

Making Room at the Table: The Protection of Indigenous Knowledge at the Interstices of International Law, Human Rights and Intellectual Property

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Introduction

The possible protection of traditional knowledge¹ as a subset of, or an adjunct to, the modern intellectual property system presents an extraordinary opportunity to critically reconsider the purposes, role and design of intellectual property law. Indeed, intensive scrutiny of modern intellectual property policy has become a characteristic feature of debates surrounding

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¹ There is no generally accepted legal terminology for the body of knowledge, skill, and expertise manifested in tangible goods or formulas, or expressed in music, art, and literature held by cultures and indigenous groups. The terms “indigenous knowledge” and “traditional knowledge” are often used interchangeably although the former implicates the claims of indigenous *peoples* as a political question and, in turn, the human right to self-determination. Indigenous knowledge then, is considered as knowledge held by a people with cultural distinctiveness in a territory, who were subsequently dominated by people of another and/or different culture, and who ultimately became the governing presence in the territory. Traditional knowledge on the other hand, may include indigenous knowledge but is a broader construct, consisting of knowledge that is known, held and used by a distinct culture that pertains to the culture itself as well as to the environment—political, economic, ecological and social— that is particular to that culture.

In this article, I eschew a distinction between “indigenous” and “traditional” viewing the relationship not as one of difference but as a continuum. I employ the term “indigenous knowledge,” recognizing it as the primary unit of traditional knowledge in regions where indigenous peoples do in fact co-exist with a different dominant culture. In regions where the indigenous people have a specific degree of political and legal autonomy, as with many countries in sub-Saharan Africa, the term indigenous knowledge might be synonymous with traditional knowledge. Indigenous knowledge is also preferable, for my purposes, to the extent that it identifies particular expressions of creativity and inventiveness with a specific culture—the very thing that modern intellectual property accomplishes through its substantive requirements and stated objectives.

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the extension of proprietary protection to new works and in the recognition of new rights for existing works.² The “upward” and “sideward” expansion of copyright³ and, more limitedly patent and trademark laws, has occurred with alarming rapidity particularly since the advent of new technologies. With each new subject matter or additional right, fundamental policy objectives and corresponding doctrines have had to be adjusted to reflect the particular features of the new object of protection.⁴ Often, entirely new judicial tests and/or conceptual frameworks have evolved in efforts to bridge the distance between the nature of conventional protected

²Historically, both courts and the legislature have been complicit in the expansion of intellectual property rights and subject matter protection. *See e.g.*, *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884) (extending copyright protection to photographs); *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (extending patent protection to genetically engineered bacterium); *State Street Bank & Trust Co. v. Signature Financial Group, Inc.*, 149 F.3d 1368 (Fed. Cir. 1998) (extending patent protection to a business method); *Qualitex Co. v. Jacobson Products Co. Inc.*, 514 U.S. 159 (1995) (holding that no special rule precludes color alone from serving as a trademark); *In re Clarke*, 17 U.S.P.Q. 2d 1238 (T.T.A.B. 1990) (holding that distinctive fragrances are registrable as trademarks).

³By “upward” expansion I mean the increase in the number of rights available to copyright owners. These include the direct rights provided by § 106 of the Copyright Act, as well the retroactive extension of copyright term by Congress which was recently affirmed by the Supreme Court. *See Eldred v. Ashcroft*, 123 S. Ct. 769 (2003). By “sideward” expansion, I mean the expanded scope of copyright protection through ancillary regimes such digital rights management systems, as well as the use of extra-copyright means, particularly contract law, to expand the reach of the statutory grant, or avoid the limitations imposed by statute. *See e.g.*, *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996) (enforcing terms of a shrinkwrap license that restricted use of an uncopyrightable database); *Bowers v. Baystate Technologies, Inc.*, 2003 WL 214782 (Fed. Cir. 2003) (holding that a prohibition against reverse engineering contained in a shrinkwrap license is not preempted by the Copyright Act).

⁴For example, in copyright, this is evident in the application of the idea/expression dichotomy to software or in the construction of fair use in reverse engineering cases. Similarly, in patent law, doctrines such as nonobviousness and utility have acquired different nuances in different fields of innovation. For a discussion of this *see* Dan L. Burk & Mark Lemley, *Is Patent Law Technology-Specific?* 17 *BERKELEY TECH. L.J.* 1155 (2002).

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works and characteristics of new or different forms of innovation and creative endeavor.⁵

Notwithstanding the seeming elasticity of many intellectual property doctrines, however, new technological advances have challenged the discipline of intellectual property in unprecedented ways and, in doing so, engendered legislative responses,⁶ justified by international developments,⁷ that many scholars contend alter and undermine the careful balance that

⁵For example, the conceptual separability test for useful articles in copyright law. *See* Kieselstein-Cord v. Accessories by Pearl, Inc., 632 F.2d 989 (2d Cir. 1980); Carol Barnhart Inc. v. Economy Cover Corp., 773 F.2d 411 (2d Cir. 1985). *See generally*, Robert Denicola, *Applied Art and Industrial Design: A Suggested Approach to Copyright in Useful Articles*, 67 Minn. L. Rev. 707 (1983). *See also*, J.H. Reichman, *Legal Hybrids Between the Patent and Copyright Paradigms*, 94 COLUM. L. REV. 2432 (1995). The treatment of software as literary work has also spawned a venerable line of cases dealing with the application of copyright doctrines in efforts to develop a coherent and consistent doctrinal framework. *See* Apple Computer, Inc. v. Franklin Computer Corp., 714 F.2d 1240 (3d Cir. 1983), cert. dismissed, 464 U.S. 1033 (1984); Computer Associates International, Inc. v. Altai, Inc. 982 F.2d 693 (2d Cir. 1992); Lotus Development Corporation v. Borland International, Inc., 49 F.3d 807 (1st Cir. 1995), aff'd by an equally divided court, 516 U.S. 233 (1996). An extensive amount of literature also exists debating the appropriateness of the legislative choice to treat software as copyrightable subject matter, and examining which aspects of software is best protected either by alternative regimes. *See e.g.*, Arthur R. Miller, *Copyright Protection for Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?*, 106 HARV. L. REV. 977 (1993); Dennis S. Karjala, *The Relative Roles of Patent and Copyright in the Protection of Computer Programs*, 17 J. MARSHALL COMPUTER & INFO. L. 41 (1998); Pamela Samuelson, et. al., *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994).

⁶The most significant example of this has been the controversial Digital Millennium Copyright Act (DMCA). *See* Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998). *See also* The Copyright Term Extension Act (CTEA) Pub.L.105-298, Title I, 112 Stat. 2847 (1998).

⁷*See* WIPO Copyright Treaty, Dec. 20, 1996, 36 I.L.M. 65; WIPO Performances and Phonograms Treaty, Dec. 20, 1996, 36 I.L.M. 76. *See generally*, Pam Samuelson, The U.S. Digital Agenda at WIPO, 37 VA. J. INT'L L. 369 (1997); Pamela Samuelson, *Intellectual Property and the Digital Economy: Why the Anti-circumvention Rules Need to Be Revised*, 14 BERKELEY TECH. L.J. 519 (1999) [hereinafter Samuelson, *Intellectual Property and the Digital Economy*].

historically has informed intellectual property policy in the United States.⁸

In this article, I argue that most manifestations of indigenous knowledge present similar challenges as new technologies to intellectual property categories and doctrines, and should be evaluated similarly. Just as new technologies have introduced new and difficult considerations to the dominant theories of intellectual property protection, indigenous knowledge protection threatens to do the same. Similar objections that characterized the debate over the copyrightability of software (is it really a “literary” work?) or more recently the patentability of business methods (can they meet the rigorous standards of patentability?) have emerged with regard to the protection of traditional knowledge as intellectual property. Further, this imagery of traditional knowledge and information technology as equal contestants for accommodation within the intellectual property rubric seems almost fanciful, if short of ridiculous.

However, the unprecedented ways that information technology has challenged the internal boundaries between the subject matters of patents, copyrights and trademarks,⁹ and the

⁸Samuelson, *Intellectual Property and the Digital Economy, supra*; Julie Cohen, *WIPO Treaty Implementation in the United States: Will Fair Use Survive?*, 21 EUR. INTEL. PROP. REV. 236 (1999).

⁹Reichman, *Legal Hybrids, supra*; J.H. Reichman & Pamela Samuelson, *Intellectual Property Rights in Data?*, 50 VAND. L. REV. 51 (1997); Maureen O’Rourke, *Fencing Cyberspace: Drawing Borders In a Virtual World*, 82 MINN. L. REV. 609, 654-686 (1998) (comparing trademark and copyright protection of linking and framing)

external ones between intellectual property, competition law and information policy¹⁰ reinforce the elasticity of intellectual property doctrines, but question the wisdom and efficacy of the current global, economic uniform rationale for all types of creative endeavor. The various subject matter interfaces/intersections are further complicated by the global context in which tensions and competing goals must be reconciled.¹¹ This ongoing experience, I argue, yields some preliminary but important insights into the question whether there is room to add traditional knowledge under the intellectual property umbrella and why it might be useful to extend current protection schemes to traditional knowledge. While a *sui generis* option appears currently to be the favored approach, and is certainly tenable, I argue that the intellectual property model is superior. I identify various goals for indigenous knowledge protection and compare those with goals of modern intellectual property in an international context. I conclude with some proposals for the utility of this conceptual project in facilitating the protection of traditional knowledge in a global economic environment.

I.

¹⁰Yochai Benkler, *Free as the Air to Common Use: First Amendment Constraints on Enclosure of the Public Domain*, 74 N.Y.U. L. REV. 354 (1999); Yochai Benkler, *Constitutional Bounds of Database Protection: The Role of Judicial Review in the Creation and Definition of Private Rights to Information*, 15 BERKELEY TECH. L. J. 535 (2000); Jessica Litman, *Revising Copyright Law for the Information Age*, 75 OR. L. REV. 19, 1996; Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283 (2000); Maureen O'Rourke, *Striking a Delicate Balance*:

¹¹Hanns Ullrich, *Intellectual Property, Access to Information, and Antitrust: Harmony, Disharmony, and International Harmonization* in, EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY: INNOVATION POLICY FOR THE KNOWLEDGE SOCIETY 365 (Rochelle Dreyfuss, Diane L Zimmerman, Harry First eds.2001); Hanns Ullrich, *TRIPs: Adequate Protection, Inadequate Trade, Adequate Competition Policy, in Antitrust: A New International Trade Remedy?* 153 (John O.Haley & Hiroshi Iyori., eds); Ruth L. Okediji, *Balancing Acts: Antitrust for Economic Development*, __ ANTITRUST BULLETIN (forthcoming 2003)

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A ROSE BY ANY OTHER NAME: INDIGENOUS KNOWLEDGE AS INTELLECTUAL PROPERTY

A. The Peripheries of Intellectual Property Discourse: When Human Rights Meets Indigenous Knowledge

The protection of indigenous knowledge most immediately evokes concern about the cultural integrity of communities or “first nations” who generally constitute a minority in the modern state that is their historic and current home.¹² This minority status of indigenous groups situates them within a larger debate in international law about the status and protection of rights of non-traditional political entities that have recently gained increasing recognition as objects of international law.¹³ Even within the national context, indigenous groups increasingly are gaining

¹²Although indigenous peoples are generally considered “minorities” in the nation they reside, their legal status is analytically distinct from the sweeping conception of minorities in law. Neither the term “minority” or “indigenous” is free from contention; neither accurately or completely captures the range of qualities and values that are represented by those described by these monikers. Indeed, most international instruments eschew a definition of the term “indigenous peoples.” See e.g., U.N Draft Declaration on the Rights of Indigenous Peoples, U.N. Doc. E/CN.4/Sub 2/1994/2/Add 20 April 1994, and American Declaration of the Rights of Indigenous Peoples, OAS Declaration 1997 OAS. G.A.Res. OEA/Ser. P, AG/Doc. 3573/97 (1997). Nevertheless, three constitutive attributes have been associated with indigenous peoples. These are i) prior occupation; ii) prior social organization; iii) distinctive cultural identities and self-identification as indigenous peoples. See Sompong Sucharitkul, *The Inter-Temporal Character of International and Comparative Law Regarding the Rights of the Indigenous Populations of the World*, 50 AM. J. COMP. L. 3, 6-7 (2001) (citing U.N. Special Reporteurs, Jose Martinez Cobo and Erica-Irene A. Daes). See also, Convention Concerning Indigenous and Tribal Peoples in Independent Countries, I.L.O. Conv. 169, I.L.O., 76th Sess., reprinted in 28 I.L.M. 1382, Arts. 1 & 2 (1989). Consequently, while the claims of minorities and indigenous groups vis a vis the state are often overlapped, there are notable differences in the status and treatment of indigenous groups both within their domestic territories and as objects of international law. See Sucharitkul, *supra*. In general, under international law the relationship between indigenous groups and the modern state is organized around competing claims of sovereignty and the legal mechanisms designed to manage this relationship.

¹³Russel Lawrence Barsh, *Indigenous Peoples: An Emerging Object of International Law*, 80 AM.J. INT’L LAW 369 (1986); Lee Swepston, *A New Step in the International Law on Indigenous and Tribal peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 677

political and legal attention most notably in Canada and Australia.¹⁴ The preservation of the distinguishing cultural attributes of indigenous groups is a fundamental objective of the ongoing international efforts to hold nation-states, and the global community at large, accountable for the ways in which indigenous groups have been subordinated or forcibly integrated into systems of governance that impinge upon their zone of freedom to continue in their way of life.¹⁵ The protection of indigenous knowledge then must be understood as a design in a larger tapestry involving claims of self-determination, doctrines of statehood and sovereignty, and the globalization of innovation. Consequently, any proposed model for the protection of indigenous knowledge must account for the complex interaction between the representative disciplines of human rights, public international law and intellectual property protection.

The variety and extensive range of objections to integrating indigenous knowledge in the intellectual property system can be systematized under three major headings. First, there is the concern regarding the *effect* of integration on the self-identity of the indigenous group. The cultural distinctiveness of most indigenous groups is reflected typically both in the kinds of goods produced through innovative processes, as well as the nature in which the process is managed in order to promote the cultural values associated with such productivity. Thus, for example, in some indigenous groups, only shamans or priestesses are permitted to engage in the identification and development of herbal medicines for treatment of the ill. Often, the

(1990); Russel Lawrence Barsh, *Indigenous Peoples in the 1990's: From Object to Subject of International Law?*, 7 HARV. HUM. RTS. J. 33 (1994). W. Michael Reisman, *Protecting Indigenous Rights in International Adjudication*, 85 AM. J. INT'L LAW 350 (1995).

14

¹⁵Reisman, *supra*; Sucharitkul, *supra* note __.

identification of these offices as the sole source of certain forms of innovative activity is related to certain religious and cultural beliefs about attributes inherent in those offices that make them the logical agents of creative activity. Given the social and political role of these offices, objections to integration on grounds of the possible effects on cultural values also encompass concern over the effect on the organizational hierarchy of the indigenous group.

A second set of concerns revolve around *preservation principles*. As stated earlier, the protection of indigenous groups as objects of international law is largely conceptualized around preserving the cultural heritage of these groups.¹⁶ Included in this heritage are farming practices, land, religious practices and cultural artifacts and values.¹⁷ Within the international law context, there is a strong consensus that integration of indigenous knowledge in the intellectual property system might adversely affect the capacity and ability of indigenous groups to preserve the uniqueness of their ways of life and creativity. Implicit (and at times explicit) is the concern that integration would, in effect, reinforce the historic paradigm that pushed indigenous groups to the peripheries of national and international systems in the first place, namely colonization, suppression and attempts to eradicate their distinctiveness as a “people” within a particular

¹⁶*See supra*, note __.

¹⁷*See* Erica-Irene A. Daes, PROTECTION OF THE HERITAGE OF INDIGENOUS PEOPLE (United Nations) (1997) (defining heritage to include “everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples...the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks.... inheritances from the past and from nature, such as human remains, the natural factors of the landscape, and naturally-occurring species of plants and animals with which the peoples have long been connected.”

nation-state.¹⁸

Third, there is a concern about protecting indigenous people from the *misappropriation* of their knowledge and the diversion of such knowledge to multinational enterprises. This diversion may undermine possibilities that indigenous knowledge offers for development objectives and programs. Indeed, much of the attention on indigenous knowledge protection in international intellectual property circles is directed toward this particular problem, and the related issues of conserving biodiversity and genetic resources. This group of concerns most poignantly represents the tension and contradiction between indigenous knowledge protection, modern intellectual property categories and the regulation of public interest shared between different “sovereignties” within the same geographical borders. On the one hand, within the indigenous community are those innovative practices, most notably in the agricultural sector, that are themselves deserving of protection and yet, end up being commercialized by multinational companies. On the other hand is the possibility that some indigenous methods of farming, propagation or harvesting need to be regulated for ecological concerns and broader environmental objectives identified in international environmental agreements. Modern intellectual property policy does not address, much less mediate these intersections between the individual, the community and the state. Consequently, the complexity of appropriating the

¹⁸Sucharitkul, *supra* note __ at __ (discussing the tension in international fora over the use of the term “peoples” in relation to indigenous groups because governments are uncomfortable with its connotation to the right of self-determination). *See also*, Reisman, *supra* note __ (noting that the issue of indigenous peoples is really the continuation of the decolonization process). *See also*, Sucharitkul, *supra* note __ (noting that while most concerns over “colonization” of indigenous peoples refers to the European incursions into Africa, Asia and Latin America, there are indeed numerous examples of colonization of indigenous groups within the same geopolitical unit).

diverse values represented by indigenous knowledge elicits conclusions about the “different” objectives underlying the interest in indigenous knowledge protection, and the “unique” cultural institutions responsible for managing such innovative activity that “must” be preserved.

Although traditional knowledge and new technology present similar challenges to modern intellectual property doctrines, the strategy employed thus far in scholarly and advocacy forums has been to emphasize the differences between indigenous knowledge and the traditional subjects of intellectual property.¹⁹ This analytical technique of difference has certain advantages and, in many instances, serves to underscore the Euro-centric core of intellectual policy and unveils the liberal assumptions that undergird the international system.²⁰ Without retreating from my own earlier arguments about the differences between European and non-European conceptions of property and the implications of those differences for a global intellectual property system,²¹ I want to examine the “discourse of difference” for its implications for indigenous knowledge protection.

¹⁹See e.g., Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property The Answer?* 30 CONNECTICUT LAW REV. 1 (1997); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. UNIV. L. REV. 769 (1999). Carlos Correa, *Traditional Knowledge and Intellectual Property, Issues and Options Surrounding the Protection of Traditional Knowledge: A Discussion Paper*, QUNO Pub. (2001). But see John Mugabe, *Intellectual Property Protection and Traditional Knowledge: An Exploration in International Policy Discourse*, in WIPO/OHCHR, INTELLECTUAL PROPERTY AND HUMAN RIGHTS, 97, 97-98 (1999) (critiquing academic distinctions between “indigenous knowledge” and “formal knowledge”).

²⁰See generally, Ruth L. Gana, *Prospects for Developing Countries Under the TRIPs Agreement*, 29 VAND. J. TRANSNAT'L L. 735 (1996) [hereinafter Gana, *Prospects*]; Ruth L. Gana, *Has Creativity Died In The Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. INT'L L. & POL'Y 109 (1995) [hereinafter Gana, *Creativity*].

²¹ Gana, *Creativity*, *supra*.

The discourse of difference is at once based upon and justified by reference to the universal human rights mandate. Human rights law is simultaneously a homogenizing and mediating discipline; it speaks at once of universality and particularity.²² By this I refer to the aspirational goals of human rights to respect all human life equally by recognizing distinctions as well as interdependence between the individual and the community, the community and the state, and the state and the international community of states. The human rights framework is particularly attractive and relevant to indigenous knowledge given the panoply of rights available to address the convergence of diverse concerns about preserving and protecting indigenous knowledge. For example the right to self-determination²³ addresses the question of sovereignty over resources and the ability of indigenous groups to determine, for themselves, the design of their political, economic and cultural life. The preservation of bio-diversity and related debates over sustainable development has reinforced the importance of indigenous knowledge and, indeed, arguably is a principal force in the identification of indigenous knowledge as a significant factor in maintaining ecological balance in pre-industrial societies. And of course there is the human right to intellectual property enshrined in Article 27.2 of the Universal Declaration of Human Rights (UDHR).²⁴ While the Universal Declaration does not go so far as

²²The premise of human rights discourse is equality under a rule of law, yet in the fulcrum of recognized rights, human rights include aspirational goals of diversity within equality.

²³ See International Covenant on Civil and Political Rights, adopted Dec. 19, 1966, S. Exec. Doc. E, 95-2, at 23 (1978), 999 U.N.T.S. 171, 173 (entered into force Mar. 23, 1976) (“All peoples have the right of self- determination.”);

²⁴See Universal Declaration of Human Rights, art. 27(2), G.A. Res. 217A (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) (“Everyone has the right to the protection of the

to prescribe a *form* of protection,²⁵ this provision provides a basis for arguments that traditional knowledge is entitled to some form of protection given the creative base from which the knowledge is derived, applied, managed and preserved throughout generations.

The fact that the edifice of modern intellectual property protection is established on historic foundations that excluded participation of the vast majority of peoples around the globe²⁶ does not lead inexorably to the conclusion that the *concept* of intellectual property is of no relevance to these cultures. In other words, intellectual property—the legal construct that makes it possible for ideas, symbols and expressions to be bought and traded— is not *only* or even presumptively a western liberal ideal.²⁷ More important, a human right to intellectual property explicitly acknowledges that creativity is not the exclusive preserve of a particular culture, historical epoch or set of circumstances. Creativity is, unavoidably, a part of the human condition and experience.²⁸ In this sense, human rights may offer some benefit to the efforts to construct a regime for the protection of traditional knowledge, whether as part of the intellectual

moral and material interests resulting from any scientific, literary or artistic production of which he is the author.").

²⁵See Ruth L. Gana, *The Myth of Development, the Progress of Rights: Human Rights to Development and Ownership of Intellectual Property*, 18 L. & POL'Y 315 (1996) [hereinafter, Gana, *Myth*].

²⁶Gana, *Prospects*, *supra* note __ at __ (discussing the history of international intellectual property protection).

²⁷Gana, *Creativity*, *supra* note __ (discussing pre-European systems of protection of creativity).

²⁸Consider, for example the case of unintended or accidental inventions which by their very nature fall beyond the well iterated paradigm of intellectual property as an instrument to incentivize creative activity.

property system or under a sui generis regime.

Some scholars have argued that employing a discursive on human rights in the context of global regulation of intellectual property rights might be effective in justifying and securing the enforcement of intellectual property rights in developing countries. What these arguments overlook is that within the human rights framework, the legal requirement of protection for creativity is inextricably linked with the legal principle of self-determination. Human rights law offers a flexibility of choice in regimes in that it recognizes the principle of protecting innovative and creative activity as expressed in any culture. However, this principle of recognition is not an endorsement of a homogenized system of protection.²⁹ Thus, the right to self-determination might coexist peaceably, even if not comfortably, with the right to own intellectual property where the choice of form and function is left up to the societies where such innovation takes place. It is thus not useful to argue that human rights provide a justification for enforcement of the provisions in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs Agreement)³⁰ or any other agreement for a global intellectual property system.³¹ Instead, a more valuable utility for human rights discourse is to engage the major doctrines that justify intellectual property and thus to serve as a fulcrum for determinations of how disparate interests—

²⁹Gana, *Myth*, *supra* note __.

³⁰Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, Legal Instruments--Results of the Uruguay Round vol. 1 (1994), 33 I.L.M. 1125 (1994); Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments--Results of the Uruguay Round vol. 31 (1994), 33 I.L.M. 81 (1994).

³¹See e.g., Note, *Tackling Global Software Piracy Under TRIPS: Insights From International Relations Theory*, 116 HARV. L. REV. 1139, 1155 (2003)

from the utilitarian/economic to the moral/spiritual— might be implemented in a global environment. In sum, human rights concerns or justifications might provide a context to evaluate both the normative and instrumentalist strands of western intellectual property doctrine implicit in multilateral agreements.

If then, human rights law provides an important framework within which indigenous knowledge might be legitimized and rationalized as a matter of international law, what strategic advantage might a discourse on difference offer to the questions that confront initiatives to protect traditional knowledge, namely questions of definition, application and integration, into the intellectual property system?³² For if the recognition of indigenous knowledge is partially justified by references to human rights, then indeed, the language of difference should not become the focal point of arguments *against* its inclusion in the intellectual property system.

B. What is Indigenous Knowledge and How is it Similar to “Intellectual Property”?

Indigenous knowledge is a broad term encompassing a variety of creative expressions consisting of art, music, poetry, oral and written literature, information, knowledge and know-how that identifies a particular social unit with its socio-economic, ecological and political environment. In sum, indigenous knowledge is a reflection of the world view and experiences of a discrete and identifiable social unit. By the same token, modern intellectual property law—both its conception and its formal requirements— reflect specific historical defining experiences

³²See Christine Haight Farley, *Protecting Folklore of Indigenous Peoples: Is Intellectual Property The Answer?* 30 CONNECTICUT LAW REV. 1 (1997); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. UNIV. L. REV. 769 (1999).

manifested in economic, social and political institutions.³³ For example, the requirement under copyright law that creative expression must be “fixed,” as I have asserted elsewhere,³⁴ reflects the significant cultural force of the printing press in European history³⁵ and its influence on the design of copyright law. Similarly, the development of patent law is very intimately associated with the rise of mercantilism and the spread of trade between European states.³⁶ The specificities of each category of intellectual property were not assiduously crafted in a vacuum, but instead were developed and refined over time as intellectual property policy became a central feature of the modern industrialized state. Thus both traditional knowledge and the formal intellectual property regime reflect a particular view of the world, historical experiences that are culturally contingent and that concern every facet of political, cultural, economic and social existence.

To determine whether or not, as a conceptual matter, indigenous knowledge *is* intellectual property, it is helpful to examine the genres of indigenous knowledge. An outline of potential categories of the different genres of indigenous knowledge³⁷ includes: (i) *Artwork*: a

³³Gana, *Creativity*, *supra* note ___.

³⁴See Ruth L. Gana, *Has Creativity Died in the Third World? Some Implications of the Internationalization of Intellectual Property*, 24 DENV. J. IN'L L.&POL'Y 109, 114-116 (1995) (discussing the impact of the printing press, and the subsequent importance of literacy, on European culture).

³⁵See LEROY VAIL AND LANDEG WHITE: POWER AND THE PRAISE POEM, SOUTHERN AFRICAN VOICES IN HISTORY 3-15 (1993).

³⁶

³⁷One of the concerns that has been raised about categorizing indigenous knowledge is that the collective heritage that is embodied in this knowledge would be violated, since the value of the knowledge to the people who hold it is rooted in their holistic world view so that the very act of categorization (or labeling) would violate a fundamental human rights norm regarding the inviolability of their culture. The practical expression of that concern is that categorization would provide different types of protection to different elements of their cultural heritage. See

significant amount of indigenous drawings and paintings depict sacred symbols, meanings or experiences.³⁸ There is art work from indigenous communities that do not serve a sacred

purpose as such, but that may hold some non-economic but politically relevant value;³⁹ (ii)

Folklore: this category of indigenous knowledge has a long history of recognition by the international community. It is considered a form of literature, although folklore also extends to music, dance, games, mythology, rituals, customs, handicrafts and designs. The distinguishing feature of all definitions of folklore seems to be an emphasis on its oral character.⁴⁰ In some countries, folklore may include scientific knowledge. Folklore may be specific to an individual or to a community; it may be part of a religious, political or social event and may manifest, ultimately, in a fixed or permanent form such as a weaving, a carving or a painting; (iii)

Handicrafts: indigenous expression is often manifested in crafts such as carvings, sculptures, and other two and three-dimensional art forms. Some of these objects are utilitarian, such as earthen pots or utensils, but with significant artistic expression integrated into the design; (iv) *Ideas and*

Discoveries: the proposals for sui generis protection of traditional knowledge are rooted, in part,

Michael Blakeney, *What is Traditional Knowledge? Why Should it be Protected? Who Should Protect It? For Whom?: Understanding the Value Chain*, WIPO Roundtable on Intellectual Property and Traditional Knowledge, Geneva, November 1- 2, (1999) at 3, WIPO/IPTK/RT/99 (internal citations omitted) . But this in itself should not be taken as an argument against the utility of categorization. As I propose in Part III of this article, the purpose of the work of creativity should play a significant role in whether it is subject to categorization for the purposes of determining the nature of protection that the work ought to be afforded.

³⁸Milpurrurru v. Indofurn Pty Ltd. (1995).

³⁹Yumbulul v. Reserve Bank of Australia (1991)

⁴⁰See Betty Mould-Iddrisu, *The Experience of Africa*, in UNESCO-WIPO, WORLD FORUM ON THE PROTECTION OF FOLKLORE, 17 (1997).

in the dominating concern over the economic value of knowledge about the therapeutic and medicinal utilities of plants and animals maintained by indigenous peoples or particular offices in traditional communities. This knowledge exists at different levels of systematization, but has proven to be of some significance multinational pharmaceutical corporations investigating prospects for new medicines or new uses of known medicinal plants;⁴¹ (v) *Know-how*: this category includes methods, formulas, experiences and knowledge pertaining to any of the information regarding plant and animal life, that is an integral part of the ability of the indigenous group to manage, interact with and preserve their ecology and by so doing, their entire human experience within a particular physical environment. Included under know-how might be crops that were first cultivated and improved by traditional peoples, plant breeders and other agro-pharmaceutical products; (vi) *Innovations*: The combination of ideas and know-how, particularly with regard to herbal medicines and the understanding of healing or therapeutic properties of certain plants, or the enhancement of crops or the development of new genetic strains in agricultural products are examples of innovations that exist in traditional societies.⁴² As stated earlier, this category of intellectual activity is, indeed, the principal object of the current debates over traditional knowledge. It is this category of works that is the most

⁴¹ See Laird, *Natural Products and the Commercialization of Indigenous Knowledge* in T. GREAVES (ED.) *INTELLECTUAL PROPERTY RIGHTS FOR INDIGENOUS PEOPLES: A SOURCEBOOK*, 145-149 (1994). See also, Mugabe, *supra* note __ at 102-104 (providing details of value added to clinical investigations and trials, or the development of drugs based on traditional knowledge).

⁴² See Roht-Arriaza, *Of Seeds and Shamans: The Appropriation of Scientific and Technical Knowledge of Indigenous and Local Communities*, 17 MICH. J. OF INT. LAW 919 (1996).

controversial because of claims that it has yielded notable “modern” drugs and treatments.⁴³ In some instances, patents issued based on such innovation or on plants with noted properties have been successfully contested.⁴⁴

Given the non-quantifiable, but integral, aspects of indigenous knowledge such as its spiritual dimensions, its cultural significance and its vitality in sustaining the social, political and environmental equilibrium of traditional peoples, the categories and definitions described above are unavoidably inexact. However, this taxonomy is useful for mediating the proposed boundaries between traditional knowledge and intellectual property to determine where there are convergences, possible bridges and areas that require different treatment.

II.

DOES INDIGENOUS KNOWLEDGE FIT THE MOLD?

The major subjects of intellectual property law are designed with reference to the purpose, form and public functions that the genre of creative work symbolizes. Thus copyright law protects creative expression that is fixed in a tangible medium of expression. Originally conceived for literary and artistic expression, this category of intellectual property now extends

⁴³ See Mugabe, *supra* note ___. See generally, POSEY AND DUTFIELD, BEYOND INTELLECTUAL PROPERTY (1996).

⁴⁴ See e.g., Glen M. Wiser, *PTO Rejection of the "Ayahuasca" Patent Claim: Background and Analysis*, available at <http://www.ciel.org/Biodiversity/ptorejection.html>; Alex Scott, *Europe Rejects Grace Fungicide Patent*, CHEM. WK., May 31, 2000, available at LEXIS, News Library, Curnws File (noting that European Patent Office has rejected patent claims asserted by W.R. Grace Co. and the U.S. Department of Agriculture for a fungicide derived from Neem seeds); Virtual Route to Knowledge, THE HINDU, Feb. 8, 2001, available at LEXIS, News Library, Curnws File (noting Indian government's efforts against assertion of intellectual property rights in turmeric powder and Basmati rice).

to pictorial, graphic and sculptural works (PGS works)⁴⁵ which include utilitarian objects with significant aesthetic components,⁴⁶ architectural works⁴⁷ and computer programs.⁴⁸ Patent law protects ideas that are novel and, initially, was focused on industrial innovation. Today however, patent law extends to computer software, business method patents and much more.⁴⁹

Trademarks protect the associational value that accrues to a name, symbol, or service with the primary public policy of preventing consumer deception and confusion.⁵⁰ Finally, trade secrets protect information that holds some economic value to its owner but that is not generally known to others in the industry.⁵¹ The broad underlying purpose of intellectual property protection is to promote investment in creative endeavor.⁵² However each subject has a specific underlying

⁴⁵ 17 U.S.C. § 102(5).

⁴⁶ The seminal case is *Mazer v. Stein*, 347 U.S. 201 (1954) (copyright protection for statuettes used as lamp bases). *See also* *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980) (belt-buckles).

⁴⁷ 17 U.S.C. § 102(8).

⁴⁸ *See* *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240 (3d Cir. 1983), cert. Dismissed, 464 U.S. 1033 (1984). *See generally*, Arthur R. Miller, *Copyright Protection For Computer Programs, Databases, and Computer-Generated Works: Is Anything New Since CONTU?* 106 HARV. L. REV. 977 (1993); *Cf.*, Pamela Samuelson, et.al, *A Manifesto Concerning the Legal Protection of Computer Programs*, 94 COLUM. L. REV. 2308 (1994).

⁴⁹ *See* 35 U.S.C. § 101 et. seq.

⁵⁰ *See* 15 U.S.C. § 1501, et. seq. *See also*, William M. Landes & Richard A. Posner, *Trademark Law: An Economic Perspective*, 30 J. L. & ECON. 265 (1987) (economic analysis of trademark law arguing that trademarks lower consumer search costs by providing a reliable source of information regarding product quality).

⁵¹ *See* Uniform Trade Secrets Act; Restatement (Third) of Unfair Competition, § 39; Restatement of Torts § 757 (1939).

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policy that circumscribes and informs the particular doctrines to facilitate the ends for which it was designed.

With the exception of some forms of folklore,⁵³ each of the categories of traditional knowledge can be protected within the extant categories of intellectual property. However, it is not the categories, necessarily, that make for the parallels but the shared *human* experience of intellectual ability and creativity that inevitably manifests in scientific and artistic products. Culture may influence or perhaps even dictate creative form and function, but it does not determine the presence of creative *ability* within any human society. Thus, it should not be surprising that there are certain features and doctrines of the intellectual property system that may be expediently extended to indigenous knowledge and the unique attributes presented by this body of creative expression.

Several doctrinal barriers to the integration of indigenous knowledge in the modern intellectual property system have been raised. In the realm of patent law, objections include questions regarding the levels of inventiveness evidenced in indigenous knowledge-based products and, in general, whether the products can sustain rigorous examination under the new international patent standards established by the TRIPs Agreement.⁵⁴ In the realm of copyright,

⁵³Some expressions of folklore such as dance, music games, architecture and arts may in fact be copyrightable. In fact, some countries provide such protection for folklore. *See e.g.* Mould-Idrissu, *supra* note __ at 18 (citing the Ghanaian Copyright Law of 1985 which defines folklore as “all literary, artistic and scientific works belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors and any such works designated under the Copyright law to be works of Ghanaian Folklore.”); Shugha Chaudhuri, *The Experience of Asia* (describing the status, strengths and weaknesses of copyright protection for folklore in India).

⁵⁴*See* TRIPs Agreement which essentially adopts the standards of novelty, non-obviousness and utility that exists in the patent laws of most developed countries.

the fact that much literature produced in indigenous communities is oral has raised eyebrows given the fixation requirement of copyright law. Similarly, much of the literary and artistic works by indigenous groups are community owned, raising questions about authorship, another central component of copyright law. Further, protection of such works is perpetual given the spiritual and cultural values involved in creativity. In the following section, I address the speciousness of these objections.

III.

INTERNATIONAL LAW AS A FRAMEWORK FOR CONSIDERATIONS OF TRADITIONAL KNOWLEDGE PROTECTION: TENSION, CONTRADICTIONS AND THE POLITICS OF PLACE

A. Integration and its Discontents: Challenging the Discourse of Orthodoxy on Intellectual Property and Development

The discourse over intellectual property in developing countries has been characterized by two extremes that have become orthodoxy in the literature. On the one hand, scholars argue that intellectual protection is necessary for economic development objectives and will enhance the prospects of technology transfer to developing countries. While there is some economic and empirical evidence to suggest that intellectual property facilitates economic development,⁵⁵ there remains considerable debate concerning how intellectual property in fact accomplishes this end. The design of intellectual property protection, particularly elements of protection ranging from length of term of protection, to the scope of protection, are unscientific in their relation to why, how and what people create. The reality is that the modern system is a reflection largely of

⁵⁵See e.g., Keith Maskus, *Intellectual Property Rights and Economic Development*, 32 CASE W. RES. J. INT'L L. 471 (2000).

uncoordinated legislative efforts, historical vicissitudes and more recently, rent seeking from industries. Mapping out a design of protection for indigenous knowledge is assertedly both infeasible and impracticable, even for those works that comfortably satisfy the formal requirements of modern international arrangements.

On the other hand, the literature sympathetic to development concerns has focused on the imperialistic project of international law that extends beyond intellectual property issues. This literature identifies the abuses of rights holders, particularly through the agency of multinational corporations. Additionally, the failed efforts of technology transfer policies, the high costs of protected goods, the development goals that, in theory, are hindered by strong protection of intellectual property rights have become the fodder of the larger conflict between developed and developing countries over global protection of intellectual property rights. The empirical evidence demonstrates that it is brazenly over-simplistic to maintain that the adoption and enforcement of intellectual property rights will “add all other things” to underdeveloped economies. When the uncompensated uses of traditional art forms, plants and know-how became public knowledge, the outcry against intellectual property rights was only that much more strident.

At least partially as a result of these two extremes, legal and policy options for the protection of indigenous knowledge did not immediately consider intellectual property rights as a viable model. Sui generis systems and/or a misappropriation model have become the two most forceful contenders for placing the protection of indigenous knowledge. The litany of reasons justifying both alternatives to intellectual property appear, however, to be similar. Proponents cite the different cultural, spiritual and moral interests that indigenous knowledge represents. In

the area of oral literature and artistic works, arguments point to the difficulties of identifying owners or “authors” given the communal context in which much of the work is created and given its meaning or significance. Some scholars even identify limitations in intellectual property law, such as the definite term of protection or the novelty requirement in patent law, which would be disadvantageous to the interests of indigenous people whose non-material and non-economic interests require protection for an indefinite period of time. Consequently the conclusion is that the best (or only) avenues for protection would be alternatives to statutorily derived intellectual property rights.

There are several important limitations to the wealth of opinion which currently favors alternative models of protection for intellectual property. First these arguments underestimate the sophistication of indigenous communities to self-regulation. Second, the arguments overlook the fact that a fundamental issue in the protection of indigenous knowledge is how to regulate the interaction of outsiders seeking to interact with the indigenous community, and not a problem of protection within the community itself. Where the issue is a problem of “translating” interests of indigenous communities into a different cultural context, then a mediating language is the needed tool. For this reason, I would argue that intellectual property provides a superior alternative to the misappropriation option, and certainly is a serious contender to the sui generis proposal.

The project of translation is one that requires a medium that is capable of interacting between two otherwise incompatible contexts. The question then, is not whether intellectual property rights can accommodate the interests of indigenous knowledge, but how those interests might be translated within the existing global framework. The global framework requires an

ongoing process of reconciling human rights obligations with the economic order of the World Trade Organization (WTO) and the legal texts that inform its constitution as the principal institution for economic cooperation. Given the vulnerabilities of many indigenous groups to their own domestic governments, as well as to multinationals or foreign scientists, placing indigenous knowledge protection outside of a framework that might encourage government actors to be transparent about their laws and practices is a questionable strategy, yet one that purports to serve the interests of indigenous groups. The easy availability of intellectual property norms to the various categories of indigenous knowledge provides an important opportunity to constrain the state via the instrument of intellectual property as an agency of international human rights. It is also important to note that certain practices that fall within “traditional knowledge” may be inconsistent with environmental policy objectives of international accords. Constructing differences between indigenous knowledge and intellectual property increases the transaction costs of identifying how best to reconcile policy goals in areas affected by the use of technology and the processes of innovation.

The parallels between indigenous knowledge and new technology force a reconsideration of the current dominant paradigm for the debate over indigenous knowledge protection. It is not that indigenous knowledge is so “different” so as to justify an alternative scheme of protection; it is that the economic assumptions and policy objectives that undergird international intellectual property harmonization are fundamentally different from what informs domestic intellectual property laws and, consequently, the objectives of this international system need to be operationalized.

III. REIMAGINING THE DEBATE: THE PROSPECTS OF INTELLECTUAL PROPERTY PROTECTION FOR INDIGENOUS KNOWLEDGE

Most observers agree that intellectual property is insufficient to address all the needs represented by indigenous knowledge. Indeed, it may not be the ideal mechanism to address the multifaceted nature of indigenous knowledge; and certainly, the multidimensional issues that coalesce around indigenous knowledge are beyond the feasible, appropriate or even desirable limits of intellectual property law. Again, however, this is not an argument *against* intellectual property as a feasible framework of protection. Indeed, one of the most striking elements of the debate over the protection of traditional knowledge is its symmetry with a modern debate, namely the protection of new technologies. It is this striking parallelism that presents a dilemma for intellectual property scholars who focus on the public policy basis of domestic laws, and the international intellectual property system. The fact is, the more expansive intellectual property becomes by its accommodation of a wide variety of products, the more it is amenable to the concerns and claims of indigenous knowledge protection. For example, certain aboriginal art is dust/earth designs, produced for particular religious or cultural ceremonies. While this art may be “fixed” for the initial assessment for copyright viability, it may not constitute a fixation of the sort that the copyright regime initially contemplates because it is generally not intended to be permanent and is in fact destroyed for sacred religious reasons. However, in a decision involving copyright infringement of computer software, the Ninth Circuit held that temporary RAM copy is fixed for copyright purposes.⁵⁶ The *MAI* decision suggests the possibility of copyright protection notwithstanding the evanescent nature of some indigenous knowledge or

⁵⁶*See* *Mai Systems Corp. v. Peak Computer, Inc.*, 991 F.2d 511 (9th Cir. 1993).

traditional art. It is also worth noting that state common law protection provides an alternative mechanism for protecting unfixed works of creative expression.⁵⁷ Further, certain performances, although not fixed, are protectable by copyright.⁵⁸ Thus traditional dances, and even certain forms of oral literature may qualify as protectable expression to the extent that they are viewed as public performances.⁵⁹ In the area of patents, as the standard of inventiveness has been “relaxed,”⁶⁰ it has afforded patent protection to minor improvements of existing inventions, business methods, formulas and discoveries. From a patent policy perspective, one might argue that patent law, by expanding in this fashion, has failed to sustain its mandate of promoting progress and thus is a weaker system for it.⁶¹ However the broader patent law becomes, the thinner its protective aegis in certain areas.⁶² Patent protection in some areas of technology

⁵⁷17 USC § 301(b)(1). *See* Estate of Hemingway v. Random House, 244 N.E. 2d 250 (N.Y. 1968); Cal.Civil Code § 980.

⁵⁸See 17 U.S.C. § 1101 (1994) (implementing the TRIPs requirement that countries protect live musical performances). *See also* United States v. Moghadam, 175 F.3d 1269 (11th Cir. 1999) (posing a constitutional challenge to this legislation).

⁵⁹The Copyright Act defines “public” performance or display in the following way: To perform or display a work publicly means– (1) to perform or display it at a place open to the public or at any place where a substantial number of persons outside of a normal circle of a family and its social acquaintances is gathered; or (2) to transmit or otherwise communicate a performance or display of the work to a place specified by clause (1) or to the public, by means of any device or process, whether the members of the public capable of receiving the performance or display receive it in the same place or in separate places and at the same time or at different times.” 17 U.S.C. § 101.

⁶⁰This is certainly a contested point, but there is general consensus that in the last decade the PTO has issued some patents that are questionable from the point of view of standards such as “novelty” and “non-obviousness.”

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⁶²*See* Dan L. Burk & Mark Lemley, *Is Patent Law Technology-Specific?* 17 BERKELEY TECH. L.J. 1155 (2002).

suggests that the standards of protection, and consequently the areas of difference between levels of innovation reflected in some products of traditional knowledge, are shrinking. This bodes well for the prospects that certain aspects of traditional knowledge may satisfy requirements of patent law. Each innovation or process will have to be evaluated under specific domestic patent law requirements. And as several commentators have noted, the TRIPs Agreement has important flexibilities to facilitate differences between national standards of inventiveness.

In the area of copyright, the prospects are more easily considered. With regard to the spiritual and non-economic interests associated with indigenous knowledge, the protection of moral rights, most evidenced in continental European countries, is a useful construct for these aspects of indigenous works. In most countries, moral rights are inalienable and last for indefinite periods. Under the Berne Convention, member states are required to grant moral rights, although the TRIPs Agreement specifically excludes moral rights from its minimum requirements.⁶³ In addition to moral rights, Professor Neil Netanel, among others, has argued for the interpretation of copyright rights in a way that encourages an international principle of freedom of speech. The same argument might be made for privacy rights, a form of which would certainly protect the sacred objects of indigenous knowledge. In sum, there are a variety of norms which undergird intellectual property rights that are both flexible and normatively consistent with indigenous interests that have not been considered seriously in the discourse about indigenous knowledge protection.

There is a myth that intellectual property is for mass production while indigenous knowledge is not. The division is not between intellectual property and indigenous knowledge

⁶³See TRIPs, Art. 9(1).

per se, as representative of different worlds, but how the interaction between these two world systems may be facilitated. Using intellectual property rights to protect indigenous knowledge is not necessarily an abdication of those elements unique to indigenous peoples. Instead, intellectual property is simply an instrumentalist means to facilitate interaction between the two regimes. Within the specific culture, other mechanisms could be used to protect identifiable interests. A protection system for indigenous knowledge does not have to be an “either” “or” proposition.⁶⁴ One of the important lessons of intellectual property rights in new technologies is that previously fixed boundaries that distinguished categories of works and enabled channeling to the appropriate subjects is inherently dynamic and problematically elastic.

A. *A Framework for Protection: A Model for Protecting Creativity*

As modernity encroaches on the boundary between the formal and informal systems for protecting creative expression and manifestation, it is important and helpful to identify the interests of indigenous peoples. These include: 1) an interest in identification as authors or owners; 2) interest in control of access to genetic resources; 3) an interest in fair and adequate compensation; 4) an interest in the protection of cultural integrity; 5) an interest in the preservation of their knowledge base and, relatedly an interest in the preservation of the group as a political unit.

A modality for assessing the appropriateness of intellectual property protection might include the following questions in considering whether a disputed product or process of creativity is protectable within the current intellectual property categories:

⁶⁴Consider the case of software which is protectable both under patent and copyright law. Consider also, the fact that a single product may entail multiple and overlapping proprietary rights.

1. Identify the nature of the work in question. Does it fit within any of the extant categories for intellectual property protection?
2. Identify the purpose of the creative output. Does the extant category facilitate the accomplishment of that purpose?
3. Identify the interest that needs to be protected. Is it religious, cultural, (or a combination of both), economic, or political?
4. International standards aimed at harmonizing national laws may be used to encourage the elimination of formalities in the administration of intellectual property rights, where such formalities still constitute an obstacle to protection.
5. Invigorate the right to self determination by employing local courts or traditional institutions and customary laws in determining the legitimacy of the property right, and the presence of a violation.

The process of consideration should be one of inclusion, not assimilation. The lack of internal consistency or uniformity in intellectual property theory, doctrine, and scope, reflected in the minimal substantive provisions of TRIPs,⁶⁵ should be considered a benefit for traditional knowledge. This lack of substantive harmonization, the result of strong legal, political and social cultures asserting themselves in the global context, provides breathing space for indigenous knowledge and its distinguishing features.

Conclusion

Although the international intellectual property system has raised serious concerns about the protection of indigenous knowledge, the international framework has also made the interests

65

of indigenous peoples a prominent aspect of the international system. Indigenous knowledge is both forward and backward looking. Proposals for how it should be protected must be dynamic, relevant and flexible—attributes which intellectual property protection has demonstrated in light of new technological challenges and works that reflect new paradigms of creativity. Rather than consider intellectual property as “different” ill-suited or arcane when compared with the needs of indigenous knowledge holders and investors, intellectual property doctrines may very well be the language we need to situate and normalize indigenous knowledge within the economic order of the information age.