepts are fundamentally incompatible with Indigenous worldviews, values and systems.

Unlocking New Protections for Indigenous Traditional Knowledge – A Way Forward

External strategies of protecting Indigenous cultural heritage and traditional knowledge must take a more holistic approach than traditional IP laws have allowed to the present. Any subsequent strategy of external intervention as part of the action stage of decolonisation must be based on and complement Indigenous internal systems of regulating, transmitting and protecting traditional knowledge and language.

Indigenous peoples have encountered serious obstacles in how their concerns are framed and approached in outside legal systems, including international and intellectual property laws. Indigenous positions on protecting Indigenous heritage and knowledge through such means have been based on the principle that systems of protection must be holistic in approach in order to reflect and respect the integrity of Indigenous holistic approaches. Any protective regimes designed by the international community must adopt the approach of managing and protecting all elements of Indigenous heritage as a single, interrelated and integrated whole. It is *not* appropriate to subdivide the heritage of Indigenous peoples into separate legal categories such as cultural, artistic or intellectual; or to subdivide it into separate elements such as songs, stories, science or sacred sites. Rather, it *is* appropriate to avoid making such distinctions for Indigenous peoples. Clearly, existing traditional forms of legal protection of cultural and intellectual property, such as copyright and patent, are not only inadequate but inherently unsuitable for the needs of Indigenous peoples.

Conclusion

Indigenous cultural heritage and traditional knowledge must be respected and protected under a post-colonial framework of international and intellectual property laws if they are to be shared on an equitable basis with *all* the peoples of the world.

The great diversity of Indigenous peoples is reflected in their relationship with some of the most biologically diverse ecosystems on the planet. Most Indigenous peoples carry traditional knowledge and an awareness of the sacred gifts with which they have been entrusted to nurture and maintain creation in all its complex interrelationships. Most Indigenous knowledge systems are also characterised by the value of sharing knowledge on an equitable basis for the good of all life forms and forces on the planet.

It should also not be forgotten that the experience of withstanding centuries of colonialism has severely damaged many Indigenous systems of protecting, preserving and transmitting their knowledge and heritage. As part of their decolonisation process, Indigenous peoples have had to embrace external strategies such as

seeking protection under a colonial framework of international law, while simultaneously trying to move toward a post-colonial framework of international relations and law, including intellectual property law.[12]

It will require international society to move away from valuing singularity to valuing diversity before the international community and its laws can be characterised as having moved beyond colonialism as an organising framework. International and intellectual property laws *are* in a position to support the internal decolonisation processes underway in many Indigenous nations and communities, including Australia. Only when Indigenous peoples are empowered by law to choose freely to share their Indigenous traditional knowledge and heritage with all other peoples on an equitable basis, can the internal and external processes of decolonisation be said to have converged to create a post-colonial and harmonious framework of international relations.

This Issue

Report by Professor Natalie Stoianoff on behalf of the Indigenous Knowledge Forum

On 1-3 August 2012, a forum on Indigenous knowledge and biodiversity in India and Australia was held at the University of Technology, Sydney (UTS), hosted by the Faculty of Law. The forum provided an opportunity for dialogue on comparative issues in Indigenous knowledge and biodiversity in Australia and India from the perspective of intellectual property and biodiversity laws and policies. The forum explored current and future directions regarding the implementation and operation of these laws and policies, particularly with respect to the rights and interests of Indigenous and local peoples. Emphasis was given to Indigenous peoples' activities in formulating their own approaches regarding the protection and use of their knowledge, as well as advocating for rights and recognition, and participation in policy development.

The rationale for the forum was two-fold. First, to address the interface between two spheres of legal regimes that are currently dealing with Indigenous knowledge; namely biodiversity and environmental laws on the one hand; and intellectual property laws on the other. And secondly, to provide a comparative focus in which to explore the issues arising from this interface, with a particular emphasis on implementation and operation of law and policy in these areas, and the rights and interests of Indigenous and local peoples.

The comparative focus on India and Australia was selected for the UTS forum for good reason. There are significant ecological, historical and legal similarities between Australia and India. Each nation has identifiable Indigenous and local populations. Each nation covers an entire continent or sub-continent, and comprises a federation of states and territories. Both have experienced British colonialism – albeit in very different modalities - and have emerged as democracies. India and Australia are both members of the Commonwealth and operate a common law legal system. Both nations are regarded as being biologically mega-diverse. These similarities provide a valuable opportunity to explore the interactions between Indigenous knowledge and practices with intellectual property and biodiversity laws, recognising also that these interactions occur within broader contexts of social, political and legal issues that concern Indigenous and local peoples.

The comparative focus is equally attentive to differences between India and Australia. There are significant differences in population size, and in economic development and growth models. The two nations also differ markedly in their discourses on Indigenous and local peoples across a wide range of matters including notions of "Indigenous" identity, political and legal aspects, and different perspectives in recognition and implementation of rights. It is these differences and commonalities between India and Australia that presented a compelling opportunity for a forum for comparative exchange and dialogue.

The forum was opened with an acknowledgment to Country by Aunty Joan Tranter, Elder in Residence, Jumbunna Indigenous House of Learning, University of Technology, Sydney (UTS), followed by welcome addresses from Consul General Arun Kumar Goel of the Consulate General of India, Sydney, Ian Goss, General Manager, Business Development & Strategy Group IP Australia, Dipen Rughani, National Chairman of the Australia India Business Council, Innes Ireland, Executive Manager, International and External Engagement, UTS, and myself as the Forum Chair.

The program for the forum comprised plenary sessions in which diverse perspectives were presented highlighting many of the issues and challenges, outlining the various legal and policy developments, and identifying questions that need

further attention. A number of these presentations included valuable case studies.

One key question that was a common theme throughout the forum concerned ways in which existing and emerging legal and policy frameworks are engaging with the rights of Indigenous and local people. Speakers addressing all these subjects included representatives from the Secretariat of the CBD, Australian Federal and State governments, Indian and Australian NGOs, the United Nations University, and Indigenous communities, and non-government activist organisations. Academic and legal experts from Australia and India presented on issues such as international protocols, national implementation, ethical knowledge management, rights to country and right to benefit from bio-resources and related knowledge.

Several papers presented at the forum will be reproduced in successive issues of the journal during 2013, commencing with the joint paper by Patricia and myself on the WIPO Intergovernmental Committee.

Further information about the Indigenous Knowledge Forum is available at: www.indigenousknowledgeforum.org.

Contents of this Issue

This first issue for 2013 covers a broad gamut of intellectual property law, from patent to copyright law, trade mark law to IP issues as they relate to traditional knowledge.

In the first article, Justice Middleton provides a succinct and illuminating overview of the role of the skilled addressee in patent litigation, tracing the historical concept of the skilled addressee through the case law to its origins, and identifying the various contexts in which such an expert is invoked. Interestingly, His Honour observes that, at the end of the day, the evidence of the skilled addressee is simply a tool that assists the Court in reaching the correct policy balance in determining the patent issues in dispute by reference to the statutory criteria.

Turning to copyright law, J.M. Hennessey SC then addresses the still unsettled topic of authorisation in acts of copyright infringement in the internet environment. The author provides an excellent contextual setting, first revisiting the *Moorhouse* and *Cooper* cases, then focusing on the significance of the *Roadshow Film* case. The author concludes that the law still remains uncertain in connection with the authorisation liability of ISPs in the online environment, and that undoubtedly the law in this critical, fast-changing area will evolve through further case law, legislative changes and the creation and implementation of consideration of relevant and hopefully workable industry codes.

Changing tempo completely, we are then invited to a survey of developments on traditional knowledge and cultural expressions in the international arena, specifically in the context of the recent work undertaken by WIPO's Intergovernmental Committee. The authors also provide an overview of the provisions relating to the protection of traditional knowledge, and the implications in particular for patent law and plant breeder's rights.

The next topic is particularly topical, wherein Devita Pathi offers us an insightful critique of the *Tobacco Plain Packaging Act* 2011 (Cth), and mounts the argument that this Act interferes with the trade mark owner's positive right of use as provided under the *Trade Marks Act*. The author takes the view that this new legislation effectively creates a two-tier trade mark system where tobacco and non-tobacco trade marks are treated differently under Australia's trade mark registration system, and moreover, that the Act arguably does not comply with Australia's obligations under international intellectual property treaties.

In the last article, Fraser Old laments the looming demise of omnibus claims under the *Intellectual Property Laws Amendment (Raising the Bar) Act 2011* (Cth). The new Act will require that claims must not rely on references to the description or drawing(s) except when absolutely necessary to define the invention, thereby preventing the routine inclusion of omnibus claims. The author strongly insists that omnibus claims have proved important in protecting against "incompetence" which, in various forms, can often arise in patent cases.

This issue's Profile places the spotlight on the career of Wayne McMaster, a well-known veteran of patent law. Nicholas Smith charts the diversity of Wayne's IP practice (notably in the pharmaceutical, biotechnology and life sciences fields), his high profile in many landmark Australian patent cases, and how he has somehow managed to traverse a variety of legal cultures from first-tier mega law firms to running his own IP practice.

Lastly, as usual, I thank each of the regular correspondents to the Current Developments section of the journal, with whom I look forward to working throughout the coming year. Their

invaluable, topical reports undoubtedly keep us abreast with the latest developments, here and abroad, in the world of intellectual property law.

1 *Paris Convention for the Protection of Industrial Property* (1883); the *Berne Convention for the Protection of Literary and Artistic Works* (1886).

2 Signed at Stockholm on 14 July 1967 and as amended on 28 September 1979.

3 Art. 3(i).

4 Art. 4.

5 See UNESCO-WIPO, *World Forum on the Protection of Folklore*, Phuket, Thailand,8-10 April 8, 1997. Available at: http://www.wipo.int/mdocsarchives/UNESCO_OMPI_FOLK_PKT_97/UNESCO_OMPI_FOLK_PKT_97_INF%201_E.pdf . Accessed 7 February 2013.

6 WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, Geneva, April 2001. Available at: http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf. Accessed 7 February 2013.

7 WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders – WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge*, (Geneva: WIPO, April 2001), 5. Available at: http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf. Accessed 7 February 2013.

8 Ibid. at 23.

9 Ibid. at 26.

10 Ibid. at 25.

11 Jerry Firestone, Jonathan Lily and Isable Torres de Noronha, "Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law', *American University Law Review,* (2005) Vol. 20, Issue 2, 241.

12 Ibid. at 290-291.