

TK & IP – Where Are We And Where Are We Going?

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In a scoping paper prepared by Mick Dodson for the consideration of the UN Permanent Forum on Indigenous Issues he said:

“‘indigenous traditional knowledge’ means *traditional practices* and culture and *the knowledge of plants and animals and of their methods of propagation*; it includes expressions of cultural values, beliefs, rituals and community laws, and it includes knowledge regarding land and ecosystem management. It is more often unwritten and handed down orally from generation to generation, and it is transmitted and preserved in that way. Some of the knowledge is of a highly sacred and secret nature and therefore extremely sensitive and culturally significant and not readily publicly available, even to members of the particular group.”

Even so, this definition has its problems because in point of fact there are a number of terms used in the literature interchangeably. These include “indigenous knowledge”, “indigenous knowledge, cultures and traditional practice”, “folklore”, “indigenous heritage” and “indigenous cultural and intellectual property” and there are more. A point which Dodson acknowledges.

And who are these indigenous peoples? They are those, according to the UN, who are:

“... living in approximately 70 countries throughout the world and constituting approximately 350 million people, including 5,000 distinct peoples and over 4,000 languages and cultures.”

But that is being somewhat conservative, because we have to appreciate that all peoples that reside in a definable geographic region and who are distinctly recognisable by their culture, language and traditions, must after living for a period of time in a region become indigenous to it. So can we exclude peoples that have migrated to a geographic region or who have, after a period of absence, returned to that region and reclaimed the right to occupy it or share occupation? And we have to accept don't we, that the French are as indigenous to France as Aborigines are to Australia?

That said, it is clear that the UN did not mean to include all traditional knowledge nor all indigenous peoples. Rather, the UN is focused on the traditional knowledge of indigenous peoples that have been dispossessed of their traditional lands over the past five to six hundred years by colonial and

post-colonial European activities.

This, in my mind is an issue, because if we are to consider a *sui generis* international regime of intellectual property or, an entirely different legal regime, dedicated to the protection of traditional knowledge, then we need to understand the economic and social as well as the legal implications of a regime which would not be inclusive but exclusive. This raises the obvious question of where to draw the line and why?

And even so, what do we mean by *sui generis* intellectual property in this respect? As IP lawyers we tend to seek solutions within the confines of our own comfort zone. But we live in societies that have developed concepts of individual ownership of chattels, real estate and, over the past five hundred years or so, intangible assets that pertain to the products of our labour. The author's right of attribution to the products of his or her intellectual or artist talent is an example of something that today is understood by the term copyright. It is intellectual property, a term that really only came into common usage less than thirty years ago. In the past, patent law was called industrial property, not intellectual property. So when we speak of a *sui generis* system of IP in the context of traditional knowledge we need to consider whether this is appropriate because it may be that this is too narrow to satisfy the specific requirements of all indigenous peoples. As Dodson says:

"it is important to ensure that *sui generis* does not ultimately result in reduced protection. Indigenous peoples have, in fact, experienced a reduction in specialized protection in other situations, which may have come about as a result of the difficulties inherent in ensuring that dominant legal systems are sufficiently malleable to accommodate indigenous perspectives, experiences, rights and customary laws."

Accordingly, communal ownership of TK is not easily dealt with by intellectual property law especially when those that seek to protect it using conventional intellectual property laws are not themselves the actual authors, designers or inventors. Indeed the TK that they seek to protect may be hundreds or thousands of years old and there will probably be an absence of evidence that establishes a nexus between that TK and those that seek to protect it.

Then again it may be the case that the TK may be relevant to point the way to an invention, but may not itself be capable of being part of the invention especially when the invention is a compound that has been synthetically manufactured using a process or is biological material that has been isolated and purified from nature. The way that the invention is defined in patent claims is important not only in defining the patent monopoly, but is important to other requirements of patentability including inventorship.

This means that the potential pharmacological application of a compound that is produced naturally in a plant may not be protectable under patent law, and worse still, may not be protectable under any law if the TK has been prior published. The protection afforded by the tort of breach of confidential information is very limited and may easily be destroyed even by well meaning individuals who mean no harm to the indigenous peoples.

The documentation of cultural knowledge, an academic activity that our society applauds and encourages, has in the past and may even today, not only result in the publication of TK so that it loses all protection under current laws, but may also cause irreparable damage to the value of that information to the indigenous peoples themselves. For it is the case that many indigenous peoples segregate TK among themselves using sex, age and other cultural thresholds as gates. Often complex traditional protocols regulate access to TK.

And while we have this thing called the public domain within which all information belongs to no one and can be freely accessed and used by anyone, it should not be assumed that indigenous peoples have an understanding of it or would agree with it. Accordingly, the idea that all TK will fall into the public domain after a period of time has passed may be anathema to many indigenous peoples.

Finally our western systems of law, whether civil or common, and which were developed over thousands of years were often forcibly imposed upon the indigenous peoples not only disregarding their own systems of law, but often used to destroy the very fabric of their societies. It is a constant complaint made by indigenous peoples that they must accept our system of law, while we fail to acknowledge and make room for theirs.

Therefore it should come as no surprise that indigenous leaders are looking beyond intellectual property. As Dodson also said:

“whatever the idea may be behind the call for a sui generis system, it seems that in the case of traditional knowledge, the current systems and activities are insufficient and something radically different needs to occur.”

I believe that we must admit that all attempts to deal with TK have so far been an abject failure. After years of discussions conducted by a variety of international bodies including WIPO, the UN and more recently by the WTO, we are as far away from resolving the issue as we were when we started. This is a shocking admission to have to make.

On September 13, 2007 the UN General Assembly voted on a resolution to adopt the UN declaration on the rights of indigenous peoples. Australia and the United States, being two of only four countries to vote against it.

“Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions

and customs.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, states shall take effective measures to recognize and protect the exercise of these rights.”

So if this is where we are, where are we going?

According to Peter Drahos, nowhere fast, at least on an international basis. The fact is that we have been trying to resolve these issues internationally for decades and the time has come to us to accept that progress will come only if we can develop a local model that can be shown to work and so motivate others countries to adopt it or something like it. As much as an international treaty is an aspiration of many indigenous peoples as a mechanism for change, the truth is that change will happen much faster at a local level. The native title legislation and the Mabo case are two examples of that kind of change. Now while it is true that TRIPS does impose limitations it does not prohibit the creation of laws to deal with TK beyond intellectual property.

An example of how frustrating it can be to effect change on a multilateral basis happened in 2005 during the Doha round. The Indian Ambassador to the WTO proposed to the WTO council that the TRIPS agreement be amended to force patent applicants to disclose the source of biological material used in their inventions. India was supported by other countries that have rich biological resources such as Brazil, Indonesia, Peru, Pakistan, China, Thailand and Turkey, but was opposed by Japan, the US, Korea and Australia. The attempt failed.

And I am sorry to have to take issue with those that believe that the WTO is not an instrument through which Japan, the EU and the US wield extraordinary political power. As IP lawyers we cannot be too precious about this area of law because the truth is that patent law has always been a protectionist economic tool – whether used defensively or offensively. History is littered with examples of how it has been used both ways and you only have to look at how the German chemical industry used us patent law to stifle innovation and production in the US to appreciate this fact. For instance, Kenneth Swan, a British patent barrister that went to chair the Swan Committee between 1945 and 1947 and who’s work led to the *UK Patents Act of 1949* had this to say about the British patent system in 1908:

“Taking advantage of their monopoly simply to prevent

manufacture in this country, powerful foreign companies built up their businesses on that continent and in America on such a gigantic scale that *even after the expiration of the British patents, they continued to monopolise our markets*, owing to the impossibility of creating and fostering these industries at home in the face of such formidable competition from well-established industries abroad."

Now this is historical fact not the musings of an economic historian writing about the politisation of the patent system.

And as Drahos has pointed out recently about the motivating forces behind TRIPS:

"one of the reasons that an ambitious agreement such as trips succeeded is that the corporate beneficiaries of that agreement were able to agree on a basic framework for a treaty. The level of agreement was such that they were able to suggest draft provisions in the form of fundamental principles and present them to GATT members in the name of the 'international business community'.

It is difficult to judge what the actual level of agreement is in the field of traditional group knowledge and practice (TGKP). The lack of agreement on basic definitions ... is one indicator that there is some way to go before one can speak of strong consensus. An agreement on TGKP that has the kind of comprehensiveness to be found in trips is probably not a realistic option."

Over the next three years Drahos and I will conduct ARC funded research that will involve meetings and discussions with Aboriginal leaders, academics, policymakers as well as with medical and scientific researchers. We will not be overly ambitious, however, we hope that we will be able to make a contribution, no matter how small, towards the development of an Australian model that will be a bridge between Aboriginal communities and business not simply to facilitate business opportunities, but to build trust and provide aboriginal communities with a system that will give them guaranteed protections over traditional knowledge that *has a useful and commercial application*.

In doing so we are also aware that there are other agendas and political forces at work that are not sympathetic – on both sides. There are always those who hold extreme views. Clearly there are indigenous peoples who believe that they can recapture complete ownership and control of all of their traditional knowledge so that it can be commercially exploitable in their hands only. There are also political and economic interests that want to keep the status quo – using the limitations of current intellectual property laws that inadvertently suppress the commercialisation of traditional knowledge. It is indeed going to be challenging and there is no guarantee of success, but it is essential that we try to help bridge the great divide between indigenous Australians and those of us who have come to occupy Australia more recently.