

CALL OF THE EARTH LLAMADO DE LA TIERRA

ISSUES IN INTELLECTUAL PROPERTY POLICY 1

Indigenous Peoples & Intellectual Property Policy: The Broad Context

The Issue

The impact of intellectual property policy on Indigenous Peoples must be understood in a broad context.

While recognition of the rights of Indigenous Peoples has improved both internationally and in many national systems, other societal trends have created new issues that affect all people, but that affect Indigenous peoples in particular ways.

These trends interact with the Human rights gains of Indigenous peoples and in some cases impact negatively upon them. Among these is the trend toward the global harmonization of Intellectual Property Rights (IPRs) standards.

The World Trading System & The Strengthening of the International IPR Regime

The increasing value of information in the global economy has been closely linked to the recent development of new technologies such as genetic engineering and information technology. The value of information as an asset has depended on and reinforced the strength of rights attributed to intellectual property rights holders.

With developments in international and national legal systems, intellectual property rights systems have grown stronger, through increases in both the duration and scope of intellectual property rights. The United States, Europe and some other industrialised countries have strengthened IPR regimes of their own accord. In addition, all members of the World Trade Organization (WTO) must implement minimum intellectual property rights standards in accordance with their obligations pursuant to the Agreement on Trade Related Aspects of Intellectual Property Rights (The TRIPS Agreement).

In the case of many WTO members, these minimum standards increase the number of years for which intellectual property rights such as patents may be held, and expand the subject matter over which intellectual property rights must be granted. Many developing countries did not previously recognize patents over pharmaceuticals. Nor did they allow patents for micro-organisms, biological processes for the production of plants or animals, or require systems of plant variety protection, all which they must now institute.

In countries such as the United States, developments in national law take patenting further, with the capacity for patents to be granted over plants and animals. In Europe,

discoveries relating to the human body can become the subject of patent rights so long as the discovered element is isolated by means of a technical process¹.

The TRIPS Agreement enjoys the same strength of enforcement of the other WTO Agreements. Enforcement measures in the WTO are strong compared with many Multilateral Environmental Agreements (MEAs) and Human rights Instruments that have only the status of 'soft law'. This is of relevance to the question of how governments are likely to act given any inconsistency between WTO and other international agreements, a question that has been debated particularly in regards to the relationship between the TRIPS Agreement and the Convention on Biological Diversity.

It is frequently asserted that that the TRIPS negotiation process favoured developed country interests. The perceived uneven result of negotiations has led some developing country members of the WTO to seek adjustment of the TRIPS Agreement through formal TRIPS review processes, as well as to seek related action in other bodies such as the World Intellectual Property Organization (WIPO) and the Convention on Biological Diversity (CBD). Some of the positions advanced in these fora impact upon the interests of Indigenous Peoples.

Significantly for Indigenous Peoples, the expansion of IPRs (patents) over life has created the opportunity for information and resources sourced from the traditional knowledge of Indigenous peoples to become the subject of private rights. These IPRs have frequently been granted to those who are not part of a given indigenous community, but who have sourced information from that community. There are a number of reasons for this.

First, IPRs are not easily held by Indigenous Peoples in relation to traditional knowledge and cultural expressions originating within their communities. This is due in part to IPRs reliance on the identification of a creator or inventor - knowledge held and created collectively does not satisfy criteria for the grant of most IPRs. Even if the requirements for the grant of IPRs were satisfied, many Indigenous Peoples have argued that some IPRs are rarely suitable instruments given the needs, aspirations and value systems of many Indigenous Peoples. In any case, there are concerns that in some instances the financial cost of IPR applications and maintenance would preclude applications by some Indigenous Peoples.

Second, national patent application procedures sometimes fail to prevent the grant of patents to outsiders that are in fact based on indigenous traditional knowledge, even where the theory behind the grant of intellectual property rights suggests that the grant should not occur. For example, the United States Patent & Trademark Office does not recognize prior art in the form of oral evidence from foreign countries. The existence of 'prior art' would show that the subject of a patent application has no novelty and therefore preclude the grant of a patent. The failure to take into account oral evidence from foreign countries can thus preclude the discovery of indigenous sources, evidence for which may only exist in oral form (See Issues Backgrounder 3 for further discussion).

¹ An element isolated from the human body or otherwise produced by means of a technical process, including the sequence or partial sequence of a gene, may constitute a patentable invention, even if the structure of that element is identical to that of a natural element. Rule 23(e)2 European Patent Convention Chapter VI*

It has been frequently suggested by commentators and through proposals to the international processes that the TRIPS agreement or WIPO based instruments may be appropriate instruments in which to require members to take procedural steps to ensure that foreign sourced information is taken into account for the purpose of the prior art.

Patent applications over traditional knowledge are often made in countries other than the country in which the knowledge was sourced, primarily the United States, Europe, Japan and other industrialised countries. Often the corporations holding IPRs sourced from indigenous peoples in developing countries are based in developed countries. Thus, the activities of these corporations benefit the developed world rather than those in developing countries and the communities from where the knowledge was sourced, a concern implicitly identified by the provision on Access and Benefit Sharing in the Convention on Biological Diversity.

The Common Heritage of Humankind & National Sovereignty over Natural Resources

Before the adoption of the 1992 Convention on Biological Diversity, the concept of the common heritage of humankind was gaining prominence. The work of UNESCO including through the adoption of the World Heritage Convention, and the Food and Agriculture Organization's International Undertaking on Plant Genetic Resources, were firmly based in the conceptual framework that there were certain resources all of humanity holds in trust for the benefit of present and future generations.

With the development of the Convention on Biological Diversity, the trend towards acknowledgement of a common heritage of humanity was displaced by the re-emergence of the assertion that nations have sovereignty over natural resources within their territories. This concept arguably sits uneasily with the notion of Indigenous sovereignty over natural resources on their lands, as espoused by the Draft Declaration on the Rights of Indigenous Peoples (see Issues Background 2 'The Rights of Indigenous Peoples'). The incorporation of the notion of state sovereignty facilitated the inclusion of provisions requiring benefit sharing with countries of origin of genetic resources. The Convention, through provision 8(j), also gave recognition to the contribution of Indigenous Peoples to the preservation and maintenance of genetic resources, the significance of which is further discussed in Issues Background 2.

The concept of the common heritage of humanity is central to any discussion of the nature of the public domain and its application to the traditional knowledge and cultural expressions of Indigenous Peoples, an issue of attention in a number of fora such as the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.

Recognition of Rights

During the last two decades there has been a significant shift towards greater acknowledgement of the rights of Indigenous Peoples. At the international level, new instruments to define and protect the rights of indigenous peoples have been developed. These include ILO Convention on Indigenous and Tribal Peoples, 1989 [No.169] and the Draft Declaration on the Rights of Indigenous Peoples. A Permanent Forum for Indigenous peoples has been established within the United Nations, and a Special

Rapporteur on the Situation of Human rights and Fundamental Freedoms of indigenous people been appointed (Commission on Human rights 2001).

Regional developments include the recent decision of the Inter-American Court of Human rights (in the case of the Indigenous Mayagna Community of Awas Tingni (Nicaragua)), in which interpretation of rights under the American Convention on Human rights has led to significant advances in the recognition and implementation of rights to land and resources.

Within several countries there have also been positive developments. Acknowledgements of native title in Australia and Canada have been significant, as has a land settlement program in South Africa. Resource rights, such as traditional hunting rights, have achieved limited recognition in some parts of the world. These are but a few examples. Many indigenous political movements have grown stronger). and in some countries public sentiment towards indigenous peoples has made a slow positive shift as more enlightened education and other social forces result in better understanding of indigenous perspectives (IWGIA 2001).

However, while these examples illustrate positive trends, there are many more examples to suggest that the situation of Indigenous Peoples in most parts of the world remains poor. Indigenous Peoples are often among the most disadvantaged and marginalized of peoples, even in developed countries.

The Way Forward

It is at the intersection of the above trends and realities that Indigenous Peoples find themselves. It is important to recognize the existence and interrelationships of these trends as we attempt to understand the wider context in which issues relating to indigenous cultural resources must be approached.

How are the differing concepts to be reconciled, if, indeed, they need to be? Can the Human rights of Indigenous Peoples be reconciled with the notion of the common heritage of humanity? Can the concept of the common heritage of humanity be reconciled with the notion of state sovereignty over natural resources? Can the notion of state sovereignty over natural resources be reconciled with the Human rights of Indigenous Peoples? Can any or all of these concepts/rights be reconciled with the free trading system and the international intellectual property rights regime?

Forming a considered position on these issues requires a broad knowledge encompassing:

- The history of Indigenous Peoples and their place, needs and priorities in various modern societies;
- The nature of Indigenous knowledge and the value systems of Indigenous Peoples;
- The rights of Indigenous Peoples at the international level and in various national jurisdictions;
- The mechanisms by which the cultural and human genetic resources of Indigenous Peoples are misused;
- The value of cultural diversity;
- The theory and history of Intellectual Property Rights;

- The international Intellectual Property Rights Regime and national intellectual property laws;
- The applicability or lack thereof of Intellectual Property Rights to the resources of Indigenous Peoples;
- The role of the public domain;
- The history of the debates in various international fora, including an understanding of their participatory structures and the interests represented in each fora;
- The interaction of policy responses at various levels of policy creation and enforcement;
- International and national Indigenous politics and representative structures; and
- Access to justice issues faced by Indigenous Peoples.

Notes

International Labor Organization, Convention on Indigenous and Tribal Peoples, 1989 [No. 169]

International Work Group for Indigenous Affairs 2002, The Indigenous World 2000-2001, IWGIA, Copenhagen.

UNEP, Convention on Biological Diversity June 5, 1992, 31 I.L.M. 818 (1992) entered into force December 29, 1993

UNESCO 1989 Recommendation on the safeguarding of Traditional Culture & Folklore (adopted by the General Conference at its twenty fifth session Paris 15 November 1989

United Nations Human rights 2001, Commission Resolution 2001/57

WTO 1995, Agreement on Trade Related Aspects of Intellectual Property Rights

Xiong, L 2001, 'Letter to Chairperson', Submission to the United Nations Sub-commission on Prevention of Discrimination and Protection of Minorities, Geneva, 23-27