Introducing IPR

The scenario goes like this: Voracious Pharmaceuticals Inc. is looking for a new, blockbuster drug. Hearing that tropical forests may have molecules with possibilities, the R&D director of Voracious sends a staff member to visit an Amazonian indigenous group for leads. The staff member befriends the local shaman who tells him of a plant that alleviates painful swelling of the joints. The staff member asks the shaman to show him the plant. The shaman obliges. The staff member collects samples, and takes them back to Voracious. The plant contains a heretofore unknown organic molecule that, ten years later, is approved as a new drug that earns Voracious tens of millions of dollars. Meanwhile the indigenous group has come under relentless pressure by local settlers. The only workable recourse is legal action but, unable to afford the costs of fighting the usurpation of their lands in court, the group is being dispersed and its culture extinguished. Although Voracious is making millions, the indigenous group whose knowledge contributed to this financial bonanza gets nothing.

This particular scenario so far has not happened, yet to different societies each of its components have occurred. Pharmaceutical companies are visiting tropical areas to engage in molecular prospecting. Indigenous knowledge has led to the identification of commercially promising biological substances. Indigenous societies are facing cultural extinction that could be avoided with leadership and cash. Can indigenous societies claim ownership of their cultural knowledge? Can they control whether it may be used by outsiders? Can they claim compensation for its permitted commercial use?

If plant extracts and potential pharmaceuticals were the only matters involved, the number of questions to ask would be manageable small. However, native knowledge with commercial possibilities is not limited to medicinals. Other commercially relevant indigenous

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1 An imaginary reparation.
2 The scale of this activity is reflected, for instance, by Reid et al., 1993, and in Pellack 1992.
3 See chapters by King and Laid
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The last three years have seen a truly astonishing rise in efforts to find ways of securing for indigenous societies mechanisms to control access to their cultural knowledge and to exact compensation for certain authorized uses by outsiders. How do we account for this sudden interest? The environmental movement is responsible for some of it: Thousands of environmentalist organizations on every continent seek to preserve natural settings and capabilities of the planet. It has finally dawned on some that calling for the protection of the life way of indigenous societies residing in these natural areas, and indigenous societies in general, adds greater strength to the demand that these natural areas be protected from development. The international human rights movement has been a second factor focusing attention on indigenous IPR. The efforts of indigenous societies to preserve and continue their cultural heritages are, tragically, often linked to violence (as in the recent Yanomamo massacre), destruction of the subsistence base, pollution of habitat, and other assaults. At bottom, one concludes, these predations comprise a gradualist form of ethnocide, mobilizing human rights organizations concerned with politically marginal peoples. IPR is a tool for reinforcing and defending cultural integrity against ethnocide. In part, too, IPR’s strength derives from the emergence of indigenous-led advocacy groups in several countries with mature political skills and sufficient resources to insert the indigenous agenda into national political arenas. For these and other reasons, indigenous issues now have more salience generally, and IPR has benefited from this fact.

It is not enough, however, that indigenous IPR be an attractive, widely endorsed idea. IPR for indigenous cultural knowledge encounters a host of problems, both conceptually and practically.

Vehicles for IPR in Western Law and Practice

IPR entails looking for legal vehicles in Western law that could be used by indigenous societies and their advocates to establish their rights of cultural ownership. IPR is not for everyone. IPR is based in Western law and in its system of courts, judges and lawyers. Advocacy of IPR assumes that indigenous societies or their advocates will use a legal system to support, and to defend their rights. Many indigenous persons are uncomfortable with that. Why should an indigenous society, with its own concepts of property and citizenship, adopt campaign of cultural preservation is high. The channelling of rents derived from culturally controlled tourism in the United States into such campaigns reinforces this observation.

4 In various instances in the American Southwest native groups have been more concerned that their intellectual property rights (IPR) for intellectual property rights (IPR) for indigenous peoples is to seek a workable basis by which indigenous societies would own their cultural knowledge, control whether any of this knowledge may be used by outsiders, and for permitted use, require acknowledgement as its source, and a share of any financial return that may come from it. IPR is based in Western law and in its system of courts, judges and lawyers. Advocacy of IPR assumes that indigenous societies or their advocates will use a legal system to support, and to defend their rights. Many indigenous persons are uncomfortable with that. Why should an indigenous society, with its own concepts of property and citizenship, adopt a campaign of cultural preservation is high. The channelling of rents derived from culturally controlled tourism in the United States into such campaigns reinforces this observation.

5 The 1990s are witnessing a dramatic increase in the number of indigenous societies who are waging aggressive campaigns against the predations of outsiders, and also in the frequency of success (see Greaves, 1992, 1994). The demand for cash to press these

6 See the chapter by Klopoff and Gonzales for a detailed discussion of the advantages and cautious entailed in alliances with such non-governmental organizations. See also Kose, 1993, for a compelling account of an Ecuadorian case.

7 See, for example, Brooke, 1993, A, 4.
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the assumptions, rules and institutions of the dominant society in order to claim its rights. The pursuit of intellectual property rights forces indigenous people to play the dominant society's game. To date, many refuse.8

At the same time, indigenous societies are finding that each year they are less isolated and, in any case, that intrusions on their isolation are one-sided. Assaults on their land base, poaching of their habitat, decimation of their food supplies, the impacts of adjacent development projects, disease, the impoverishment of their children, the available theft of their craft markets - these do not cease if one simply stops interacting. Today, an active offensive mounted on the turf of the outside world is central to survival. When indigenous societies seek intellectual property rights for their cultural knowledge it is an effort consistent with many policies.

When legal mechanisms are sought for indigenous IPR, two central legal vehicles are most commonly mentioned: (1) the right to copyright or patent; and (2) the right to cultural knowledge, and the use of contracts granting access to specific elements of cultural knowledge or products under indigenous control. The next two paragraphs will briefly introduce these two general vehicles.

While we commonly think in terms of copyrighting indigenous knowledge, in Western law the ownership of intellectual property actually falls into four major legal types: copyrights, patents, trademarks, and trade secrets. The idea underlying each is that if a person originates ideas of value, that person should enjoy the benefits of ownership of these ideas, including the right to allow or deny others the use of them, and to share financially in profits stemming from their use in the marketplace.9 Someone who steals those ideas (this is, uses them without consent and any required compensation) can be sued for damages and be required to stop using them. Copyrights, patents, trademarks and trade secrets are separate legal domains that together protect most of the aspects of intellectual property that people have heretofore sought to own and protect. Were these rights extended to indigenous cultural knowledge a

8 Richard Dorrerick, Two Parables, eloquently described the feelings of those who hold this view point at the symposium, "Tropical Forest Medical Resources and the Conservation of Biodiversity", January 1991. At the same time, Western style property guarantees are the top priority for most indigenous groups in seeking to establish a secure land base, however dissonant with traditional attitudes toward the landscape. The arena of Western institutions is played in where the stakes are high and there is no other choice.

9 In the case of patents, copyrights and trademarks, this also entails placing the information in public circulation. For patents, others can then invent new, separable potential things stimulated by the registered patent.

10 In industrialized countries such as the U.S. certain types of intellectual property have become so complex that elaborate bodies of specialized law have accumulated to protect ownership. Examples are pharmaceutical formulas, domesticated plant varieties, computer software, and the arts and crafts produced by native societies. These specialized legal domains can be relevant because some indigenous knowledge may fit within these specialized bodies of intellectual property law. See, for example, Chapter 12 by Stephenon.

11 This is well illustrated by Chapter 6 (Clegg et al) and Chapter 10 (Laid).

the individualistic, capitalist principles on which it is based. The U.S. has also aggressively sought strengthening of IPR protections through the Uruguay Rounds of GATT.\(^{13}\) Yet, as the chapters by Audrey Chapman (Ch. 14) and Darrell Posey (Ch. 15) make clear, there are some international avenues where IPR for indigenous culture might be pursued, although the obstacles are large. At the same time, Dean Saagee, in Chapter 13, makes clear that progress at the international level – particularly through the avenues open to the UN Working Group on Indigenous Populations – is essential if improvements at the national level are reasonably to be expected. But none of this is yet in place. For the present, no Indigenous society, in the U.S. or any other country, is able to copyright its corpus of cultural knowledge. I want to turn now to some of the conceptual reasons why this is so.

**Conceptual Issues of IPR**

When lawyers first hear talk about according patent or copyright protection to Indigenous culture, they roll their eyes. They see these immediate conceptual problems that make the whole plan seem frivolous. The first problem is that copyrights and patents are protected knowledge, not for knowledge that already exists. If I write a new children’s story I can copyright it, but I cannot copyright “Goldilocks and the Three Bears.” That which is already in the public domain cannot be copyrighted. The second problem is that copyrights and patents are conferred on individuals (or corporations, legal entities acting as individuals). They give individuals ownership rights that are thereby denied to the other members of their society. Thus, copyrights and patents go to individuals, not to whole societies. The third problem is that copyrights and patents are supposed to confer temporary rights. Though the law allows for renewals, the fundamental principle is that author rights granted to the creator of intellectual property are for a finite number of years (currently the lifetime of the author plus 50 years). Thereafter, the rights of ownership lapse and the material goes into the public domain, owned by no one.\(^{14}\)

None of these three problems is simply an arbitrary practice. Each of the three stems from a mainly Eighteenth Century European philosophy about social progress. In its basic form, the philosophy is this: A society thrives on progress. Creative people provide the innovations that generate progress. To foster creativity, creators must foresee the prospect of benefiting materially from their works. Within

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\(^{13}\) See Amun 1990:39.

\(^{14}\) Trademarks and appellations of origin, however, may be maintained by the owner indefinitely. See Chapter 2 (Oliver, Cleveland et al.) for examples of experimentation in the American Southwest.

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Eighteenth Century capitalism this meant (and still means) vesting creators with the rights of monopoly ownership in exchange for placing the information in the public domain. That monopoly remains in force for only a finite period of time, however, so as to unduly impede further progress and price competition that comes when the innovation is available for all to use. Patents and copyrights, then, reward the innovator sufficiently to encourage creativity, but then lapse so that further development by others, and economic competitiveness, can supplant the temporary monopoly. This linkage between invention and social progress became a foundation of Euro-American social policy in the Eighteenth Century. The United States Constitution specifically provides for copyrights and patents in order “To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.”

Therefore, one can see that to propose allowing Indigenous societies to patent and copyright their knowledge appears on its face to be nonsense. There is no identifiable inventor, all traditional culture is already in a public domain, and the monopoly benefits would, at best, be only for a finite number of years. The present purpose of patents and copyrights is to encourage change, not to maintain the traditional. For those who are unadamned by lawyers, these objections merely define the problem. It indicates what is needed is a new legal instrument – an instrument of the Twenty First Century, that confers on ownership and control of Indigenous culture on those who practice it; an ownership and control that is society-wide rather than individual; that applies to what is already in the public domain; that, like ownership of property, confers an unending, monopoly ownership; and which is intended not to ensure progress, but to better enable Indigenous societies to preserve and benefit from what is theirs.

The practical-minded among us recognize that establishing a new legal concept on a global basis is a goal that, at best, is decades away. Realistically it might never be achieved. A concept with fewer impediments is contracts. If an Indigenous society were sufficiently aware, it could insist that before it shares any cultural knowledge with Vraicious Pharmacists’ employee, that it must have a contract specifying what royalties it will receive in the advent of commercial success. Valid signatures by the two parties make it binding. Contracts can be applied to traditional knowledge, vested in a whole community and can extend for as long as the contract specifies. Conceptually, then, a contract is a more readily made instrument for control of an element of cultural knowledge than is a patent or copyright. As various chapters of this Sourcebook illustrate, many Indigenous groups are already

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\(^{15}\) Article 1, Chapter 8, Constitution of the United States of America
The Acceptability of IPR to Indigenous Groups

The fact is that until now IPR as a concept and a goal has been almost entirely discussed among a few hundred non-indigenous people in industrial countries whose professional or personal concern has been with cultural preservation, with cultural rights, and with associated concerns in environmental conservancy, the preservation of biodiversity, human rights, molecular prospecting, and innovations in law. Regrettably, it cannot be said that there is either widespread awareness or support for IPR among Indigenous societies, indigenous leaders, or indigenous advocacy groups. Indigenous leaders have been present at meetings on IPR held by the Rainforest Alliance, the Society for Applied Anthropology, the International Society for Ethnobiology, the National Science Foundation, and in other settings, but it remains true that IPR so far is neither a widely voiced objective of indigenous groups nor a rapidly spreading idea among indigenous societies. However, that may now be changing.16

At the same time, elements of IPR are emerging in indigenous settings in many places. The National Cancer Institute has implemented a model contract for use in molecular prospecting that accords future royalties to in-country users. These royalties, once earned, potentially, to indigenous societies assisting in the process (see chapter by Cragg et al.). Merck's widely publicized contract for molecular prospecting with Costa Rica's INBIO institute is a parallel example from the corporate side. The paper by Steven King of Shaman Pharmaceuticals illustrates the case of a company working directly with indigenous societies. Cultural Survival Inc. has already developed contracts with Amazonian societies.


17. The Merck-INBIO agreement, however, involves no indigenous signatory or beneficiary. Prospecting in areas claimed by Costa Rica's indigenous groups is, for the present, avoided (Sittenfeld and Guiter 1993: 95-26).

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for the supply of sustainable forest products, has as The Body Shop, a British, international cosmetics company committed to ecologically responsible products. For several years, now, the Native Americans of the Southwest have had exclusive ownership, guaranteed by federal laws, of tribal attributions, tribal trademarks, and similar designations for crafts in the Southwest. And finally, Canadian Inuit villages employ researchers under the stipulation that the villages retain authority over the information gathered, and own the copyrights to authorized publications containing their cultural information. 18

The conclusion that may be drawn from this is that the pursuit of IPR should be continued. Without doubt, however, the involvement of indigenous people in the further development of this concept is urgent. This especially applies to multi-ethnic indigenous advocacy groups which have emerged in many countries of the hemisphere, including Brazil, Ecuador, Bolivia, Mexico, the United States and Canada. These groups have the legal expertise to orchestrate whatever effort may be launched for IPR and the opportunity to shape the agenda through grass roots input. 19

Issues of IPR in Practice

Earlier I discussed conceptual problems that arise in applying copyright and patent concepts to indigenous cultural knowledge. In this final section I want to sketch some of the practical challenges that also arise.

The first problem is designating to whom IPR would apply. Presumably we would not want IPR to apply to traditional knowledge in industrial societies. Nobody should be able to copyright Goldblossoms or patent a dinner fork. The goal is to accord IPR to indigenous societies, which means creating a special legal privilege, a category of people to whom it applies, and an apparatus for qualifying groups claiming inclusion. This would be messy, but not impossible. 20

A more worrisome problem is to recognize that indigenous societies are not alone among people who perceive themselves under threat. The so-called "village peoples," the rural farmers inhabiting the rural areas of most Third World countries, are also demanding separate

18. See, for example, Brit-554 (1992).

19. The draft Covenant on Intellectual and Cultural Property Rights currently circulating among indigenous and international organizations in a particularly goodexample of a grassroots involvement. The Covenant is mentioned in Appendix 1 of Chapter 15 (Pouey).

20. For example, U.S. Native American societies identified and acceded numerous rights invariable to other citizens, such as in a judicially afforded being preference for positions in the Bureau of Indian Affairs, based on reasoning from first- or affirmative action.
Another question is, who monitors whether the terms of IPR contracts or copyrights are being fulfilled and royalties properly paid? And if piracy or fraud is discovered, who goes to court? who pays the lawyers, and who gets a fee for doing all this? Here’s suspect that multi-lateral advocacy organizations have a logical role.

What is more important, however, is to agree that these issues are ones that indigenous people themselves will resolve. Non-indigenous advocates must respect the prerogative of indigenous peoples to supply their own answers to these questions. Meanwhile, the lack of easy answers should not deter many non-indigenous advocates from lending their help in securing IPR in those forms desired by indigenous communities, and on their terms.

Closing Thoughts

Another question, which is challenging existing intelectual property laws, is the rapidly developing technology for transforming any initial phenomenon into something else. Whether it’s a new medicinal they, or a novel sound from a musical instrument, increasingly it is the jodex, not the phenomenon, that is of value. Chemists in the laboratory quickly seek out parallel compounds that do the same job more effectively, with fewer side effects, or for new applications the original substance couldn’t address. So, too, musical sounds need no longer rely on physical instruments, but on electronic synthesis. The group that sparks a surge of new innovation will face serious hurdles in claiming a share of the derivatives. In my estimation, this is the most serious problem for IPR; knowledge that has been carefully guarded against change becomes profoundly weak in demonstrating consequent access to the changes it stimulates.

Before closing, I want to offer one rather speculative thought that may be worth pursuing. Unlike the previous issues in this section, this is not a problem but, rather, an effort to better delimit where IPR may best apply. In a conference two years ago sponsored by the Rainforest Alliance a man from an African society law, for Africans, villagers. These associations are thus positioned to become key beneficiaries of pharmaceutical contracts even through the ownership of such information is more broadly distributed. See McGowan and Udeha’s (Chapter 4) for more on this point. 23 A clear example is for very rapidly developed laboratory synthesis of the anti-cancer drug, Taxol, previously available only from the Pacific Yew-tree (of Coitota and Kondysh 1955-1963).

24 A recent object lesson is the bitter, unproductive lawsuit by the computer maker, Apple, against the giant software manufacturer, Microsoft, over infringement on screen icons and other elements of software associate with Apple’s product (see Wall Street Journal 1993).
little use for IPR. In most African states, he argued, the larger tribal societies see themselves as rightful elements of the nation's government. Owning their cultural knowledge is not the issue, owning a share of the central government is.

This may help us better understand where IPR is likely to be regarded most favorably, namely, where traditional societies understand themselves to be enclaves, however unwilled, within a dominant society, economy and legal system that is controlled by others. While this describes the structural position of most of the world's indigenous societies, it also happens to fit village-level communities on every continent where distinctive local knowledge of plants may be commercially interesting. The chapter by McGraw and Udinina, gives a compelling example for Nigeria. On the other hand, IPR may be of particular utility to Indigenous societies who, sovereignty claims notwithstanding, find themselves picked over by outsiders who invaded, subdued, and still control. Despite this litany of issues, both conceptual and practical, IPR for Indigenous peoples is a goal that is making progress. The progress is urgent because Indigenous peoples remain under siege and badly in need of tools and income to protect themselves in a world where the last vestiges of protective isolation are evaporating like the morning mist.

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