

TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY PROTECTION – THE ENDEAVOUR OF NIUE

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This paper identifies briefly the special features of traditional knowledge, its relationship with current intellectual property protection, and then considers the particular initiatives being considered by Niue for the protection of its traditional knowledge for the generations to come. The Niue initiatives include use of the Model Law for the Protection of Traditional Knowledge and Expressions of Culture approved at the Pacific Island Forum Ministers Meeting in 2003.

Cet article expose brièvement les relations qui peuvent exister entre la nécessaire conservation des valeurs ancestrales traditionnelles et les concepts relatifs à la protection des droits intellectuels. Prenant l'exemple de Niue, cet article analyse les mesures prises par les autorités de ce territoire, qui ont repris les préceptes posés par le droit international public, principes consacrés en 2003 par une décision du Forum du Pacifique, pour assurer au bénéfice des générations futures la conservation et la transmission des valeurs ancestrales de leur communauté.

I TRADITIONAL KNOWLEDGE AND CURRENT IP PROTECTION SYSTEM

A Features

It is difficult to define traditional knowledge (TK), but it can be said to be knowledge associated with the environment or the long-standing traditions and practices of certain regional, indigenous, or local communities.¹

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¹ Graham Dutfield "Legal and Economic Aspects of Traditional Knowledge" in Keith E Maskus & Jerome H Reichman (eds) *International Public Goods and Transfer of Technology – Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) 495, 496-498.

Traditional knowledge has been said to be²

a body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use.

It is the ways and means used "by individuals or communities to identify and improve genetic resources over time, including processes related to their extraction from nature and their preparation for human usage."³ It is broad enough to encompass all forms of information, learning, tradition, lore, practices, myths, symbols, religious beliefs, forms of healing, farming practices, technologies, land utilisation, handcraft, and so on, originating in and practised by a community. It includes the wisdom, knowledge, and teachings of these communities.⁴

The traditional knowledge of indigenous peoples has unique features. It is typically unwritten and has been passed down orally for generations from person to person.⁵ Some forms of traditional knowledge are expressed through stories, legends, folklore, rituals, songs, and laws. Other forms of traditional knowledge are often expressed through different means. The owner of traditional knowledge can be a whole tribe or community or a clan or individual. In addition, because traditional knowledge is passed down orally and exists as practice and custom, sometimes it is hard to identify its owner.⁶

B Problems

There are aspects of traditional knowledge that are incompatible with intellectual property protection. The first problem is the public domain issue. Intellectual property protection creates a kind of monopoly to restrict trade practice in order to encourage investment, and this has positive economic social and cultural consequences. According to this system, anything in the public domain is excluded from protection and things are free for use by anyone if they are not under intellectual property protection. Traditional knowledge of indigenous people, such as knowledge of the medical properties of plants, forms of healing or systems of construction developed informally by communities over time, can be regarded as having entered the public domain because it has usually existed for

2 M Johnson "Research on Traditional Environmental Knowledge: Its Development and Its Role" in M Johnson (ed) *Lore: Capturing Traditional Knowledge Environmental Knowledge* (IDRC, Ottawa, 1992) 3, 3-4.

3 Thomas Cottier and Marion Panizzon "Legal Perspective on Traditional Knowledge: The Case for Intellectual Property Protection" in Keith E Maskus & Jerome H Reichman (eds) *International Public Goods and Transfer of Technology – Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) 565, 566.

4 WIPO, available at: http://www.wipo.int/export/sites/www/freepublications/en/tk/920/wipo_pub_920.pdf (last accessed on 5 April 2008).

5 Above n 2, 7-8.

6 Above n 1, 501-4.

generations and is shared among the people. Therefore, it is difficult to protect traditional knowledge under the current intellectual property system.⁷

Another problem is that the intellectual property system involves disclosure of information in order to get protection. Even if an indigenous people might wish to register patents on its traditional knowledge, it may be culturally inappropriate to record such knowledge in writing.⁸

II INTERNATIONAL CONTEXT

A Treaties

The protection of traditional knowledge is gaining more and more international interest and support. This interest and support involves respect for the cultural and spiritual values of the traditional knowledge, the preservation of biodiversity, the recognition of social and economic benefits, and fairness and equity in sharing in the economic benefits from exploitation of traditional knowledge. As a result, many international regimes have established obligations or guidelines for the protection of traditional knowledge. Key examples are: in the regime of environmental protection, the Convention on Biological Diversity; in intellectual property, in the Trade-Related Aspects of Intellectual Property Rights (TRIPS); and in human rights, in the UN Declaration on the Rights of Indigenous Peoples.

1 Convention on Biological Diversity

The Convention on Biological Diversity, signed at the United Nations Conference on Environment and Development in 1992, was the first international environmental convention to develop measures for the use and protection of traditional knowledge, related to the conservation and sustainable use of biodiversity. It requires the protection of traditional knowledge of "indigenous and local communities".⁹

7 See above n 3, 569-71.

8 Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2002) 113.

9 Article 8: "In-situ Conservation: Each Contracting Party shall, as far as possible and as appropriate: (a)... (j) Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices."

Article 10: "Sustainable Use of Components of Biological Diversity: Each Contracting Party shall, as far as possible and as appropriate: (a)... (c) Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."

2 TRIPS

Article 27.3(b) of TRIPS sets out conditions under which certain biological materials or intellectual innovations may be excluded from patenting, and it provides:

Members may also exclude from patentability: ... (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

In the TRIPS-related Doha Declaration of 2001, paragraph 19 expanded the review to article 27 and the rest of TRIPS to include the relationship between TRIPS and the UN Convention on Biological Diversity and the protection of traditional knowledge and folklore.¹⁰

3 Human Rights

The international human rights regime has established protection for traditional knowledge, and some human rights bodies argue that the protection of traditional knowledge is one of the fundamental rights of human beings. On 13 September 2007 the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples.

Article 11 of the Declaration provides:

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.

And Article 31 of the Declaration provides:

¹⁰ "We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension." DOHA WTO MINISTERIAL 2001: MINISTERIAL DECLARATION (14 November 2001) WT/MIN(01)/DEC/1 para 19.

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.

B Protection through a Sui Generis System

Protection for TK has been included in various international regimes, and various countries have protected TK through their own policies.¹¹ International intellectual property protection regimes try to harmonise the protection of traditional knowledge under current IP law. This has been mainly through (i) *sui generis* laws, (ii) patent laws with protection of a *sui generis* nature, and (iii) regulatory systems relating to intellectual property-type protection.¹² Whether or not these practices are effective, they indicate that a *sui generis* system is probably necessary to deal with the protection of traditional knowledge.

As intellectual property protection gives incentives for innovation and promotes the participation and sharing of scientific and artistic creations for a more innovative society, traditional knowledge owners should be encouraged to participate in this process.¹³ On the other hand, due to the features of traditional knowledge, the participation and sharing of traditional knowledge by others may be unfair for the traditional knowledge owners. In such circumstances, a *sui generis* system should be created to meet the competing interests and a trade-off should be made between interests of traditional knowledge owners and the intellectual property rights protection.

C The Model Law for the Protection of Traditional Knowledge and Expressions of Culture¹⁴

The protection of traditional knowledge calls for international cooperation, and some model laws have been developed for that purpose. Of particular relevance for the South Pacific and for Niue is the

11 For example, Thailand has an Act on Protection and Promotion of Traditional Thai Medicinal Intelligence; Portugal has Decree Law No 118/2002 Establishing a Legal Regime for the Registration, Conservation, Legal Safeguarding and Transfer of Autochthonous Plant Material as well as Associated Knowledge; China has the Patent Law of 2000 to protect traditional Chinese medicine.

12 See WIPO, available at: <http://www.wipo.int/tk/en/laws/tk.html> (last accessed on 5 April, 2008).

13 See Lionel Bently and Brad Sherman *Intellectual Property Law* (Oxford University Press, New York, 2004) 328; The World Intellectual Property Organization (WIPO) *Intellectual Property Reading Material* (WIPO, Geneva, 1995) (WIPO Publication No. 476 (E)) 5.

14 See WIPO, available at http://www.wipo.int/tk/en/laws/pdf/spc_framework.pdf (last accessed on 5 April 2008).

Model Law for the Protection of Traditional Knowledge and Expressions of Culture (Model Law), which was developed under WIPO auspices by Professor Kanwal Puri and Dr Clark Peteru in 2002. This Model Law was received by the Pacific Islands Forum Ministers, however, it did not become the subject of a Forum resolution.

The Model Law is expressly stated to be for use at the national level; it had no vocation for international use.¹⁵ That use between countries of the Pacific was left to the relevant Pacific regional organisations to develop.

The key regional organisation in the Pacific is the Pacific Islands Forum and its latest strategic statement is the Pacific Plan 2005.¹⁶ In Appendix A of that Plan (which deals with the Implementation Strategy 2006-2008) under the general rubric of Sustainable Development, Item 11 has the objective for 2006-2008 to have "Recognised and protected cultural values, identities and traditional knowledge". In the "Milestones" column, it is stated that "further analysis is required" but that a report might possibly be made to the Forum in 2007. The 2007 Annual Report on Progress with the Pacific Plan¹⁷ has no mention of the Model Law or of traditional knowledge or of cultural protection.

The key chapters of the Model Law deal with Traditional Cultural Rights, Moral Rights, Obtaining Prior and Informed Consent from Traditional Owners (including application procedures, and authorised user agreements), and designation of a Cultural Authority.

This is the Model Law that is under active consideration by the Government of Niue for implementation in Niue.

III THE ENDEAVOUR OF NIUE

Niue is a small South Pacific country with a land area of 269 square kilometres and, of the approximately 20,000 Niueans in the world, only about 1,500 are living on the island.¹⁸ The people there can be categorised as an indigenous people¹⁹ and they live a life which still has substantial

15 Above n 14, the Background statement.

16 See http://www.forumsec.org.fj/UserFiles/File/Pacific_Plan_Nov_2007_version.pdf (last accessed on 12 June 2008).

17 See http://www.forumsec.org.fj/_resources/article/files/Pacific%20Plan%20Annual%20Progress%20Report%20-%202007.pdf (last accessed on 12 June 2008).

18 See Niue website: www.gov.nu and <http://en.wikipedia.org/wiki/Niue> (last accessed on 5 April 2008).

19 According to the UN, "There are an estimated 300 million indigenous people in more than 70 countries worldwide. Indigenous peoples [footnote omitted] are the inheritors and practitioners of unique cultures and ways of relating to other people and to the environment. Indigenous peoples have retained social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live." See <http://www.unhcr.ch/html/racism/indileaflet1.doc> (last accessed on 5 April 2008).

traditional cultural influence. The people of Niue have their own traditional knowledge, and that traditional knowledge is a very important part of their life for subsistence and cultural identification reasons.²⁰

Niue offers intellectual property protection on the basis of the patent, trade marks, design and copyright laws of New Zealand.²¹ In addition to the current intellectual property laws, Niue has its own Archives Act, Niue Cultural Council Act and, at the administrative level, a Language Commission, and a Culture Heritage Unit called Tāoga Niue.²² Against this background, Niue needs to find its own way to meet the competing interests of traditional knowledge protection and intellectual property protection. There is a government commitment to formalise, by statute, the status of the Language Commission and the Tāoga Niue, and it is in this context that steps are being considered which will make special provision for the identification, recording, and protection in perpetuity, of important aspects of Niue traditional knowledge.

In order to meet the considerations of both the protection of intellectual property and the protection of traditional knowledge under the international framework, the Niue government has indicated that it wishes to establish a *sui generis* system to suit its own situation. The endeavour is represented in the drafting of two related laws to protect Niue traditional culture and traditional knowledge. These drafts are a Niue Language Commission Bill to protect the Niue language, and a Tāoga Niue Bill to protect the traditional culture and knowledge of Niue.

These laws, especially the Tāoga Niue Bill, will give particular attention to the protection of Niue traditional knowledge, and create a *sui generis* system for the protection of traditional knowledge. Features of the law would be a registration system for the identification and disclosure of the traditional knowledge voluntarily by the Niue government and individuals, a requirement (using the Model Law for the Protection of Traditional Knowledge and Expressions of Culture)²³ of prior and informed consent of traditional owners to use traditional knowledge, and a dispute resolution system to deal with disputes as to the identity of the traditional owners.

20 Above n 3, 566, the author points out that interest in the protection of TK is rooted in the goal of promoting social, economic, and ecological development of rural areas.

21 See Niue Act 1966, s 737: "A copyright, design, patent, or trademark protected by New Zealand law shall be accorded the same protection by the courts of Niue as that available in New Zealand under the laws of New Zealand for the time being in force".

22 "Tāoga" means the cultural heritage and treasures of Niue, as represented in its diverse sectors by Vagahau Niue, Arts and Crafts, History, Environment, Customs and Traditions, Heritage Assets, and the Cultural Bridge to people of Niue descent abroad. Vagahau Niue is the language of Niue.

23 See WIPO, available at: http://www.wipo.int/tk/en/laws/pdf/spc_framework.pdf (last accessed on 5 April 2008).

A *Registration*

The first aspect of the endeavour of Niue is to introduce a registration system through Tāoga Niue, Niue's Department of Cultural Affairs. Tāoga Niue will be responsible for collecting data on traditional knowledge, for identifying the traditional owners and promoting registration by government and owners of traditional knowledge or items of cultural significance. The registration is conducted basically in two ways. The first and main way is on the initiative of Tāoga Niue. It will start to register Niue's traditional knowledge and to identify the traditional owners. This process will be done by Tāoga Niue in consultation with a separate and independent Advisory Council, which will consist of experts from diverse areas of cultural affairs. The second way will be through individual voluntary application, which encourages the traditional owners to disclose their traditional knowledge.

Registration can serve to identify the traditional objects and traditional knowledge of Niue and the traditional owners. Registration is therefore an administrative measure to protect the traditional knowledge of Niue.

The registration system can have advantages in the protection of the traditional knowledge of Niue—

- (a) Registration helps to create an information database of Niue traditional knowledge and can constitute evidence Niue traditional knowledge. This information can help prevent perceived abuses of traditional knowledge such as "biopiracy" or "bioprospecting".²⁴
- (b) This prior art can also deny patent protection or invalidate a prevailing patent under the intellectual property system, because "novelty" or "no prior disclosure" is one of the criteria for granting a patent and any prior art will mean this criterion cannot be satisfied.²⁵
- (c) Registration can identify the traditional knowledge owners.
- (d) Registration can help to promote the conclusion of prior and informed consent agreements.
- (e) Registration system can help to gather and accumulate the knowledge owned by the indigenous people in Niue and prevent the knowledge from becoming lost over generations.

Registration may also have negative aspects. Because registration requires disclosure, some who own traditional knowledge will be reluctant to register for fear that others will copy their traditional knowledge. Furthermore, some kinds of disclosure of traditional knowledge are regarded as offensive

24 The labels "biopiracy" or "bioprospecting" refer to the creation of a new synthetic product from extracting the active ingredient of the native plants by using the indigenous people's knowledge. See Susy Frankel and Geoff McLay *Intellectual Property in New Zealand* (LexisNexis Butterworths, Wellington, 2002) 112.

25 See above n 24, 113.

to traditional owners' customs or values. The disclosure of traditional knowledge may mean more disputes as to the ownership of the traditional knowledge.

B Prior and Informed Consent

Although the disclosure of traditional knowledge will preclude patent protection for the traditional knowledge owners, that does not mean that the traditional owners will not be protected by the disclosure. The endeavour of Niue is to provide for the protection of traditional knowledge owners' rights through a system of a prior and informed consent. For this Niue may adopt the Model Law for the Protection of Traditional Knowledge and Expressions of Culture Law with minor changes to adapt it to the Niue situation. This Model Law has significant features:

- (a) The recognition in perpetuity of the right of traditional knowledge owners.²⁶ This recognition meets the indications of the human rights regime. It recognises the inalienability of the rights, but it also deals with the relationship with the prevailing intellectual property right by giving effect to those intellectual property laws.²⁷
- (b) It strikes a balance of rights and obligations between the traditional owners and users. For example, if agreement has been reached between the user and any claimed traditional owners, users can be protected from any lawsuits in case of dispute as to the identity of the traditional owner.²⁸
- (c) The prior and informed consent system will vest in Tāoga Niue the power to take charge of applications for the use of traditional knowledge and to publish and supervise the applications. This administrative examination and approval procedure can manage the proper use of traditional knowledge for non-customary use. By its supervision, the administrative body can ensure that non-customary use of the traditional knowledge will not be offensive to the culture and custom of Niue. Taoga Niue can also exercise its authority to ensure the proper use of the traditional knowledge to promote biodiversity for sustainable development of the environment. The recording of the applications can serve as formal evidence in case of dispute between traditional owners and other users.
- (d) Through arrangements of prior and informed consent of traditional owners, sharing of traditional knowledge will be promoted and ultimately benefit the whole world.

C Dispute Resolution

The proposed Niue system has a unique dispute resolution system. A panel, the Advisory Council, will resolve any dispute arising from claims of traditional knowledge by using customary laws or

26 See s 8 of the Model Law.

27 See ss 9 and 10 of the Model Law.

28 See s 31 of the Model Law.

practice. The members of the Advisory Council will be a group of independent cultural affairs experts.²⁹ This dispute resolution system is similar to an arbitration system, since the decision would be final and could be conducted in a non-public way at the request the disputants.

This system has certain advantages. Firstly, the members of the Advisory Council are experts in cultural affairs and the experts are independent of the government. Secondly, because this panel is the final decision-making authority, it ensures predictability, stability and enforceability of decisions on traditional knowledge. Thirdly, because this panel can, at the request of the disputants, hear a dispute in confidence, it will encourage traditional knowledge owners to resolve disputes through this panel without worrying that the traditional knowledge will be disclosed. Finally, the use of customary law and practice suits the situation of Niue and will help the resolution of the disputes.³⁰

Niue has very few people, so the proposed dispute resolution system seems to be well suited to the circumstances of Niue. However, it is not perfect. The dispute resolution system is similar to arbitration, but it also has administrative features since the disputants have no right to choose their own arbitrators and must accept the jurisdiction of the Advisory Council. The draft law does not give detailed rules for the Advisory Council on how to arbitrate a dispute, and this may leave some loopholes in the system.³¹ A decision made by the Advisory Council is not appealable.

IV CONCLUDING THOUGHTS

The establishment of the traditional knowledge protection system and the work done in Niue is a good example of an attempt to protect traditional knowledge. However, even if implemented the protection of traditional knowledge will be only a territorial endeavour of Niue: there will still be a long way to go for a good protection of the traditional knowledge owners. A good system for the protection of traditional knowledge relies on cooperation of all of international society; only with international cooperation can the protection of traditional knowledge be fully achieved.

As the saying goes, "Rome was not built in a day", and it is true that the protection of traditional knowledge at the international level cannot be achieved in one day. This will depend on the efforts of each indigenous peoples group, community or country to find its own way to protect TK, and to promote common understanding in the world.

29 The proposed Tāoga Niue Bill s 8 (2) provides the composition of the Advisory Council.

30 Antony Taubman "Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge" in Keith E Maskus & Jerome H Reichman (eds) *International Public Goods and Transfer of Technology – Under a Globalized Intellectual Property Regime* (Cambridge University Press, Cambridge, 2005) 521, 530-33. Taubman's view is that customary laws and protocols should be recognised to govern traditional knowledge without creating an intellectual property right.

31 Such as the avoidance of conflict of interest in the Advisory Council in a specific dispute. The Act would however give Cabinet the power to make regulations and allow the Advisory Council to make rules for its own procedure.

International intellectual property protection underwent territorial, regional and global stages.³² It started on a country by country basis; next there was more bilateralism and regionalism such as Paris Convention and Berne Convention, and finally the more global understanding reflected in the TRIPS. Traditional knowledge protection will have to undergo this process to reach a better international status.

Niue is a small country, and its influence in the protection of traditional knowledge may be limited. However, with the small step of Niue in the creation of a *sui generis* system, it is hoped that a bigger step in the protection of traditional knowledge, to bilateralism,³³ to regionalism³⁴ and to globalisation, will ultimately be taken.

32 John Braithwaite and Peter Drahos *Global Business Regulations* (Cambridge University Press, Cambridge, 2000) 59, 63-64.

33 For example, Niue could establish a bilateral treaty with New Zealand or a neighbouring country for the protection of traditional knowledge.

34 For example, the Pacific Islands Forum can be used to promote a regional agreement.

