

## Editorial

# The quest for ‘real’ protection for indigenous intangible property rights

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Intellectual property rights (IPRs) and the regimes of protection and enforcement surrounding them have often been the subject of debate, a debate fuelled in the past year by the increased emphasis on free-trade negotiations and multi-lateral treaties including the now-rejected Anti-Counterfeiting Trade Agreement (ACTA) and its Goliath cousin, the Trans-Pacific Partnership Agreement (TPPA). The significant media coverage afforded to these treaties, however, risks thrusting certain perspectives of IPR protection and enforcement into the spotlight, while eclipsing alternative, but equally crucial voices that are perhaps in greater need of legitimate dialogue to safeguard their own collection of intangible rights. Caught in the vortex of inadequate recognition and ineffective protection, are the communal intellectual property rights of indigenous communities, centred on traditional knowledge (TK), traditional cultural expressions (TCE), expressions of folklore (EoF) and genetic resources (GR).

The fundamental incompatibility between current IPR regimes and the rights of indigenous peoples stems largely from the lack of understanding of the driving forces that have led to the development of TK, TCEs, EoFs and GRs – that of the protection of whole indigenous cultures through the preservation of the traditional knowledge acquired by these communities *as a whole*.

The issues are complex. Professor James Anaya's 2014 keynote speech at the 26<sup>th</sup> Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore at WIPO<sup>1</sup> highlighted the differences governing the intangible rights of indigenous peoples generally, and why these world views have so often been left out of the current mainframe of IPRs. Whereas, the majority view of IPRs tends to focus on the rights of the individual and their protection as such, indigenous cultures are inherently built over

centuries and across generations on communal understandings and organic exchanges of knowledge, making it practically impossible to ascribe the ownership of a certain set of IPRs to one or a few individuals.

As Professor Anaya articulates and the authors of this special issue of *JIPLP* varyingly contemplate, the similarities between the inadequacies of the protection of tangible rights of indigenous peoples (eg indigenous land rights) and that of their intangible rights protection (including IPRs) tend to stem from a common source – the failure to acknowledge the “inherent logic of indigenous peoples’ world views”.<sup>2</sup>

Perhaps the solutions lie not just in finding ways to include indigenous IPRs in current IPR regimes, but through the facilitation of an entire paradigm shift to capture the nuances of these issues both effectively and precisely. How, for instance, can indigenous IPRs be valued commercially, and how may adequate compensation models be developed in exchange for the commercial use of these rights? A key to increasing the recognition of the inherent value of indigenous IPRs within their traditional cultural settings may lie in developing methods to properly value this worth in tangible terms. What seems necessary is a model to adequately measure the significance of indigenous IPRs, starting at the source (the indigenous community), and finding ways of translating this value into benefit systems that can be returned to the communities from which the IPRs were sourced. Hence recognition is attributed to the crucial part these IPRs play within the cultures from which they are derived.

The strength of intellectual property law lies in its ability to meet the demands of a frenetically changing world, thus affording it vast amounts of power in shaping the law of the future; but this brings with it the

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1 James Anaya (Prof.), UN Special Rapporteur on the Rights of Indigenous Peoples, *Keynote address at UN Special Rapporteur on the Rights of Indigenous Peoples: Intellectual property and genetic resources: What is at*

*stake for indigenous peoples?* (3 February 2014), 6<sup>th</sup> Session of the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Geneva. Address available online at: <http://unsr.jamesanaya.org/statements/intellectual-property-genetic-resources-and-the-rights-of-indigenous-peoples> (last accessed: 9 February 2014).

2 *Id.*

challenge – can that power be harnessed to adequately protect rights of the past? Even if the answer is in the affirmative, it does not necessarily follow that the purpose of IPR protection should be to reduce IPRs to protectable commodities solely for the purpose of commercial exploitation. Protection of IPRs might be secured for

any number of reasons, including the recognition of the right for ownership of those rights to be retained within the community. IPRs thus have the capacity to function both as shields and swords. Such weaponry however brings with it obligations: “With great power, comes great responsibility”.<sup>3</sup>

3 Stan Lee & Steve Ditko, *The Amazing Spider-Man: Amazing Fantasy #15*, Marvel Comics (Aug. 1962). This quote has alternately been attributed to Benjamin “Uncle Ben” Parker and the French writer, François-Marie

Arouet (Voltaire), bringing up the completely separate issue of the intellectual property rights around misquotations, if there are any.