

TRADITIONAL KNOWLEDGE EXISTS; INTELLECTUAL PROPERTY IS INVENTED OR CREATED

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Prior to contact with Europeans between 300 and 600 years ago, Traditional Knowledge (TK) systems had developed and flourished over thousands of years in various parts of the world. These knowledge systems are rich and varied, ranging from soil and plant taxonomy, cultural and genetic information, animal husbandry, medicine and pharmacology, ecology, zoology, music, arts, architecture, social welfare, governance, conflict management, and many others. Most of these TK systems continue to exist and evolve; at the same time, they have been appropriated and subjected to Western legal regimes. Indigenous cultural expressions are manifestations of TK that are passed on by Indigenous ancestors through successive generations. They are, in turn, inherited by current, to be passed on to future, generations. The use of traditional motifs in individual art may be viewed as undermining the integrity of the culture, particularly if these motifs are used by a non-Indigenous artist. It has been recorded that international and national markets have exploited traditional designs.¹

Not all TK originates from Indigenous peoples. Other forms of knowledge such as ancient Chinese medicine, Caribbean steel drum making and music, ancient Belgian weaving and lace-making techniques, and ancient Swiss yodeling have been considered to be forms of Traditional Knowledge. It is the case, however, that well over 95 percent of TK is derived from Indigenous peoples. The term "Traditional Knowledge" differs from the term "Indigenous knowledge" in that it does not include contemporary Indigenous knowledge and knowledge developed from a combination of traditional and contemporary knowledge. The two terms are, however, sometimes used interchangeably. Certain voices in the discourse prefer the term Indigenous knowledge because TK can be interpreted as implying that Indigenous knowledge is static and

¹ MARIE BATTISTE & JAMES (SÁKÉJ) YOUNGBLOOD HENDERSON, PROTECTING INDIGENOUS KNOWLEDGE: A GLOBAL CHALLENGE 161 (2000).

does not evolve and adapt. However, Traditional Knowledge is the term used in most national discourses and virtually all of the international forums. Indigenous knowledge is not only “technical,” but also empirical in nature. Its recipients integrate insights, wisdom, ideas, perceptions, and innovative capabilities that pertain to ecological, biological, geographical, and other physical phenomena. It has the capacity for total systems understanding and management.²

The World Intellectual Property Organization Inter-Governmental Committee on Intellectual Property, Traditional Knowledge, Genetic Resources and Folklore (WIPO IGC) was established by the World Intellectual Property Organization (WIPO) General Assembly in October 2000 as a United Nations international forum for debate and dialogue concerning the interplay between intellectual property and TK.

In carrying out its ongoing mandate to establish international standards for the protection and regulation of the use of TK, WIPO developed the following working definition of Traditional Knowledge for the purposes of a 1998–1999 fact-finding mission that led to the establishment of the IGC:

Traditional knowledge (TK) is knowledge, know-how, skills and practices that are developed, sustained and passed on from generation to generation within a community, often forming part of its cultural or spiritual identity...

TK in a general sense embraces the content of knowledge itself as well as traditional cultural expressions, including distinctive signs and symbols associated with TK.

TK in the narrow sense refers to knowledge as such, in particular the knowledge resulting from intellectual activity in a traditional context, and includes know-how, practices, skills, and innovations.

² Sákéj Henderson, *Traditional Indigenous Knowledge, in (TRANS)MISSIONS: THE PROTECTION AND TRANSFORMATION OF TRADITIONAL KNOWLEDGE* 198 (2015) (unpublished manuscript) (on file with author).

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Traditional knowledge can be found in a wide variety of contexts, including: agricultural, scientific, technical, ecological and medicinal knowledge as well as biodiversity-related knowledge.³

However, these high-capacity, time-tested Indigenous knowledge systems have been devalued and diminished by having Eurocentric perceptions and institutions imposed upon them. In the process, many of the systems have been debased through misrepresentation, misappropriation, unauthorized use, and the separating of the content from its accompanying regulatory regime.

1. CUSTOMARY LAWS: DEVELOPED LEGAL REGIMES DEVALUED AND DIMINISHED

Indigenous peoples have numerous internal customary laws associated with the use of TK. These customary laws have also been called “cultural protocols.” They are part of the laws that Indigenous Nations have been governed by for millennia and are primarily contained in the oral tradition. In lieu of the increased outside interest in TK and problems with interaction between TK and intellectual property rights (IPR) systems, there is a current movement among many Indigenous Nations to document their laws around the usage of their knowledge in written and/or digital format. In addition, many Indigenous Nations are developing methodologies for adapting and evolving customary laws, so they will be effective in present-day situations.

Although customary laws around the use of TK vary greatly between Indigenous Nations, some examples of customary laws include the following:

- Certain plant harvesting, songs, dances, stories, and dramatic performances can only be performed/recited and are owned by certain individuals, families, or clan members in certain settings and/or certain seasons and/or for certain Indigenous internal cultural reasons.

³ *Traditional Knowledge*, WORLD INTELLECTUAL PROPERTY ORGANIZATION, www.wipo.int/tk/en/tk/ (last visited July 14, 2015).

- Crests, motifs, designs, and symbols, as well as herbal and medicinal techniques are owned by certain individuals, families, or clan members.
- Artistic aspects of TK, such as songs, dances, stories, dramatic performances, and herbal and medicinal techniques can only be shared in certain settings or spiritual ceremonies with individuals who have earned, inherited, and/or gone through a cultural and/or educational process.
- Art forms and techniques, and herbal and medicinal techniques cannot be practiced, and/or certain motifs cannot be used until the emerging trainee has apprenticed under a master of the technique.
- Certain ceremonial art and herbal and medicinal techniques can only be shared for specific internal Indigenous cultural and/or spiritual reasons and within specific Indigenous cultural contexts.

These are but a few general examples of customary laws that Indigenous Nations around the world have developed over thousands years to regulate the use of TK. Indigenous customary laws are intimately intertwined and connected with TK, and form what can be viewed as whole and complete, integrated, complex Indigenous knowledge systems throughout the world. For example, speaking about clan ownership in Nlaka'pamux customary law, Shirley Sterling states: "This concept of collective ownership by clans, nations, family groups and individuals of stories and other knowledge must be respected. The protocols for the use of collective knowledge from each cultural area and each First Nation would have to be identified and followed."⁴

Indigenous customary law, like other sources of law, is dynamic by its very nature. Like its subject matter—culture, practices, and traditions—it is not frozen in time. It has evolved with the social development of Indigenous peoples. Indigenous customary law also has an inextricably communal nature. Both the social structures that recreate, exercise, and transmit this law through generations

⁴ Shirley Sterling, *The Grandmother Stories: Oral Tradition and the Transmission of Culture* (Aug., 1997) (unpublished Ph.D. thesis, University of British Columbia) available at <https://circle.ubc.ca/handle/2429/7345>.

and the protocols that govern these processes are deeply rooted in the traditional territories of Indigenous peoples—they are inalienable from the land and environment itself. Indigenous customary law is inseparable from Indigenous knowledge. In some Indigenous Nations the abstract subtlety of Indigenous customary law is indivisible from cultural expressions such as stories, designs, and songs. That is, a story may have an underlying principle of environmental law or natural resource planning. A song may explain the custodial relationship that a certain community has with a particular animal species. A design may be a symbol that expresses sovereignty over a territory or the social hierarchy of a Nation's clan system. A watchman's pole may be considered an assertion of Aboriginal title, tell a story of a historical figure, or have a sacred significance.

Neither the common law nor international treaties place Indigenous customary law on equal footing with other sources of law. As a result, TK is particularly vulnerable to continued misuse and appropriation without substantive legal protection. Indigenous jurisprudence and law should protect Indigenous knowledge. In relation to Eurocentric law, Indigenous jurisprudence of each heritage should be seen as an issue of conflict of laws and comparative jurisprudence. With regard to its authority over Indigenous knowledge, Indigenous law and protocol should prevail over Eurocentric patent, trademark, or copyright laws. However, due to a series of historical realities that will be considered below, the status quo is that Indigenous knowledge is subordinate to European legal regimes—IPR and other Eurocentric legal regimes trump or fail to recognize Indigenous law. This has created a situation where TK is taken out of its Indigenous context and placed in Western contexts without the accompanying Indigenous law, thus leaving TK vulnerable and often devoid of, or lacking in, its integrity.

2. INTERACTION BETWEEN TK AND IPR SYSTEMS

As stated earlier, in the process of transporting European institutions into various parts of the world occupied by Indigenous peoples, the IPR system has now been applied to the TK system. Many issues have arisen in the past ten years regarding problems resulting from the existing IPR system's apparent inability to protect

TK. The main problems with TK protection in the IPR system are:

1) that expressions of TK often cannot qualify for protection because they are too old and are, therefore, supposedly in the public domain;

2) that the “author” of the material is often not identifiable and there is thus no “rights holder” in the usual sense of the term;

3) that TK is owned “collectively” by Indigenous groups for cultural claims and not by individuals or corporations for economic claims.

2.1. *The Public Domain Problem*

Under the IPR system, knowledge and creative ideas that are not “protected” are in the public domain (that is, they are accessible by the public). Generally, Indigenous peoples have not used IPR to protect their knowledge, and so TK is often treated as if it is in the public domain without regard for customary laws. Another key problem for TK is that the IPR system’s concept of the public domain is based on the premise that although *the author or creator deserves recognition and compensation for his or her work because it is the product of his or her genius, all of society must eventually be able to benefit from that genius*. Therefore, according to this aspect of IPR theory, all knowledge and creative ideas must eventually enter the public domain. This is the reasoning behind the time period limitations associated with copyright, patents, and trademarks in IPR theory.

The precept that all intellectual property, including TK, is intended to eventually enter the public domain is a problem for Indigenous peoples because customary law dictates that certain aspects of TK are not intended for external access and use in any form. Examples of this include sacred ceremonial masks; songs and dances; various forms of shamanic art; sacred stories; prayers; songs; ceremonies; art objects with strong spiritual significance such as scrolls, petroglyphs, and decorated staffs; rattles; blankets; medicine bundles and clothing adornments; various sacred symbols, designs, crests, medicines, and motifs. However, the present reality is that TK is, or will be, in the public domain (that is, the IPR system overrides customary law). The same problems caused by the application of IPR to TK occur when the creative commons licensing rules are applied to TK unless there has been a clear Indigenous free, prior, and informed consent with Indigenous identified authorities.

One of the greatest ironies of the status quo in the interface between European and Indigenous knowledge management systems is that Indigenous systems predate European systems by centuries. This point can be highlighted by the historical reality that when Christopher Columbus landed in the Americas, hundreds of integrated knowledge systems with regulatory regimes had been functioning on the continent for generations while no such regulatory regimes were in existence in Europe. What would now be termed “piracy,” “unauthorized disclosure,” and “copyright infringement” was common practice in sixteenth-century Europe. In the period of time leading up to the mid-sixteenth century, European authors’ works were produced in chapbooks and sold without permission. Likewise, inventors began to boycott the trade fair circuit based around Frankfurt because they would commonly have their ideas misappropriated. During this period, it was also common practice for monarchies and churches to commission artwork and take ownership over it without regard for any concept of the rights of artists. This section will briefly outline the development of some of the important milestones in Europe that led to the concept of “intellectual property” and the development of what became the IPR system.

3. GNARITAS NULLIUS (NOBODY’S KNOWLEDGE)

Just as Indigenous territories were declared *terra nullius* in the colonization process, so, too, has TK been treated as *gnaritas nullius* (nobody’s knowledge) by the IPR system, causing TK to flow into the public domain along with Western knowledge. In effect, Indigenous knowledge has been colonized along with many other Indigenous institutions and possessions. In this colonization process based on *gnaritas nullius*, manifestations of, and practices derived from, Indigenous knowledge – such as the canoe and kayak design, bungee jumping, snowshoes, lacrosse, surfing, and sustainable development – are embraced by Western peoples as their own (without acknowledgement of the source), just as lands were taken in the colonization process based on *terra nullius*. This has occurred despite widespread Indigenous claims of ownership and breach of customary law. The problem is that advocates for the public domain seem to see knowledge as the same concept across

cultures, and impose the liberal ideals of freedom and equality to Indigenous knowledge systems. Not all knowledge has the same role and significance within diverse epistemologies, nor do diverse worldviews all necessarily incorporate a principle that knowledge can be universally accessed. Neither can all knowledge fit into Western paradigms and legal regimes. However, while advocating for Sui Generis regimes, Indigenous peoples have been asking why British Common Law can not accommodate collective copyright and why collective ownership under Indigenous customary law can not be recognized. Some have openly questioned whether a common law right to collective ownership and control over aboriginal property exists and, if so, whether heritage conservation and limitation of action legislation has any implications to that right.⁵ While there have been unsuccessful attempts in Australia to recognize collective ownership of TK in *M*, Payunka, Marika & Others v Indofurn* (1994) and *Bulun Bulun & Anor v R & T Textiles Pty Ltd* (1998), there have been no such cases in Canada. Since the SCC (Supreme Court of Canada) has yet to consider the existence of a collective Aboriginal Right to ownership and control of Aboriginal cultural property, we can only speculate what the answers to these questions will be.⁶

A central dimension of Indigenous knowledge systems is that knowledge is shared according to developed rules and expectations for behavior within frameworks that have been developed and practiced over millennia. Arguments for a public domain of Indigenous knowledge again reduce the capacity for Indigenous people's control and decision making power over their knowledge, and these arguments cannot be reasonably made within the problematic frameworks of the colonization of TK and *gnaritas nullius*. "Intellectual property law is largely European in derivation and promotes particular cultural interpretations of knowledge, ownership, authorship, private property, and monopoly privilege. Indigenous peoples do not necessarily interpret or conceptualize their knowledge systems and knowledge practices in the same way

⁵ Catherine Bell & Robert Paterson, *Aboriginal Rights and Repatriation of Cultural Property in BOX OF TREASURES OR EMPTY BOX: 20 YEARS OF SECTION 35 104, 121* (Ardith Walkem & Halie Bruce, eds. 2003).

⁶ *Id.* (asking the likelihood of establishing a common law right to collective ownership and control of aboriginal property).

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or through these concepts.”⁷ Thus, Indigenous peoples and their allies continue to argue for recognition of Indigenous laws’ jurisdiction over Indigenous knowledge and the development of *sui generis* regimes that incorporate and complement Indigenous laws at local, national, and international United Nations levels such as the WIPO IGC. Although the WIPO IGC Mandate was not renewed by the WIPO General Assembly in 2014, many Indigenous negotiators and NGOs and TK advocates believe that a break in the program of work could be beneficial and remain hopeful that the mandate will be resumed in the near future.

⁷ JANE ANDERSON, INDIGENOUS/TRADITIONAL KNOWLEDGE & INTELLECTUAL PROPERTY, Executive Summary Center for the Study of the Public Domain, Duke University School of Law (2010) (unpublished issues paper) (on file with the Duke University Center for the Study of the Public Domain, Duke University School of Law), available at <http://www.law.duke.edu/cspd/itkpaper>.