Aid, Trade and Taboo: the place of indigenous traditional knowledge in development strategies: A Pacific perspective

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Abstract

There is pressure from the developed world and indeed from within the under-developed/developing world to put in place IP regimes which are trade and investment friendly, and, primarily, based on western models of intellectual property rights, economic values and social organisation. Pacific island countries are examples of some of the least developed nations in the world. In order to improve their economic performance they are being urged to enter EU-ACP partnerships, to join the WTO, to sign up to international conventions and in general to put their intellectual property regimes in order to support twenty-first century initiatives and WIPO criteria. Yet these countries have long-standing traditional ways of safeguarding intellectual property associated with their culture, with survival and with community cohesion. Along with many other indigenous people, they are discovering that recognition of the rights of indigenous people does not always translate into recognition of traditional knowledge or protection of the various forms of property and resources which are important to them. Nor do the protections which are introduced necessarily benefit them, and in some cases may adversely affect them.

This paper uses examples from Pacific island countries to highlight the present failure of national and trans-national intellectual property regimes to acknowledge and incorporate traditional protections and approaches to indigenous knowledge and practice, and considers possible outcomes from this.

Key Words: Intellectual property, law, trade, development, Pacific islands

1. Introduction

In the context of trade and development it is almost impossible to dissociate law and politics, especially when that development is also closely linked to foreign aid and intervention by third party states and non-state entities. With this in mind, this paper looks at the relationship between aid funded intervention and developments in intellectual property law, reflected through trade initiatives and imperatives in some of the least developed countries of the world. These are countries where aid is hugely important, where trade is extremely limited or imbalanced (imports rather than exports), and where intellectual property regimes are reflected in plural and often parallel legal systems, in which introduced laws derived from a colonial past (notably legislation and general principles of common law and equity) operate alongside traditional, unwritten customary laws, practices and processes, enforced by prohibitions and taboos, public shaming, sorcery and in some cases banishment.

The link between IP (in a western-centric sense), traditional knowledge (in an indigenous sense), law, and development is important because aid is increasingly dependent on, or directed at, trade expansion, integral to which is the capitalisation of cultural tourism, the exploitation of genetic resources – for example, via bio-prospecting, and the commoditisation of expressions of culture: in short, the ‘propertisation’ of traditional knowledge and material expressions of culture. By this I mean the attribution of western-centric primarily common law, property concepts to manifestations of TK which traditionally have not been shaped or controlled by this type of legal discourse.
This thrust of aid for trade and the development of IP laws to fit that purpose has to be placed against the international recognition of the rights of indigenous people and the acknowledgement that in democratic sovereign states – however small, the right to exercise self-determination is important. There are therefore dilemmas. If legal processes are to be used to provide appropriate protection to all forms of intellectual property (including traditional knowledge) at the same time as creating a facilitating environment for that property to be used to advantage in the public domain, both for private and public benefit, and if a wide variety of players can be encouraged to engage with intellectual property (for example investors, manufacturers, pharmaceutical companies, recording studios etc.) then ways have to be found to accommodate a diversity of agendas and values.

2. Material Studied

This paper draws on a range of materials in the public domain, including academic writing, policy statements by governments, international organisations and non-governmental organisations. The research is doctrinal and adopts a law in context approach to the interrelated topics considered here.

3. Area Description

The geographical area under consideration here is the south-west Pacific, specifically Pacific Islands States (PICS), comprising over 20 states and territories, varying in size and population from under 2,000 in countries such as Niue and Tokelau to over six and a half million in Papua New Guinea. The total land area of the region including the Federated States of Micronesia and Papua New Guinea is approximately 991,103 sq km. There are three major groups of peoples and culture: the Melanesians, Polynesians and Micronesians. Island countries of the Pacific are grouped according to their predominant population type. Out of the total land area, about 99.4 per cent is located in Melanesian countries (especially Papua New Guinea which includes about 45.7% of this land area), Micronesia 0.17 per cent and Polynesia 0.42 per cent. The smallest island country in the region is Tokelau only 10 sq km or 0.001 per cent of the total land area.

Most people in these islands rely on subsistence economies. There is virtually no industrialisation and very limited manufacturing. Predominant sources of national income are the exploitation of natural resources, commercial agriculture and tourism. In a global context, thirty-eight member states of the UN are Small Island Developing Countries (SIDS). All PICS are SIDs: Fiji, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu, as well as non-UN members Cook Islands, Niue, New Caledonia, Niue, French Polynesia.

Some SIDs are also Least Developed Countries (LDCs): in the Pacific these include, Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu.

Although most of these islands were once under colonial rule or administration, since 1960 they have by and large achieved independence. Despite the colonial legacy, including many introduced laws, Pacific island countries continue to be countries with strong traditional social organisation, a rich cultural heritage and evident attachment to custom, customary practices and customary laws, recognised both formally and informally within their legal systems and in many cases strengthened post-independence. While conservative advocates of

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1 Exceptions are French Polynesia, New Caledonia, Rapa Nui, Pitcairn and Tokelau. Niue
traditional knowledge may claim that Pacific people practice and observe traditional knowledge on a daily basis, it should be pointed out that an increasing percentage of the populations are urbanised, educated and in waged employment.

This paper considers the impact of trade related intellectual property regimes on the rights of the indigenous people of this region with particular reference to issues of traditional knowledge and expressions of indigenous culture. The local and regional is considered against the global and international background of human rights conventions, trade imperatives and dominant discourses regarding development.

4. Discussion

In all Pacific Island countries indigenous people represent the majority of the population. This is relevant in so far as the UN Declaration on the Rights of Indigenous People, 2007,\(^2\) states in Article 11:

> 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.

The article goes on to advise that 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) states:

> 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.

While this international convention purports to afford special rights and protections to indigenous people and their way of life, within the international sphere there are also trade related treaties, conventions and agreements which appear to potentially undermine the above rights of indigenous people. These include: the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) 1995,\(^3\) the Paris Convention for the Protection of Industrial Property,\(^4\) the Berne Convention for the Protection of Literary and Artistic works,\(^5\)

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\(^2\) Adopted by General Assembly Resolution 61/295 on 13 September 2007.
\(^3\) This opened for signature on 15 April 1994 and came into force on 1 January 1995. Fiji Islands, Papua New Guinea and Solomon Islands are all signatory members of TRIPS.
\(^4\) Papua New Guinea and Tonga are parties to this.
\(^5\) Fiji Islands and Tonga are parties to this, Fiji by succession in 1971 and by signature the following year, and Tonga by signature in 2001.
the International Treaty on Plant Genetic Resources for Food and Agriculture; and the Convention on Biological Diversity.

4.1 Aid For Trade

This potentially contradictory international environment is brought into sharper focus when development issues are raised. For some time now Pacific island governments have been involved in discussions surrounding trade agreements: between themselves and the European Union (EU-ACP Agreements); between themselves and their near neighbours – Australia and New Zealand, under PACER and PACER-Plus, and globally under accession negotiations with the World Trade Organization. Such initiatives have the support of external agencies – especially aid donors who would like to see more effort being made by Pacific island states to nurture their own economic development and who see cultural tourism as one possible avenue as well as the continued and expanded exploitation of natural resources, including bio-prospecting, and the growth of commercial agriculture through the intensive cultivation of single crops rather than mixed farming of a variety of subsistence crops. These initiatives also often have the support of internal agencies which see resources being under-exploited for commercial gain, identify areas where more investment could be attracted, or simply wish to financially improve their own positions.

Aid for trade is an initiative launched by the WTO six years ago. It is meant to encourage development in the least developed nations. According to Ban Ki-Moon (July 2011) the initiative is ‘to help developing countries, particularly the least developed, develop the necessary trade-related skills and infrastructure to carry out and benefit from WTO agreements and to expand their trade.’

6 Cook Islands, Kiribati, Marshall Islands and Samoa are parties to this.
7 Cook Islands, Fiji Islands, Marshall Islands, Nauru, Papua New Guinea, Samoa, Solomon Islands, Tuvalu and Vanuatu have all signed and ratified this treaty, while Kiribati, Niue and Tonga have ratified this. Vanuatu has given effect to this treaty in domestic law through the Convention on Biological Diversity (Ratification) Act No. 23 of 1992 which came into effect in 1993.
8 PACER is the Pacific Agreement on Closer Economic Relations. Details can be found at http://www.forumsec.org/resources/uploads/attachments/documents/PACER.pdf. It is aimed at ‘trade liberalisation and economic integration in the Pacific region’. PACER Plus was launched by Forum Trade Ministers in 2009. Australia is a PACER partner and provides funding for the project. Australia and New Zealand are involved in PACER Plus.
9 Former colonies became members of GATT (the predecessor to WTO) on independence provided their colonial masters were GATT members. This was an interim provision and full membership – which would automatically lead in turn to WTO membership, through formal accession had to be applied for. WTO agreements are wider in scope that the former GATT membership and include: legislative and regulatory reforms and market access concessions relating to goods and services, intellectual property rights and investment ventures. Compliance with TRIPS is integral to WTO membership. Other countries of the region which are members of the WTO are: Fiji Islands (14 January 1996), Papua New Guinea (9 June 1996) and Solomon Islands (26 July 1996) and Tonga (2007). Vanuatu and Samoa are the latest countries to join the WTO (2012).
10 ‘Global aid for trade efforts vital for boosting development, Ban says’ UN News Centre
http://www.un.org/apps/news/story.asp?NewsID=39073&Cr=aid+for+trade&Crl
One of the projects under the AID for Trade initiative is the WTO’s Enhanced Integrated Framework programme. The aim of the EIF is to assist the world’s poorest countries to ‘integrate into the global trading system’. It draws on developed nations to provide aid. An example is Australia’s contribution of $2 million to EIF including to PICs: Kiribati, Samoa, Solomon Islands, Tuvalu and Vanuatu. In combination aid for trade and EIF present an opportunity for developed countries to push for compliance with TRIPS by responding to the identified individual priorities and needs of LDCs. This in turn supports WTO compliance either among those SIDs already members or those considering joining the WTO. The World Intellectual Property Organisation is also engaging with development which is impacting on Pacific Island States.

4.2 WIPO Programme Four

Intellectual Property for Development was at the core of Strategic Goal III of WIPO’s 2010-2011 Strategic Framework and Programme Structure. The rhetoric behind IP for Development is that IP is not an end in itself but rather is a tool that could drive countries’ growth and development:

WIPO, as the lead United Nations agency mandated to promote the protection of intellectual property through cooperation among states and in collaboration with other international organizations, is committed to ensuring that all countries are able to benefit from the use of IP for economic, social and cultural development.

The WIPO programme recognises that while Traditional Knowledge (TK) Traditional Cultural Expression (TCE) and Genetic Resources (GRs) hold considerable commercial promise and if commercially exploited may contribute to economic development, also acknowledges that there are concerns that TK, TCEs and GRs, especially those that are culturally sensitive, should not be exploited in unfair or inappropriate ways and without appropriate benefit-sharing. A major challenge therefore is the need to clarify the precise contribution that IP principles and systems can play in realizing diverse economic and cultural developmental goals.

Although this caution appears to recognise the concerns covered in the UN Declaration on the Rights of Indigenous People mentioned above, the language of the project makes it clear that key terms are ‘effective use’, ‘economic’, ‘commercial exploitation’ ‘life sciences’, ‘goals’, and so on. In other words the agenda is being set by western developed nations. Consequently where PICs seek to engage with law reform directed at IP for development, especially where any such law reform is aid-dependent, the agenda is likely to be one-sided and any accommodation of plural approaches, especially to TK, will be challenging. This is a challenge not only being faced by national governments and legislatures but at a regional level as well.

4.3 Regional Initiatives

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11 Facilitating the Use of IP for Development, under the WIPO Strategic Framework and Program Structure of Program and Budget 2010-2011.
12 WIPO Intellectual Property for Development http://www.wipo.int/ip-development/en/
The island countries of the Pacific are members of the Pacific Islands Forum Secretariat, which sits at the centre of a network of regional organizations providing the institutional framework for regional cooperation across a range of economic, political and social concerns. Trade partners Australia and New Zealand are also Forum members, which means that a certain tension exists between on the one hand, the role of the Forum and its associated network of regional organizations as a key vehicle for the promotion of regional solidarity and cooperation among the Pacific island countries, and on the other hand, its role in facilitating political and economic cooperation between these countries and Australia and New Zealand. This relationship is further complicated by the fact that Australia and New Zealand provide considerable funding for the operations of the Forum (although they are by no means the sole funders and others include Japan, China and the European Union). Australia and New Zealand, therefore, have considerable influence and vested interests in the Forum and its policies.

In 1999 a meeting of Forum Trade Ministers identified as a matter of concern the improper exploitation of the region’s traditional and cultural resources without adequate compensation being paid to custom owners, as well as incidents of such resources being exploited by third parties without informed prior consent. Forum Trade Ministers mandated the Secretariat to develop frameworks to address this. This concern generated the drafting of a model intellectual property law for the Pacific in 2000. The model law, which is still available for adoption by Pacific Island countries, focuses on traditional knowledge and expressions of culture which are neither protected by customary law nor by introduced intellectual property law. In particular it encompasses works that are not in material forms, works that originate and are managed by a collective or community, and works that are handed down from one generation to the next. It provides for traditional cultural rights to be held in perpetuity and to be inalienable. Any exploitation of cultural rights is through contract with a number of safeguards in place to ensure that contracts are free and fair. Although this model law was endorsed for adoption by member countries of the Pacific Islands Forum at a meeting of Secretariat of the Pacific Community (SPC) in 2003, no countries to date have taken advantage of it.

Concerns have not, however, disappeared. In the Pacific Community’s Cultural Affairs Programme, Strategic Plan for 2006-2009, the Secretariat stated:

The culture of Pacific Island societies is a source of creativity and innovation, and gives Pacific Island people a strong sense of identity and self-sufficiency in the face of changes resulting from increasing migration, urbanisation, commercial and media exploitation, and growing material aspirations. Although a dynamic cultural identity is the key to a

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13 Concrete examples of this exploitation have always been rather elusive.
14 The Model Law for the Protection of Traditional Knowledge and Expressions of Culture. For background see L. Kalinoe (2000) Melanesian Law Journal 6.
15 Secretariat of the Pacific Community Guidelines for developing national legislation for the protection of traditional knowledge and expressions of culture based on the Pacific Model 2 and Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture 2002. Secretariat of the Pacific Community’s Cultural Affairs Programme, Strategic Plan for 2006-2009.
successful future for Pacific Islanders, little priority is given to cultural issues by national
governments and administrations…

Pacific Islanders’ intellectual property, in particular their traditional knowledge and
expressions of culture… remain vulnerable to appropriation and commercialisation for
profit by outside interests. For example, handicrafts and souvenirs are being replicated
outside the region and imported for sale as genuine items to tourists to the detriment of
national handicraft industries. Music and images are recorded for publication without the
permission of traditional owners. Medicines and plants have been patented with few
benefits being returned to communities. No international or regional regime has legally
protected these forms of culture. The international system of intellectual property
recognises individual ownership, is time-bound, and interprets the concept of ‘invention’
strictly so it does not adequately protect traditional knowledge, which has collective
ownership, is held in perpetuity from generation to generation, is incremental and informal,
and changes over time. 16

As a result, in recent years a Pacific Regional Framework for the protection of traditional
knowledge and expressions of culture,17 has been developed in close consultation with the
South Pacific Community (SPC), UNESCO, Forum Pacific Island member countries and
territories and the Council of Pacific Arts.18

In March 2007, following a meeting of the South Pacific Commission and the Forum, it was
decided that responsibilities relating to the Model Law would move from the Commission to
the Forum. The commitment of the Forum to its new role was manifest in the convening of a
workshop in June 2007, with the aim of determining member countries’ needs for technical
assistance required for progressing the Model Law’s implementation at the national level.19
However, as any such technical assistance is likely to require aid-funding, identified needs
and requests for technical assistance will feed neatly into the international initiatives outlined
above.

The continuing close link with trade is also evident in the Pacific Traditional Knowledge
Implementation Action Plan, which is based on a distillation of Forum Trade Ministers’
directives since 1999 and the broader trade context. The Action Plan has also been drawn up
against the wider international economic context impacting on Pacific island states and their
economies and policies.20

16 http://www.spc.int/culture
17 South Pacific Forum ‘Regional framework for the Protection of Traditional Knowledge and
Expressions of Culture’
http://www.forumsec.org.fj/resources/uploads/attachments/documents/PacificModelLaw,Pro
ectionofTKandExpprsnssofCulture20021.pdf
18 This comprises the twenty – seven countries and territories which participate in the Festival
of Pacific Arts and therefore extends beyond the membership of the Forum.
19 The conclusions and recommendations of that Workshop were subsequently endorsed by
Forum Trade Ministers in August 2007.
20 Implementation of the plan is itself aid dependent. In 2009 funding of USD$570,400 for a
two year project was allocated to Cook Islands, Fiji, Kiribati, Palau, Papua New Guinea and
It should also be pointed out that despite the regional impetus behind the draft model law, this is seen as only being suitable for national adoption rather than regional adoption. Parallel agendas are at work here. Indeed little international support has been given to the development of a regional law. This is despite the fact that it has been acknowledged at regional level that national systems by themselves are weak and under resourced to address IP matters. A hybrid national-regional approach has now emerged whereby the shift of focus is to a longer term objective of assisting the Forum Island Countries (FICs) to establish a regional infrastructure based on mutual recognition of traditional knowledge and the establishment of an enforcement regime across boundaries, which would become operational on the basis of a multi-lateral treaty. In other words a cross border enforcement mechanism regardless of internal differences of substance.

This regional initiative also appears to be taking a potentially different direction from that encompassed by the model law. Although the Pacific Plan, which is the policy blueprint for the Forum, recognizes the need for protection of cultural values, identities and traditional knowledge, and in particular the role that Intellectual Property Rights (IPRs) may have in ensuring the sustainable development and ownership of the region’s traditional knowledge resources and ‘recognises the need for protection of cultural values, identities and TK (traditional knowledge)’, trade ministers seem to be firmly focussing on commercial intellectual property, notably trade-marks.

In its 2011 report the Pacific Islands Forum Secretariat noted that the Forum Trade Ministers had ‘considered an update on developments relating to Traditional Knowledge (TK) and Intellectual Property (IP) issues including the work being undertaken for the development of the Memorandum of Understanding (MoU) for a Regional Trademark Applications System, the implementation of the Traditional Knowledge Action Plan and broader support provided to the Forum island countries on TK and IP work.’

Vanuatu. Apart from facilitating Vanuatu’s WTO accession and Papua New Guinea preparing to host the Examining Body for the Regional Trademarks Application System, it is not clear what has been achieved.

For example, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, held in Geneva on 13 – 21 June 2002, did not support the examination of possible measures for the regional and international protection of expression of folklore.

However this is largely dependent on uniform national regimes and would also be dependent on a co-ordinated legal approach to the protection of the region’s TK, including the mutual recognition and enforcement of rights and obligations between participating jurisdictions. To date PICs have not demonstrated this degree of mutuality.

Ministers also noted the need for technical assistance in implementing any regional measure and the need/provisions for funding (Australian).
These regional developments have repercussions further afield. Pacific Island states are also involved in negotiating European Partnership Agreements (EPAs) with the European Union. EPA negotiations form part of a wider series of trade negotiations between the EU and seventy-seven of its former colonies with the aim of bringing trade agreements more in line with WTO trading rules. Among various EU initiatives in the region, the EU is funding a project focusing on the development of ‘cultural industries’ in the Pacific region.

Its project: ‘Structuring the Cultural Sector in the Pacific for Improved Human Development’ follows a series of high-level declarations about the importance of culture to development, for example, the 2002 Declaration of Pacific Ministers of Culture, and a conviction (internally and externally) that the promotion of sustainable and cultural industries is a priority. This initiative involves re-conceptualising culture as a means of generating economic growth, for example, through the development of indigenous handicrafts and ethno-tourism. As traditional knowledge is a foundation for such handicrafts, and also the cultural practices that tourists will come to see, IP for TK is clearly implicated in these developments.


defined as ‘the totality of all knowledge and practices, whether explicit or implicit, used in the management of socio-economic and ecological facets of life. This knowledge is established on past experiences and

Indigenous People, Traditional Knowledge And Cultural Practice

These initiatives at an international and regional level indicate that PICs are involved in a number of contemporary developments affecting IP and TK. The issue, at least for this paper, is whether the politics in this area of the law create a playing field that is so uneven that only one side can possibly prevail.

Indigenous cultural heritage, traditional knowledge, traditional expressions of cultural (and here is not the place to go into the various difficulties and debates surrounding all these terms) do not always fit neatly into western-centric ideas about intellectual property, whether one is referring to the skills of women in weaving, or the cultivation of the palms that are woven, the designs on mats or the songs, costumes, musical instruments or dances that are performed to celebrate various festivals and important occasions. At the same time trade imperatives and consequent developments are likely to generate competing claims to rights or control and access over different elements of traditional knowledge, especially when it is increasingly viewed as a commodity and a means of generating cash in what are increasingly cash-dependent economies, and also as the discourse of intellectual property rights becomes more prevalent.

Traditional Knowledge and IP

To understand the challenges that face any IP regime a definition of TK might illuminate some of the difficulties. Traditional Knowledge has been defined as ‘the totality of all knowledge and practices, whether explicit or implicit, used in the management of socio-economic and ecological facets of life. This knowledge is established on past experiences and

The EU includes PICs under the ACP bracket (Africa, the Caribbean and the Pacific).
observation. It is usually a collective property of a society. Many members of the particular society contribute to it over time … it is modified and enlarged as it is used … (it) is transmitted from generation to generation’.  

In the Pacific TK is also indigenous knowledge – although not all indigenous knowledge is traditional, and in many – but not all, instances is manifest in ‘traditional cultural expression’ (TCE). This has been defined as ‘any form, tangible or intangible, or a combination thereof, in which traditional culture and knowledge are embodied and have been passed on [from generation to generation], and includes tangible or intangible forms of creativity of the beneficiaries’. What is ‘traditional’ and what is truly an expression of culture is problematic because traditional knowledge is dynamic in nature and changes its character as the needs and experiences of people change. It is also deeply entrenched and combines temporal and spiritual dimensions. It is difficult therefore, to isolate or separately archive traditional knowledge from traditional people. TK and TCE are consequently aspects of both the ‘intangible cultural heritage’ of indigenous people as well as the ‘tangible heritage’.

Current Legal Frameworks

As has been indicated, in the South Pacific region the laws relating to intellectual property are largely based on the common law introduced into the region from England, either directly or via Australia, New Zealand or the United States of America. Much of the legislation made under colonial administration was directed at protecting the interests of settlers rather than the indigenous people – even if it had consequences for the local population. In some cases this legislation was passed specifically for the island countries, in other cases however statutes of general application from England, or Australia or New Zealand were held to apply in the colony. This latter was particularly the case with intellectual property law and is a situation which has continued in much of the region post-independence. Features of these laws with which IP lawyers are familiar are based on common law property concepts, e.g. identifiable persons as originators, owners, holders of licences etc.; clear moments in time at which rights arise, geographical specificity, recognised forms of expression or physicality and so on. As laws they are also premised on strong, workable, administrative systems, enforceability and acceptance.

There is a growing awareness in the region that intellectual property laws modelled on western principles of ownership, alienability and commercial exploitation are not always appropriate for indigenous cultural property. This is not just a concern of Pacific islanders but of other indigenous people elsewhere. At the heart of the problem lies different

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26 ‘Intellectual Property Protection And Traditional Knowledge’ An Exploration in International Policy Discourse, Dr. John Mugabe 1998.
27 WIPO WIPO/GRTKF/IC/19/4
28 Forsyth, M. ‘Intellectual Property laws in the South Pacific: Friend or Foe?’ Journal of South Pacific Law 7(1) (2003).
29 See for example the UNESCO Report on the Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands (1999) and the Australian cases of Yumbulul v. Reserve Bank of Australia [1991] 2 IPR 481 and Milpurrurru and others v. Indofurn Pty Ltd [1995] 30 IPR 209.
perception of property and rights to that property. Pacific islanders traditionally make little distinction tangible and intangible property, so that the idea of intellectual property being distinct from the plant, costume, mat or headdress that is the physical manifestation of myth, magic or identity is an anathema to many Pacific islanders. Nor have Pacific islanders traditionally needed a commercial incentive to create artistic works, perform dances or sing songs and there has been little incentive to create industrial designs, invent techniques of production requiring patents or manufacture products protected by distinct trademarks. Indeed the lack of case law in which such matters have been raised suggests that many aspects of intellectual property are still of little or no significance in the region, at least not for indigenous people. Moreover, even if rapid development, the globalization of markets and increasingly frequent contact with outsiders prompted more national legislation, resourcing the administrative framework for the effective implementation and enforcement of western-style intellectual property laws presents considerable challenges for most Pacific Island countries.

Despite these challenges, in the last decade there have been some initiatives to address the issue of intellectual property laws from a national perspective and to develop laws which address key issues raised by the Pacific context, notable traditional knowledge or indigenous intellectual property.

Most national efforts to address the issue of indigenous intellectual property have focussed on drafting copyright legislation which takes account of expressions of Pacific culture. For example in Tonga, the Copyright Act 2002 which came into effect in March 2004, includes ‘folklore’ within the scope of derivative works. ‘Folklore’ is defined as: ‘a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.’ However, little else in the 2002 Act makes concessions to the indigenous nature of folklore. There is for example, a presumption that ownership or original authorship can be established and that where the intellectual property is collectively owned the copyright will be limited to a period of fifty years, ignoring thereby the inter-generational transfer of TK.

In Samoa the Copyright Act 1998 also deals with ‘expressions of folklore’, which it defines as: ‘group-orientated and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.’ Section 29 of

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30 Kalinoe, L. ‘Promulgating Traditional Knowledge Sensitive IPR legislation in Papua New Guinea and Related Developments in Pacific Island Countries: A Reflection on the Past Three Years’ (2000) 6 Melanesian Law Journal.

31 Sections 2 and 4.
32 Part IV (section 2).
33 The definition of expressions of folklore is similarly defined in Papua New Guinea under Part V of the Copyright and Neighbouring Rights Act 2000, and the scope of the protection is similar to that of Samoa. In Fiji, expressions of folklore are included within the meaning of ‘public performance’, and special reference is made to the recording of folk songs.
the Samoa Act provides protection for expressions of folklore by recognizing the rights of: reproduction, communication to the public by performance, broadcasting, distribution by cable or other means and adaptation, translation and other transformation, in any circumstances in which such expressions are made either for commercial purposes or outside their traditional or customary setting. However, any monies collected as a result of the operation of section 29 are directed to be used for the purposes of cultural development. They do not go to the people from whom the folklore has originated.

Criticising similar provisions in Papua New Guinea, Kalinoe has pointed out that while the definition of ‘folklore’:

is certainly comprehensive...there is however no distinction made between secret/sacred material/expressions of folklore and those which are not. This is a cause for concern for general protection purpose and for allowing access, including the current forms of transaction and transmission of various and different classes of expressions of folklore either between generations or between neighbouring communities. A distinction must be made between secret/sacred expressions of folklore and those which are not so in order that appropriate levels of protection can be instituted: perhaps absolute protection for those secret/sacred material and a lesser level of protection for those which do not fall under that category. (2000 MLJ 6)

The problem with the above is that accommodating traditional knowledge is still constrained by the concepts and forms of western copyright law. More innovative is recent law brought into force in Vanuatu.

In Vanuatu legislation passed at the time of Vanuatu’s initial attempts to accede to the WTO in the late 1990s were brought into force in year, 2011. The Vanuatu Copyright Act 2000, uses the term ‘Expressions of Indigenous Culture’. ‘Indigenous culture’ is interpreted to mean: any way in which indigenous knowledge may appear or be manifested. This includes all material objects; names, stories, histories and songs in oral narratives; dances, ceremonies and ritual performances or practices; and the delineated forms, parts and details of designs, visual compositions, specialized and technical knowledge and the skills required to implement that knowledge, including knowledge and skills about biological resources use and systems of classification.

‘Indigenous knowledge’ is stated as meaning any knowledge that is created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; and whose nature or use of which has been transmitted from generation to generation; and that is regarded as pertaining to a particular indigenous person or people in Vanuatu. The rights afforded to indigenous culture are the same economic rights which are

34 The delay in implementing the legislation are closely tied to the debates surrounding WTO accession that have taken place and may also have been prompted by indigenous musicians finding a champion in Parliament to advocate protection for their compositions and recordings.
conferred on standard copyright rights and performance rights.\textsuperscript{35} Where these rights are infringed and the infringer is not a custom owner of the expression of indigenous culture, or the expression has not been sanctioned or authorized by the custom owners, or has not been done in accordance with the rules of custom, then the custom owners may institute an action against the infringer.\textsuperscript{36} Alternatively the chiefs of the locality of the traditional custom owners may ask the National Cultural Council or the National Council of Chiefs (created under the Constitution of Vanuatu) to institute proceedings. The Vanuatu National Cultural Council is a statutory body and is custodian of expressions of indigenous culture.\textsuperscript{37} If it is not possible to identify who the custom owners of the expression are, then either of the above two bodies may institute proceedings. Any damages awarded in a successful action to either of these two bodies must be used for the purposes of indigenous cultural development.\textsuperscript{38} As is the case elsewhere in the region, there will not be an infringement of copyright where copies are made for exclusively personal purposes, for supporting the reporting of current events or where used for teaching. However it is not necessary to establish that the infringer was making copies for profit making purposes and it does not matter when the expression of indigenous culture first came into existence. Where expressions of indigenous culture are published then the source and location of that source must be indicated. The Act also envisages the possibility of concurrent communal rights and individual rights over expressions of indigenous culture under different provisions of the Act.\textsuperscript{39}

This piece of legislation goes further than that of the other island countries of the South Pacific region at the present time, in seeking to bring indigenous intellectual property rights within the scope of the law. It is however fraught with difficulties and inconsistencies, notably in its enforcement and administrative structures and in its retention of concepts of ownership and community rights.\textsuperscript{40}

There is the continuing problem that legislation is trying to fit an acceptable internationally recognised formula which will accommodate the safeguards demanded by non-indigenous IP right holders – for example to protect against piracy, while at the same time trying to protect indigenous right-holders and accommodate other indigenous users of TK. In arriving at procedures to enforce these regulatory regimes, the role of traditional mechanisms for regulating traditional knowledge and cultural property are often marginalised or seen as been extra-legal or in a parallel universe. For example, intellectual property has traditionally been protected by the imposition of ‘tabu’ or custom prohibitions on the copying or performing of rituals, dances, music, songs, drawings, magic etc. Breach of such traditional restrictions or prohibitions in the past might attract the sanction of the death penalty, stoning or banishment. Today it is likely to require custom compensation payments using a mixture of traditional wealth, such as foodstuffs, fine n mats, pigs, and cash or other western goods. However

\textsuperscript{35} Indigenous rights are recognised under section 8(1) and standard rights under section 23(1).
\textsuperscript{36} Section 42 read with 34 and 23.
\textsuperscript{37} Established under the Vanuatu National Cultural Council Act (Cap 186).
\textsuperscript{38} Section 42(4).
\textsuperscript{39} For example where one group claims performance rights and an individual claims film rights.
\textsuperscript{40} For example the notion of community and communal or collective rights is widely used without specificity, and it is unclear whether all claims are to be heard by informal customary forums or will be appealed to formal courts, and if so how these will be constituted.
urbanisation, the development of tourism, the influence of global media, the re-structuring of traditional society as a consequence of migration and emigration has meant that many of the traditional customary forms of protection are becoming less effective. Traditionally most dances, performances, songs etc. were the property of a group from a certain location. Occasionally knowledge or rituals, skills, magic or medicine might be the preserve of an individual within a certain family. This knowledge is then passed on from one generation to the next; to the chosen or appointed successor in title. Secrecy still surrounds much intellectual property.

In traditional intellectual property regimes the use and dissemination of TK is controlled by customary practices which are procedures as much as laws. Traditional IP is found in unwritten customary law, practices and protocols. Customary practices are mediated by elders and other men and women of higher customary status, for example, chiefs and councils of chiefs. While certain knowledge and traditional cultural expressions are in the public domain because they are important for all members of the community to know and experience, access to other categories of TK and the right to enact certain TCEs has to be purchased and earned, while some TK is secret or private and only communicated to a selected few – to the extent that misuse or abuse may attract severe sanctions including punishments through sorcery. More significantly especially in the context of the trade agendas, the customary regime for regulating TK/TCEs only works effectively in-country, where it is widely respected by the general population and policed and enforced by elders, chiefs and chiefs’ councils. Penalties for breaches of law and protocol are extracted and community disapproval of such breaches continues to be a significant deterrent to such actions. At a local level safeguards are created by the use of taboos, punishments and compensation payments and the operation of customary law is supported in the Constitutions and in other national laws and institutions. These measures are, however often weak or ineffective against outside forces.

**TK and Trade**

While cultural intellectual property is recognised as one of the region’s potential trading assets it is not easily brought within the current intellectual property frameworks. To illustrate this I have chosen two examples both from Vanuatu: the land dive and kava.

The first example is the Nagol or land dive. The Nagol is a traditional cultural expression of the Sa-language speakers of the south of the island of Pentecost in central Vanuatu. It is a ritual undertaken historically to ensure a bountiful yam harvest (a staple food in the region). The key feature of the Nagol is the construction of a wooden tower from which men jump with vines tied to their ankles. The idea has been stolen. A New Zealander acknowledges using the Nagol as the inspiration for his creation of bungy jumping, over which he holds the patent. Bungy jumping is now a multi-billion dollar worldwide industry and the communities to whom the Nagol belongs feel aggrieved that they do not get a share of any of this money. In terms of current IP law the indigenous performers have little chance of success because under Western law the New Zealander’s inspiration from the Nagol constitutes the use of an “idea” (which cannot be protected under copyright law) and another drawback is that the
communities themselves have not organized themselves into one legal entity which could bring this case to court. More successful has been the court challenge of the original custodians of the land-dive to prevent other indigenous islanders performing the land-dive in other (more tourist accessible locations). Although ostensibly about constitutional rights, the litigation was fundamentally about who had the right to benefit from such exploitation and what procedures should be involved if the benefit was to pass from traditional owners/performers to new owners/performers.\(^{41}\) Although the court did not consider any intellectual property rights it did acknowledge the need to observe traditional procedures in seeking permission to perform the dive away from its traditional location. More recently the National Cultural Centre (mentioned above), has intervened to restrict performances, although its status to do so is questionable. The example illustrates that at a local level matters could be resolved without recourse to IP law. Further than that however, there was no remedy.

The second example is not a performance but a drink: Kava. Kava is a traditional drink made from the root of the kava plant (\textit{Piper methysticum}), a pepper plant with numerous medicinal properties. In Vanuatu it is made from fresh mashed roots,\(^{42}\) in other parts of the Pacific it is made from dried powdered root.\(^{43}\) Its medicinal qualities include killing 'bacteria and fungi; (it)acts as a local anesthetic, painkiller, and diuretic; relaxes muscles; induces sleep; and reduces blood pressure.\(^{44}\) The active substances in kava are called kavalactones which serve to relax muscles, dull pain, and induce sleepiness. As a traditional plant it has been cultivated in Vanuatu (and other parts of the Pacific) for over 2,000 years. Originally used as a spiritual and ceremonial drink to facilitate communication with the ancestors, it is now used as a recreational drink. It is a plant that cannot reproduce itself. Therefore the human cultivation of kava has been essential to its survival and the development of over fifty varieties in Vanuatu alone.

Since the 1970s foreign pharmaceutical companies have been interested in this plant and its properties and kava has been heavily commercialized especially in Germany, France and the United States. Local people had great hopes of financial benefit and kava cultivation increased. However, little was done to created added-value to the product in country and middlemen took the bulk of the profit. Moreover in 2002 health scares generated by kava from elsewhere and the resulting adverse publicity hit Pacific markets.\(^{45}\) In the good years claims based on existing IP laws were thwarted by the fact that kava is a traditional medicine in at least ten Pacific Island countries and the identification or constitution of one legal “owner” of the TK related to kava’s medicinal properties is an almost insurmountable task. In

\(^{41}\) \textit{In Re the Nagol Jump, Assal & Vatu v. The Council of Chiefs of Santo} [1980-1994] Van LR 545.
\(^{42}\) Traditionally it was held that the best kava was made by young boys masticating the root and then spitting it out to be strained with water into the drinkable potion.
\(^{43}\) In Fiji for example where it is called \textit{yaqona}.
\(^{44}\) A. Ryman ‘The Sacred Root: Drinking Kava on Vanuatu’ \textit{World and I}, April 2004 v19 i4 p174.
\(^{45}\) In the 1990s the kava market was estimated to be worth $200 million. In 2002 the German ban on kava imports resulted in a loss of $US 1 billion export revenue to major kava producing countries; Samoa, Fiji, Tonga and Vanuatu.
the bad years since the 2002 ban local growers have struggled to lobby to get the ban lifted despite ambiguous scientific research justifying the ban.46

Continuing challenges for advancing intellectual property regimes

These are challenging times for intellectual property laws in the region. On the one hand there is the pressure, both internal and external, to put laws in place to meet the criteria for WTO membership or in response to ACP-EU partnership agreements, in other words to take commercial advantage of indigenous intellectual property as a potential economic development sector. To date the nature of such laws has been determined by actors and factors beyond the region, as evidenced by existing laws on patents, industrial designs and trademarks. While such laws may be beneficial to a small number of local industries and commercial enterprises, they are for the greater part directed at protecting global and foreign corporations. Nor is it clearly established that strengthening the intellectual property laws of an undeveloped or under-developed country improves development. Often all that happens is that the developed countries which trade with less developed ones benefit from the intellectual property laws there. One of the consequences of this is that many products become more expensive for Pacific islanders, including CDs, videos, brand name clothing, food and medicine. On the other hand there is increasing regional recognition of the risk that what is unique to Pacific islanders, for example their culture, designs, dance, ceremonies, plant knowledge or genetic resources, will be taken from them, developed by outsiders, and exploited beyond their control and without greatly benefitting them. There is therefore a need to record, preserve, and protect indigenous intellectual property in ways which are compatible with and take into account traditional safeguarding mechanisms for indigenous knowledge. It is also clear that national laws in small island states are insufficient by themselves to ensure protection. It is this realisation that has prompted regional organizations such as the Pacific Island Forum Secretariat to advocate a regional framework, ultimately framed in a treaty, for the protection of traditional knowledge and expressions of culture alongside national measures.

Within Pacific island countries there is tension between those who embrace the commercial exploitation of indigenous cultural property or manifestations of traditional knowledge and those who are against this. The diverging views are illustrated by research undertaken by Miranda Forsyth in Samoa concerning the Samoan tattoo (tatau). Writing about the contemporary conflicting claims and views about this traditional form of body art, Forsyth notes:

Samoan tatau is a practice over which there are multiple, often conflicting, claims and aspirations: there is the desire to preserve and limit the practice to its (some would say imaginary) pre-modern form to reinforce a Samoan sense of identity and cultural pride; there is the desire to exploit it for commercial gain (through marketing opportunities such as the ink, tatau festivals, and performing tatau); and there is the desire to use it to market the state

46 Pacific Network on Globalisation 2007
and to distinguish it as a tourist destination. Interestingly, all the advocates for these different perspectives are calling for the introduction of legal rules to limit the practice to accord with their particular view of what *tatau* should stand for. In doing so they are drawing on new discourses, such as those surrounding traditional knowledge, copyright and intangible cultural heritage.

Sometimes the conflict is not simply about commercial exploitation or non-exploitation but about the processes observed in moving from the latter to the former, or the division of benefits once cultural property is in the public domain, as illustrated by the case of the Vanuatu land-dive. Similar disputes have arisen elsewhere in the region – although not brought to the formal courts – for example, regarding fire walking in Fiji and warrior dances from Samoa. Tourists are keen to see such spectacles and hotels and resorts prepared to pay performers, even if the performers do not own the rights to the spectacle and may not have obtained the necessary consent. Even where performance to strangers or in a different location is permitted by the community or custodians of the traditions, there may be sanctions or restrictions imposed. For example, spectators may be requested to keep a certain distance from the event or asked not to take photographs. Unfortunately tourists do not always respect these limitations and there is little that performers or custodians can do about it. They alone must face the wrath of the ancestors and the penalties which may follow from the breaking of ‘tabu’, the tourists go home with their pictures, videos and recordings of ‘primitive’ native dances and ceremonies.

Even where national legislation is implemented which recognises the plural claims to intellectual property there are problems of management of the property itself and any economic benefits it engenders. Legal institutions such as trusts, co-operatives, incorporated associations, or companies – all of which are introduced concepts, have met with mixed success in the region. Where a centralised agency is established or appointed to administer cultural property then its legal status may be uncertain, or its location and services inaccessible to people in remote or distant communities, or its governance suspect. Where national governments act on behalf of the people of the country there may be a lack of democratic participation and an inequitable distribution of benefits.

Similarly administrative and enforcement mechanisms may be under-resourced or simply unworkable in countries where people are geographically scattered, where those who might infringe intellectual property laws can soon be outside the jurisdiction of the local courts, and where inter-country enforcement of judgments is poorly developed.

It has been suggested by a former director of the cultural Centre in Vanuatu that:

47 M. Forsyth ‘Lifting the Lid’ forthcoming.
48 For example, in 2004, the government of Samoa entered into a bi-lateral agreement with the University of California: Memorandum of Understanding with the University of California at Berkley regarding the division of economic return from research into Prostratin Gene Sequences, an Anti-Viral Molecule [2004] PITSE 1 (13 August 2004). Similar attempts by the Tongan government to commercial exploit a gene pool met with considerable opposition once the media got hold of the story and the project had to be abandoned.
What communities lack control over (and require assistance with) is instances of the commercial misuse of TK/TCEs and the use of TK/TCEs by outsiders’. 49

However, perceptions of misuse are not homogenous. There are divergencies of agendas. Some indigenous cultural custodians want to protect and preserve traditional knowledge and forms of cultural expression for commercial exploitation. Others see no problem with using what they have to generate income. They are happy to borrow for others and have others borrow from them; they engage in the global exchange of knowledge. Some want more state intervention others want less, believing that the control of TK should vest in individuals, in families and in communities. However, there are challenges in defining communities or communal rights in TK. Pacific societies are not homogenous. Some have greater access to markets, others live outside their home islands. Some are remote from centres of commerce and live in rural areas, others are more urbanized with access to the internet, to overseas travel and to money based economies. TK and TECs mean very different things to many people.

Conclusion

In the context of the Pacific intellectual property law seems to be inherently contradictory. On the one hand it is there to protect the intellectual endeavour of the creator. On the other hand its presence is intended to encourage such endeavours so that the outcomes can bring benefits – usually commercial, to the public and to the creator, even though that publication (used in the widest sense), can itself undermine the protection. Moreover, western-centric perceptions of this area of law are firmly grounded in theories of property based on ownership, markets, and money. They depend on clear definitions and points in time which the fluidity of customary organisation elude. While most non-indigenous models of intellectual property law fail to address the complex nature of traditional knowledge and its various manifestations it is also clear that recent in-country law reforms struggle to come up with regulatory regimes which can cover the diversity of interests in rapidly changing societies.

The dilemma for twenty-first century intellectual property regimes in Pacific island states is therefore how to preserve the important social dimension of intellectual property in the indigenous context while shaping laws that meet national, regional and international trade and development demands.

49 Ralph Regenvanu, presentation at panel session on “Indigenous and Local Communities’ Concerns and Experiences in Protecting their Traditional Knowledge and Cultural Expressions” 9th Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) of the World Intellectual Property Organisation (WIPO), 24th April 2006, Geneva, Switzerland
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