

PROTECTING CULTURAL INDUSTRIES TO PROMOTE CULTURAL DIVERSITY: DILEMMAS FOR INTERNATIONAL POLICY-MAKING POSED BY THE RECOGNITION OF TRADITIONAL KNOWLEDGE

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This section of the volume is entitled, “Assessing the Suitability of Intellectual Property Rights for Traditional Knowledge *and* Cultural Industries,” yet none of the other contributors address the relationship between proposed rights and industries of a cultural nature.¹ I will suggest that it is precisely this relationship that needs to be considered and that the policy issues posed by considerations of cultural identity and cultural diversity are likely to be the most difficult ones to engage in ongoing international negotiations with respect to cultural forms, forms of property, norms of expression and the optimal range of public goods.

I. *An Anthropological View of Traditional Knowledge*

The term “traditional knowledge” is most often used to refer to knowledge, innovations, and practices relevant to the preservation of biological diversity, pursuant to the Convention on Biological Diversity,² which may include knowledge concerning agricultural and medicinal techniques as well as forms of animal and landscape management. The terms indigenous knowledge, tribal knowledge, farmers’ knowledge, rural knowledge and folk knowledge are also

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¹ The Frankfurt School tradition of critical theory coined the term “The Cultural Industry” to refer to industries of mass culture. My use of the term cultural industries is not a pluralization of that term (now supplanted by the concept of the entertainment industry), but rather an acknowledgment of the cultural dimensions of human industry and the desire to create new opportunities for those who understand their efforts in cultural terms and seek acknowledgment for and benefit from the value of these efforts to human sustainable development.

² Convention on Biological Diversity (CBD), 5 June 1992, 31 I.L.M. 818 (1993).

widely used. The coupling of traditional knowledge with folklore by the World Intellectual Property Organization (WIPO) in its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore has encouraged intellectual property scholars to use the term more loosely so as to include other forms of collectively held cultural goods. Most recently, the term “traditional cultural expressions” has been adopted by WIPO as a synonym for “expressions of folklore” because the latter was considered to have negative connotations by many communities for whom it implied antiquated knowledge. Nonetheless, the cultural dimensions of traditional knowledge are often avoided in legal and economic considerations of the issue and the importance of cultural issues in emerging struggles for social justice is even more rarely appreciated.³

Traditional knowledge is clearly social, innovative, dynamic and often tacit in nature. It is often uncodified or codified in forms that may be culturally specific and difficult to access. Recognizing its value may require new forms of intellectual and political discourse. As the Assistant Director-General for Natural Sciences at the United Nations Educational, Scientific, and Cultural Organization (UNESCO) observed, there is a tendency in the Western world to reduce indigenous knowledge to those elements judged of most interest to science, which is regarded as a rational, objective and culture-free activity.⁴ We believe that the rational and irrational are easily separated and that fact can be distinguished from fiction, or truth from superstition.

Philosophers, historians, and cultural studies theorists have shown us, however, that science has developed and continues to work through very specific cultural practices that are neither universal nor sufficient to meet the challenges we face in the twenty-first century. Because traditional knowledge may encode very sophisticated information about ecology,

³ For considerations of the role of traditional knowledge in new social movements that are difficult to classify using modern European rights categories (social, economic, cultural, political or civil) see Rosemary J. Coombe, *Protecting Traditional Environmental Knowledge: Intellectual Property, Human Right or Intrinsic to an Alternative Form of Sustainable Development?* U. FLA. INTL. L. REV. -- (2004).

⁴ Walter Erdelen, *Linking Traditional and Scientific Knowledge for Sustainable Development*, Opening Address at the World Summit on Sustainable Development (29 Aug. 2002), available at http://portal.unesco.org/en/ev.php@URL_ID=5570&URL_DO=DO_TOPIC&URL_SECTION=201.html.

medicine, agriculture and animal care and behavior, judging it from the purely rationalistic perspective of science alone is not only ethnocentric, it also fails to recognize its efficacy and import for human developmental objectives.

Anthropological scholarship provides ample evidence of the validity and value of such knowledge and suggests that the very Western definition of “science” creates narrow and inappropriately ethnocentric boundaries around the knowledge relevant to sustainable development. “Do Cree hunters practice science?” Colin Scott asks.⁵ If by science we mean “a social activity that draws deductive inferences from first premises, that these inferences are deliberately and systematically verified in relation to experience, and that models of the world are reflexively adjusted to conform to observed regularities in the course of events, then yes, Cree hunters practice science – as surely all human societies do.”⁶ If however, we need to restrict science by recourse to Western metaphors that oppose nature to mind and eliminate any cultural or spiritual elements, then we narrow the field considerably. As Carlos Correa suggests with respect to traditional medicine, methods of diagnosis and treatment are strongly influenced by cultural values; they may not *translate* without an understanding of the social and spiritual context in which they are performed and may become ineffective when applied in radically different contexts.⁷

Some processes “work” only when ritually administered. In her excellent study of traditional medicine in Zimbabwe, anthropologist Chloe Frommer shows that it involves cultural practices central to a social and symbolic system that links individuals, families and communities in ongoing relationships.⁸ Their “protection,” she suggests, will involve the “protection” of ways

⁵ Colin Scott, *Science for the West, Myth for the Rest? The Case of James Bay Cree Knowledge Construction*, in *NAKED SCIENCE: ANTHROPOLOGICAL INQUIRIES INTO BOUNDARIES, POWER, AND KNOWLEDGE* 69, 69 (Laura Nader ed., 1996).

⁶ *Id.*

⁷ Carlos Correa, *Protection and Promotion of Traditional Medicine: Implications for Public Health in Developing Countries* (South Centre 2002), at <http://www.southcentre.org/publications/traditionalmedicine/toc.htm> (last visited 3 June 2003). See also Anthony Taubman, *Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge* [this volume].

⁸ Chloe Frommer, *The Cultural Right to Practice in Traditional Medicinal Knowledge in Zimbabwe*, at <https://upload.mcgill.ca/cdas/frommer.pdf> (last visited 3 Jun. 2003).

of life. Although this knowledge can be and is used in non-customary ways, especially by those healers who have held themselves out as a trade union of experts, its abstraction from particularized experiences in local villages may disable its continuing evolution and growth as a dynamic system.

The growing international recognition of this knowledge may afford new opportunities for practitioners, but the growing global emphasis on empirical pharmacology may overemphasize technical expertise without providing any protection for the social and ritual matrix in which healers have the most power and in which the most effective innovations in traditional medicine emerge. This is one of the reasons that many customary healers object to the use of databases. Although more widely known practices and plant sources may be archived as public domain material that would ideally serve as prior art in patent searches, the most significant knowledge cannot be codified or made static and retain all its social, physical, and psychological effects.⁹ Perhaps this is less true of local agricultural knowledge, which although apparently held in culturally specific ways, is often, if not always, combined with more “scientific” forms of knowledge in hybrid forms.¹⁰ In any case, there appear to be fewer objections to the creation of databases that accumulate agricultural knowledge.

II. *The Intellectual Property Conundrum*

Intellectual property scholars might be tempted simply to ignore such knowledge as necessarily falling outside their purview. After all, most intellectual property regimes operate under the assumption that protected technologies and creative works may be known and available for use through standard forms of publication that do not require any particular channels of communication beyond those necessary to achieve an arms-length commercial licensing

⁹ *Id.*

¹⁰ For an extended discussion, see AKHIL GUPTA, *POSTCOLONIAL DEVELOPMENTS: AGRICULTURE AND THE MAKING OF MODERN INDIA* (Duke University Press 1998). Similar arguments about the necessary hybridization of traditional agricultural knowledge are made by Arun Agrawal, *Dismantling the Divide Between Indigenous and Scientific Knowledge*, 26 *DEV. & CHANGE* 413 (1995) and Arun Agrawal, *Indigenous Knowledge and Scientific Knowledge: Some Critical Comments*, 3(3) *INDIGENOUS KNOWLEDGE AND DEV. MONITOR* (1995), available at <http://www.nuffic.nl/ciran/ikdm/3-3/articles/agrawal.html>.

transaction or to support an appeal to an administrative licensing body. Acquiring traditional knowledge, however, may require rather different forms of social relationship that involve trust, collaboration, and possibly even apprenticeship. Indeed, one of the byproducts of the ongoing negotiations around the protection of traditional knowledge under the Convention of Biological Diversity has been the emergence of cross-cultural exchanges between traditional knowledge practitioners in different indigenous communities. If Cree and Mayan healers visit each others' territories in Quebec and Mexico to share their practical knowledge and insight, it is because they know that this knowledge cannot be conveyed abstractly, but involves local interpretation and perception. These powers of healing may be locally understood as ancestral gifts, but traditional lore that is individually inherited by consecrated authorities may still be shared with those who show respect for the cultural context of their significance. This kind of sharing requires forms of respect that our intellectual property laws, with the possible exception of moral rights traditions, do little to encourage.

To the extent that trade secret protection relies upon relationships of confidentiality that are often akin to fiduciary obligations, it does hold some promise for modeling rights to account for the value of traditional knowledge, provided that the value to be protected is recognized as more than simply commercial. The TRIPS Agreement also requires that, in the course of repressing unfair competition, members of the WTO must protect "undisclosed information" against unlawful acquisition,¹¹ which would reasonably include breaches of trust and confidentiality and arguably might provide a greater scope of protection than the common law doctrine of trade secrets. This form of protection is being modified for use by local communities with respect to the sharing of information registered in traditional knowledge databases.¹²

¹¹ Agreement on Trade-Related Aspects of Intellectual Property Rights, 15 Apr. 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex IC, LEGAL INSTRUMENTS –RESULTS OF THE URUGUAY ROUND vol. 31, 331 I.L.M. 81 (1994) [hereinafter TRIPS Agreement], art. 39.

¹² One recent endeavor involving indigenous peoples in Ecuador uses a trade secret model to protect traditional knowledge in closely held databases. It is discussed in Graham Dutfield, *Trips-Related Aspects of Traditional Knowledge*, 33 CASE W. RES. J. INT'L L. 233, 264-65 (2001). Similar initiatives are underway in Peru and in India (Personal communication from Alejandro Argumedo, and Anil Gupta at the World Intellectual Property Organization Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fourth Session (Dec. 2002)).

We should more generally consider how intellectual property rights could be shaped to promote the sharing of traditional knowledge and practices in a fashion that respects those who hold it. Indeed, the recent proliferation of aboriginal networks and international communities of shamans and healers communicating through new information technologies suggests that a cross-cultural commons is in fact developing. As I have argued extensively elsewhere, however, when it comes to traditional knowledge, the goal of providing and protecting public goods cannot be met by simply assuming their position in a singular public domain, particularly if that public domain is considered merely a source of resources free for general appropriation.¹³ Multiple public domains that serve a number of distinct “publics” may be more appropriate.

Proposals for the protection of cultural forms have a tendency to annoy or provoke many American intellectual property scholars, who associate progressive positions on most copyright and trademark issues with the principle of fair use and the First Amendment. From an international perspective, however, freedom of expression is only one of a number of important human rights, and individual rights must be balanced with collective social and cultural rights. This appears to be recognized by many jurisdictions with significant indigenous populations. For example, in Australia, amendments scheduled to be introduced into Parliament in 2004, would enable indigenous communities to take legal action to protect against inappropriate, derogatory or culturally insensitive use of copyright material.¹⁴ As a collective moral right, this provision would provide communities with “legal standing to safeguard the integrity of creative works embodying traditional community knowledge and wisdom.”¹⁵ The legislation is designed to enable users of protected works to identify those works to which the new rights attach and to “facilitate cooperation and respect between artists, authors, film-makers and indigenous

¹³ Rosemary J. Coombe, *Fear, Hope and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property*, 52 DEPAUL L. REV. 1171 (2003).

¹⁴ Minister for Immigration and Multicultural and Indigenous Affairs, Government of Australia, *Indigenous Communities to Get New Protection for Creative Works*, at <http://www.minister.immi.gov.au/atsia/media/media03/r03031.htm> (19 May 2003) [hereinafter *New Protection for Creative Works*]. The bill was intended for introduction to Parliament in the spring of 2004 but appears to have been postponed. See Copyright Amendment (Indigenous Communal Moral Rights) Bill, Legislation Proposed for Introduction in the 2004 Spring Sittings at <http://www.dpnc.gov.au/pdfs/proposed.legislation.pdf> A succinct history of the bill is provided by the Australian Copyright Council, *Article for Australian Intellectual Property Law Bulletin: Indigenous Communal Moral Rights*, at <http://www.copyright.org.au/PDF/Articles/A03n24.pdf>

¹⁵ *Id.*

communities.”¹⁶ The latter objective is significant. These new rights are meant not simply to protect abstract works, but to forge cross-cultural understanding and relationships. Certainly, the proposed law will tend to limit activities in the public domain, if by these we mean totally unconstrained arts of appropriation. There is no way of knowing whether Australians will see fewer culturally hybrid works as a consequence of this need to consult with Aboriginal peoples, but those works that do derive from aboriginal cultural traditions are much less likely to misrepresent them or cause injury to those obliged to protect them.

Although WIPO’s Intergovernmental Committee acknowledges that the propriety of relegating traditional knowledge to public domain status remains one of the most controversial areas in formulating policy, they also recognize that a wholly unregulated public domain will not meet the needs of indigenous and local communities.¹⁷ The rights of states and communities to prevent uses that falsely suggest a connection with a cultural community, that are derogatory or offensive, or that make use of sacred or secret knowledge are affirmed.¹⁸

III. *Cross-Cultural Relations and Respect for Religious Diversity*

With respect to environmental traditional knowledge, the benefits of consultation and engagement with indigenous peoples are also becoming more evident. Recent research tracking seal migration in Alaska was successful precisely because it combined the traditional hunting knowledge of native peoples with new technologies of satellite tracking. The combination of these culturally distinct forms of knowledge led to the first success in tracking a ringed seal in open sea ice. Not only was knowledge about the seal’s life history and migration improved for both parties, but the project created “an enhanced trust and mutual respect between scientists and custodians of traditional ecological knowledge.”¹⁹ This newfound trust and respect bodes well

¹⁶ *Id.*

¹⁷ Consolidated Analysis of the Legal Protection of Traditional Cultural Expression, WIPO/GRTKF/IC/5/3, at 6 (2 May 2003).

¹⁸ *Id.*

¹⁹ Gay Sheffield of the Alaska Department of Fish and Game (ADFG), *quoted in* Press Release, Natural Science Foundation, NSF-Funded Researchers Track Alaska Seal Migration for the First Time (29 Oct. 2001), at <http://www.nsf.gov/od/lpa/news/press/01/pr0186.htm>.

for the cross-cultural relationships of mutual learning that will be crucial to the larger National Science Foundation (NSF) project of establishing an onshore environmental observatory in the Bering Strait that collects chemical, biological and physical data on the transport of nutrient-rich waters.

Freedom of religion and respect for religious diversity are also principles that must be taken into account when we consider the intersection of intellectual property and traditional knowledge. In many societies a people's religion or, more specifically, the cosmology of a given community encodes information and institutions basic to economy and ecology. Traditional ecological knowledge may involve beliefs that would appear "superstitious" or "primitive" to an outsider. Zapotec science, for instance, is heavily informed by spiritual beliefs but encodes insights that are empirically accurate, sophisticated and pragmatic. Athapaskans and Australian aboriginal traditional knowledge succeeds in enabling hunting and gathering in marginalized environments, and it has become legally obligatory in many jurisdictions to consult with holders of this knowledge in formulating environmental impact assessments. Although it might be more convenient for government decision makers simply to consult a database, in most cases it is recognized that proper regard for the environmental insight encoded by traditional knowledge requires consultation with, if not prior informed consent from and benefit-sharing arrangements with those who hold it. Moreover, demands that peoples with oral traditions publish their knowledge for it to be taken into account (as prior art or otherwise) are inherently discriminatory.

As anthropologist Colin Scott notes, the mere presence of aboriginal peoples on environmental co-management boards will not necessarily motivate a cultural hybridization of environmental knowledge and practice in Canada. What is needed is support for the intensive involvement of aboriginal governments as research partners in all matters of resource extraction, with a view to developing activities that promote long term sustainability of resource bases and create revenue and benefit-sharing opportunities to maintain economically viable communities within their traditional territories.²⁰ We need, in other words, to foster cultural industries.

²⁰ Colin H. Scott, Institute of Intergovernmental Relations Conference, Co-management and the Politics of

Successful instances of environmental management may also involve respect for and deference to customary legal norms. Recognition of customary legal norms regarding traditional knowledge is acknowledged by the WIPO Intergovernmental Committee and is, from my perspective, one of the most important aspects of Anthony Taubman's proposal.²¹

IV. Respecting the Holistic Nature of Traditional Knowledge

To divorce "science" from "religion" and to tear away the "cosmological" or spiritual gloss from an allegedly "practical" core will undermine many forms of traditional knowledge, because these may be part of more integrated systems of understanding. The holistic nature of indigenous worldviews can certainly be exaggerated, but the wholesale dismissal of this possibility under the guise of rejecting "romanticism" represents more an anxiety on the part of Western scholars than the results of empirical inquiry (and shows a remarkable ignorance about Romanticism itself). If, for instance, certain Mexican plants, which Western science regards as belonging to the same species, turn out to possess very different biochemical properties that are indicated by indigenous categorical systems and local knowledge,²² then dominant scientific paradigms obscure potentially important forms of variability that constitute the biological diversity we seek to protect. As various studies commissioned by the United Nations suggest, when we lose languages and the cultural categorical systems they encode, we also lose points of entry into new forms of diversity and worlds that no single language or terminology can encompass.²³

These other, more holistic forms of 'human ecology' are known by people living in particular environments. Instead of merely conceding that their knowledge is valuable, we should

Aboriginal Consent to Resource Development (1 Nov. 2002), at http://www.iigr.ca/conferences/archive/pdfs3/Colin_Scott.pdf (1 Nov. 2002).

²¹Taubman, above n. 6.

²²See Cori Hayden, *WHEN NATURE GOES PUBLIC: THE MAKING AND UNMAKING OF BIOPROSPECTING IN MEXICO* (Princeton University Press, 2003).

²³ See the studies collected in Posey, Darrell Addison (ed.). *CULTURAL AND SPIRITUAL VALUES OF BIODIVERSITY: A COMPLEMENTARY CONTRIBUTION TO THE GLOBAL BIODIVERSITY ASSESSMENT* (Intermediate Technology Publications, 1999). Published for and on behalf of United National Environment Programme, Nairobi (1999).

consider means to respect their lives and expertise and support their livelihoods. This is why *in situ* rather than *ex situ* forms of preserving biological diversity have been given priority in international negotiations with respect to implementing the CBD's provisions on protecting and maintaining traditional knowledge and an "ecosystem approach" favoured.²⁴ One of the more powerful arguments made against any form of "protection" for traditional knowledge that abstracts it from the lifeworlds of those who hold it is made by the agricultural economist, Arun Agrawal:

If the primary motive for highlighting the knowledge of the marginalized poor is to find them a greater voice in development, then it would seem preferable to foreground this objective, rather than framing it in terms of the confounding rhetoric of indigenous vs. Western/scientific knowledge. If indigenous knowledge systems are disappearing, it is primarily because the pressures of modernization and cultural homogenization, under the auspices of the modern nation-state and the international trade system, threaten the lifestyles, practices and cultures of nomadic populations, small agricultural producers and indigenous peoples. The appropriate response from those who are interested in preserving the diversity of different knowledge systems, might then lie in attempting to reorient and reverse state policies to permit members of threatened populations to determine their own future, thus facilitating *in situ* preservation of indigenous knowledge. *In situ* preservation cannot succeed unless indigenous populations and local communities gain control over the use of the lands on which they dwell and the resources on which they rely. Those who are seen to possess knowledge must also possess the right to decide on how to conserve their knowledge, and how and by whom it will be used.²⁵

Such an approach would undoubtedly be more costly for outsiders, and the political and ethical challenges we face in creating the mechanics for implementing it are daunting. Still, it is preferable to *ex situ* forms of protection, which are more likely to freeze knowledge in its current forms than promote ongoing innovation within and across traditions and are more likely to provide opportunities only to those who are socially connected to powerful external actors.

At the World Conference on Science, organized by UNESCO in cooperation with the International Council for Science in 1999, a set of recommendations was addressed to

²⁴ CBD, above n. 2, Article 8. For a list of considerations, guidance to the Parties and related references see items collected at www.biodiv.org/convention/articles.asp?a=cbd-08&inf=1#inf

²⁵ Arun Agrawal, *Indigenous and Scientific Knowledge: Some Critical Comments*, 3(3) INDIGENOUS KNOWLEDGE AND DEV. MONITOR (1995), at <http://www.nuffic.nl/ciran/ikdm/3-3/articles/agrawal.html>.

governments, non-governmental organizations (NGOs), and international organizations. It advised them to “sustain traditional knowledge systems through active support to the societies that are keepers and developers of this knowledge, their ways of life, their languages, their social organization and the environments in which they live, and fully recognize the contribution of women as repositories of a large part of traditional knowledge.”²⁶

Peter Drahos has suggested that “other-regarding preferences can only be taken up by unpredictable alliances amongst unknown actors.”²⁷ The movement to protect traditional knowledge is not limited to indigenous peoples, nor is the identity of actors recognized as “indigenous” static in nature. On the contrary, the identities of actors deemed to be indigenous or of communities recognized as local and embodying traditional lifestyles are emergent. As Benedict Kingsbury has exhaustively documented, there is no singular definition of indigenous peoples under international law, and it is increasingly accepted as a norm of customary law that indigenous peoples identify themselves.²⁸

V. *Political Dimensions*

Increasingly, groups of healers, tribal peoples, and farmers, many of whom are women, are organizing to assert rights with respect to their knowledge, practices, and livelihoods. Political and legal anthropologists have long understood that people’s and peoples’ identities do not exist “before the law,” but that identities are shaped in relation to legal regimes that accomplish new forms of interpellation. In the short term, this trend is likely to create conditions of uncertainty and potential for conflict. Any new forms of collective rights will undoubtedly produce political effects in situations where community identities are undefined. Anthropologist Shane Green’s study of the local struggle over benefit-sharing provisions in the International Cooperative Biodiversity Group (ICBG) bioprospecting agreements with “the Aguaruna” in Peru

²⁶ Erdelen, above n. 3.

²⁷ Peter Drahos, *The Regulation of Public Goods* [this volume].

²⁸ Benedict Kingsbury, *Indigenous Peoples in International Law: A Constructivist Approach to the Asian Controversy*, 92 AM. J. INT’L L. 414 (1998).

is illustrative.²⁹ These approximately 240 communities “are at the forefront of Amazonian indigenous political organizing” and are affiliated with local organizations and panindigenous organizations advocating at national and international levels. Nevertheless, the formulation of a “know-how license” with universities and a pharmaceutical company to share benefits from a collection of plant genetic resources and related knowledge created a crisis in terms of the legitimate location of political authority and representation.³⁰

Anthropologist Cori Hayden recounts similar struggles over bioprospecting in Mexico with respect to the role of “local communities” and regarding the legitimacy of “community” consent to the collection of plant resources and traditional medicinal knowledge under two other ICBG agreements.³¹ Ironically, whereas the Peruvian instance gave rise to unrealistic expectations of future wealth on the part of the indigenous groups involved, the Mexican crisis resulted in a situation where scientists involved in one project went out of their way to avoid dealing with local communities – picking up plants from the sides or roads or purchasing them dried in public markets so as to avoid any issues of distributional ethics. The Chiapas-based project, however, gave rise to an international controversy about the ethics of “biopiracy” so widely-publicized and so rancorous that an expensive and time-consuming research project involving the collection of Mayan medicinal knowledge was eventually cancelled with great bitterness and recriminations.

Still, it is important to keep in mind that these controversies arose precisely because the peoples involved had no rights and were therefore contracting in a political and legal vacuum. Without state or international recognition of them as having juridical identities, contracts involving “local or indigenous communities” may well invite political opportunism from many quarters. We should not underestimate the role of international NGOs in these disputes, who may polemically politicize these issues for their own publicity purposes. Anthropological work

²⁹ Shane Green, *Intellectual Property, Resources, or Territory? Reframing the Debate over Indigenous Rights, Traditional Knowledge, and Pharmaceutical Bioprospection*, in TRUTH CLAIMS AND HUMAN RIGHTS 229, 232 (M.P. Bradley & P. Petro eds., 2002). See also Shane Green, *Indigenous People Incorporated? Culture as Politics, Culture as Property in Pharmaceutical Bioprospecting*, 45 CURRENT ANTHROPOLOGY 211 (2004).

³⁰ *Id.*

³¹ Hayden, above n. 21.

suggests that those villages enmeshed in social networks that link them to national and international NGOs may in fact be in the best position to represent themselves as “local” communities, to characterize their knowledge as “traditional,” and to defend their identity as “indigenous” in parts of the world where peoples who rely upon subsistence economies are marginalized or under pressures to assimilate.³² However, here again we need to understand that these pressures and accompanying inequities emerge in situations where states have recognized no rights and peoples are compelled to appeal to international NGOs for protection from incursions into their territories that threaten their traditional subsistence resources and practices.

However daunting the political challenges ahead of us, it is both rather late and rather patronizing to assume, as David Lange appears to do,³³ that indigenous, tribal, rural, or local “others” are indifferent to investments in and benefits from the new recognition afforded by emerging international legal regimes. The claim that “we” should just leave “them” alone is simply a recipe for the continuing loss of languages, livelihoods, and the resources and knowledge that the world’s poor rely upon for more than eighty five percent of their food, fuel, shelter and medicine.³⁴ It is also a recipe for undermining the continued survival of modern medicine and agriculture, which are crucially dependent on the genetic resources produced with the knowledge held by the world’s poor. The global project of compensating people for the contributions of their cultural industries to global agriculture, medicine, and environmental sustainability is not just something externally imposed upon them, but a struggle in which they are centrally involved. Having had the privilege of sitting in on the Indigenous Working Group sessions during several CBD meetings, I can attest to the keen desire of many representatives of indigenous, forest-dwelling, rural, and farming peoples (as well as traditional medicinal

³² Tania Murray Li, *Articulating Indigenous Identity in Indonesia: Resource Politics and the “Tribal Slot”*, 42 COMP. STUD. SOC’Y & HIST. 149 (2000). See also the various studies collected in TANIA MURRAY LI, *TRANSFORMING THE INDONESIAN UPLANDS: MARGINALITY, POWER AND PRODUCTION* (Harwood Academic Publishers 1999).

³³ David Lange, Comment: *Traditional Knowledge, Folklore, and the Case for Benign Neglect* [this volume].

³⁴ For an extensive discussion of the importance of traditional knowledge relating to biological resources both to the world’s most vulnerable peoples and to “modern” industries, see Rosemary J. Coombe, *The Recognition of Indigenous Peoples’ and Community Traditional Knowledge in International Law*, 14 ST. THOMAS L. REV. 275 (2001).

practitioners and women's alliances) to forge new forms of economic opportunity and recognition for their peoples that would revitalize and enable them to maintain their traditional cultural identities. Nonetheless, there remains great uncertainty about the appropriate means for accomplishing this and a continuing distrust of intellectual property protection (which many see primarily as a means for corporate expropriation and capital accumulation).³⁵ The WIPO secretariat is aware of these tensions and has recognized that it must reach out to new beneficiaries and provide them with some stake in the intellectual property system if they are to hold it in any esteem.

Many environmental, indigenous, farmers, and women's groups, as well as food activists and health practitioners, are committed to seeing intellectual property regimes change to prevent practices -- described as "biopiracy" by some and irresponsible granting of patents by others -- as well as the patenting of genetic resources, genetically modified organisms, and technologies that limit plant reproduction. Thousands of Indian villagers collectively organized more than a decade ago to oppose the patenting of seeds. Hundreds of thousands more are now engaged in the project of creating databases of their own knowledge and looking for means to use it to leverage themselves out of poverty. Such intellectual property issues motivated many grassroots political struggles long before they appeared on the scholarly agendas of intellectual property professors in the developed countries. Rather than imposing an agenda upon them, I would suggest that "we" are only beginning to learn from them what the salient issues are, and an ongoing dialogue with the participants in this struggle is in order before "we" leap to judgment about what "they" require.³⁶

³⁵ Scholars are similarly divided. Compare, e.g., Taubman, above n. 6 (expressing reservations about the application of IP regimes to TK) with Thomas Cottier & Marion Panizzon, *Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection* [this volume] (strongly advocating IP protection).

³⁶ The continuing exclusion of NGOs representing indigenous peoples and local communities embodying traditional lifestyles from academic conferences addressing traditional knowledge is indicative of this refusal to engage with, or to show respect for, those who hold this knowledge. Even when the rationale for limiting participation is that the conference is academic, the indigenous and Third World academic authorities who actually participate in these international legal deliberations are not invited to represent the participants in these global negotiations.

VI. *Human Rights, Cultural Diversity, and Public Goods*

There appears to be some consensus that intellectual property and trade-related intellectual property regimes will need to be transformed to prevent expropriations of traditional knowledge and genetic resources and appropriations of cultural heritage. They will also need to operate more transparently within an expanded global institutional framework to which they are accountable. Similarly, the exercise of intellectual property rights by private actors should be monitored to ensure that other, more fundamental rights are not being violated. Peter Drahos rightly asserts that any new intellectual property “solutions” must be tied to global norms.³⁷ The only global normative framework that currently has sufficient legitimacy to command the allegiance of the diverse political actors engaged in this dispute is that provided by international human rights, although their consideration has been remarkably absent in discussions of the issue in the United States. Both the activities of the WTO and the interpretation of the TRIPS Agreement are subject to international human rights law. Intellectual property rights are cultural rights within the international human rights framework.³⁸ As such, they are integrally related to other recognized human needs bearing on cultural expression, the maintenance of cultural diversity, the protection of cultural heritage, and the right to participate in cultural life of the arts and sciences in culturally specific ways.³⁹

New intellectual property rights are, as Thomas Cottier and Marion Panizzon point out,

³⁷ Drahos, above n. 26.

³⁸ Rosemary J. Coombe, *Intellectual Property, Human Rights, and Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity*, 6 IND. J. GLOBAL LEGAL STUD. 59 (1998).

³⁹ There is now a large body of literature suggesting that cultural and religious rights in international human rights law conflict with women’s rights. Although I cannot engage with these arguments in the space afforded to me here, I direct the reader to Modhavi Sunder, *Piercing the Veil*, 112 YALE L.J. 1399 (2003) for an overview of these debates. Like Sunder, I believe that cultural communities are evolving and that people have desires both to maintain cultural traditions and to strive for new forms of equality and justice within those traditions. Based on observation of negotiations at Convention on Biological Diversity and WIPO Intergovernmental Committee meetings, it would appear that the commitment to finding means of protecting traditional knowledge is widely understood to provide new forms of positive recognition and compensation for the work that women do and new forms of self-esteem and economic opportunity for youth. Unlike many critical legal scholars, I do not believe it is possible to adopt any single position on the evocation of culture in international law, given the range of contexts in which it figures and the number and complexity of the political issues involved.

insufficient unless tied to public policy strategies,⁴⁰ and the desire to support cultural traditions and maintain cultural diversity is certainly emerging as an important issue of international public policy. As I have argued elsewhere, the growing concern with “cultural” issues and the designation of issues as “cultural” in nature, is integrally linked with globalization and the growing hegemony of informational capital.⁴¹ These concerns, however, are not limited to indigenous peoples, rural peoples, or isolated communities. An extensive civil society network of creators, artists, and cultural industries, together with government ministers from fifty-three states, is committed to the creation of a legally binding Instrument of Cultural Diversity that builds on prior work done by the Council of Europe.⁴² Insisting that monocultures are as dangerous to democracy as they are to agriculture, this movement recognizes cultural diversity as a public good that promotes social cohesion and economic development. The adoption by acclamation of the UNESCO Universal Declaration on Cultural Diversity in November 2001,⁴³ and the recent release of a Preliminary Draft of a Convention on the Protection of the Diversity of Cultural Contents and Artistic Expression,⁴⁴ following the adoption, signature and registration of the International Convention for the Safeguarding of Intangible Cultural Heritage⁴⁵ as a legal Convention in November 2003, indicates that there is strong international support for the proposition that states have a legitimate right to promote and maintain a favorable environment for the creation and expression of diverse forms of culture through the formulation of cultural policies. Culture itself is understood as an important resource for human development.

⁴⁰ Cottier and Panizzon, above n. 34.

⁴¹ Rosemary J. Coombe, *Works in Progress: Traditional Knowledge, Biological Diversity and Intellectual Property in a Neoliberal Era*, in *GLOBALIZATION UNDER CONSTRUCTION: GOVERNMENTALITY, LAW AND IDENTITY* 273 (Richard W. Perry & William Maurer eds., 2003). See also Rosemary J. Coombe, *When and Why are things becoming Cultural? Global Flows, Neoliberalism and the Proliferation of Meaningful Difference* 1 *LAW, CULTURE AND HUMANITIES* – (2005).

⁴² See Ivan Bernier, *A New International Instrument on Cultural Diversity: Questions and Answers*, at <http://www.incd.net/html/english/conf/bernier.htm> (22 Sept. 2001); The Honorable Sheila Copps, Minister of Canadian Heritage, Closing Remarks at the Second International Meetings of Professional Cultural Organizations (4 Feb. 2003), at http://www.pch.gc.ca/pc-ch/min/notes/2003-02-04a_e.cfm.

⁴³ At <http://www.unesco.org/culturelink/review>.

⁴⁴ Unesco, CLT/CPD/2004/CONF-201/2 at <http://unesdoc.unesco.org/images/0013/001356/135649e.pdf>

⁴⁵ At http://portal.unesco.org/en/ev.php-URL_ID=17716@URL_DO=DO_TOPIC&URL_SECTION=201.htm

Cultural diversity presupposes the existence of a process of exchanges that is open to renewal and innovation but also committed to tradition, and does not aim at the preservation of a static set of behaviors, values and expressions. It is a concept premised on the belief that different forms of inspiration are generated from within distinctive cultural heritages and that their maintenance as sources for ongoing creativity constitutes a public good. Indigenous peoples are given special priority because their thousands of languages are understood to represent most of the world's remaining linguistic diversity.⁴⁶

These initiatives are motivated by the belief that globalization and trade liberalization are undermining cultural diversity and that the strategy of carving out cultural exemptions in trade agreements is less than effective.⁴⁷ Rather than continuing to assert rights to protect cultural traditions defensively, the states involved seek to positively affirm cultural diversity among and within nation-states as a positive social good. Cultural goods, as vectors of identity, value and meaning should not be understood merely as commodities or consumer goods. In a country such as Canada, for instance, where over fifty-five percent of the population come from national backgrounds that are neither British nor Quebecois (and where, by the year 2006, forty-three percent of the population will have origins that are not aboriginal, French or English⁴⁸) it is essential that publicly available cultural forms represent the society's true diversity. Given the population size, markets alone will not provide this variety. A culturally pluralistic public sphere requires a range of cultural expression and a space for cultural choices and expressive opportunities beyond those inherent in the consumption of standardized goods sold by multinational corporations. Internationally, better relations between states and among communities will require the development of institutions to promote cross-cultural dialogue,

⁴⁶ Anthropologists and linguists are divided about the validity of claiming linguistic "loss," and the equation of this with cultural "loss," which is itself a problematic concept. Nonetheless, these concepts appear to have been widely embraced by policy-makers for whom they sufficiently capture or describe processes of undesirable change that inflict great social and economic costs for communities and nation states. For a discussion, see Stuart Kirsch, *Lost Worlds: Environmental Disaster, 'Culture Loss,' and the Law*, 42 CURRENT ANTHROPOLOGY 167 (2001).

⁴⁷ For elaboration, see Ivan Bernier, above n 41; Ivan Bernier, *Preserving and Promoting Cultural Diversity: Necessity and Prospects for Action*, at http://www.cdc-ccd.org/Anglais/Liensanglais/events/meeting/text_bernier_eng.html (last visited 4 June 2003).

⁴⁸ Copps, above n. 41.

exchange, and fertilization.

When we talk about protecting the cultural commons as a public good, we need to think about what content we wish to maintain there. In addition to requiring “sustainable access” to cultural goods, we also need to consider models for the sustainable production of culturally diverse content. Traditional cultures, although (and perhaps because) they do not exist in isolation and are inevitably hybridized with forms of modernity provide the basis for forms of creativity and innovation necessary for sustainable economic development for many of the world’s peoples. Different forms of creativity are nurtured within different cultural traditions and nonmarket institutions will be necessary to promote and nurture culturally diverse innovations and creative works and to promote their dissemination. As the WIPO Intergovernmental Committee acknowledges

Challenges of multiculturalism and cultural diversity, particularly in societies with both indigenous and immigrant communities, require cultural policies that maintain a balance between the protection and preservation of cultural expressions – traditional or otherwise– and the free exchange of cultural experiences. Mediating between the preservation of cultural heritage and cultural distinctiveness on the one hand, and nurturing and nourishing of “living” culture as a source of creativity and development on the other, is another challenge.⁴⁹

There are many challenges before us. If, as Carol Rose suggests, “seeing property is an act of imagination,”⁵⁰ then the protection of traditional knowledge, and the inclusion of cultural industries reflecting a fuller range of the world’s peoples will require cultural industry of another sort – the effort to transcend the cultural limitations through which we imagine intellectual property.

⁴⁹ Consolidated Analysis of the Legal Protection of Traditional Cultural Expression, above n. 17, at 2.

⁵⁰ CAROL ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 296 (Westview Press 1994).