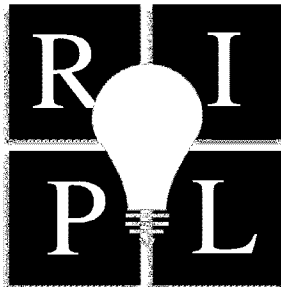


# THE JOHN MARSHALL REVIEW OF INTELLECTUAL PROPERTY LAW



TRADITIONAL KNOWLEDGE AND THE FIGHT FOR THE PUBLIC DOMAIN

DORIS ESTELLE LONG

ABSTRACT

What are the challenges facing the protection of traditional knowledge internationally? Can the protection of such rights, which have traditionally existed outside the boundaries of intellectual property, be achieved in the face of current challenges to protections epitomized by such emerging international movements as enhanced access to information and culture as a human right? This article examines some of the emerging issues in this hotly contested area and suggests that such movements, which are not adverse to intellectual property and traditional knowledge rights, should be used to craft a new method for addressing the issue of traditional knowledge protection internationally.

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## TRADITIONAL KNOWLEDGE AND THE FIGHT FOR THE PUBLIC DOMAIN

DORIS ESTELLE LONG\*

Sixty-five years ago, when The John Marshall Law School first started its Center for Intellectual Property<sup>1</sup>, there was “traditional knowledge.” Sixty-five years from now, there will still be “traditional knowledge” at John Marshall’s Center for Intellectual Property. Between these two dates, it would be nice if better protection for such knowledge could be developed.

Some of the more recent difficulties associated with extending harmonized international protection to so-called traditional knowledge have focused on the critical issue of the relationship between traditional knowledge protection and intellectual property. This is represented largely in debates over domestic public policy choices governing economic, educational and commercial development, the scope of the public domain, and public access to “information” and “expression.”<sup>2</sup>

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<sup>1</sup> See generally The John Marshall Law School, Intellectual Property Law Center, [http://www.jmls.edu/academics/ip\\_law/ip\\_center\\_main.shtml](http://www.jmls.edu/academics/ip_law/ip_center_main.shtml) (last visited July 5, 2006).

<sup>2</sup> See generally CPTEch: Access to Knowledge, <http://www.cptech.org/a2k/> (last visited July 5, 2006); James D. Nason, *Traditional Property and Modern Laws: The Need for Native American Community Intellectual Property Rights Legislation*, 12 STAN. L. & POL’Y REV. 255 (2001); Molly Torsen, “Anonymous, Untitled, Mixed Media”: *Mixing Intellectual Property Law With Other Legal Philosophies To Protect Traditional Cultural Expressions*, 53 J. COPYRIGHT SOC’Y 287 (2006); Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769 (1999); WIPO, IDENTIFYING THE INTELLECTUAL PROPERTY NEEDS AND EXPECTATIONS OF TRADITIONAL KNOWLEDGE HOLDERS, WIPO REPORT ON FACT-FINDING MISSIONS ON INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE (2001) [hereinafter WIPO, NEEDS AND EXPECTATIONS]; MICHAEL BROWN, WHO OWNS NATIVE ART (Harvard University Press) (2003); Doris Estelle Long, “Globalization”: *A Future Trend or a Satisfying Mirage*, 49 J. COPYRIGHT SOC’Y 313 (2001) [hereinafter Long, “Globalization”]; Erica-Irene Daes, Study in the Protection of the Cultural and Intellectual Property of Indigenous Peoples, U.N. Sub-commission on Prevention of Discrimination of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/28 (1993); Angela Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property*, 80 WASH. L. REV. 69 (2005); Peter Drahos, *Towards an International Framework for the Protection of Traditional Group Knowledge and Practice*, Feb. 2-4, 2004, [http://cgkd.anu.edu.au/menus/PDFs/Drahos\\_tkframework.pdf](http://cgkd.anu.edu.au/menus/PDFs/Drahos_tkframework.pdf). Rekha Ramani, Note and

Today, there tends to be one group who believes that traditional knowledge falls outside the scope of any form of legal protection, including, particularly, any *sui generis* protection based on modified intellectual property principles. These individuals further suggest that if any such rights exist, the holders should give up such rights, usually for the benefit of society at large. Finally, they affirm that traditional knowledge, however defined, resides firmly in the public domain. A second group maintains that generational (traditional) knowledge, particularly where such knowledge represents the culture and traditions of an identifiable indigenous group, is entitled to protection, and, more importantly, to control.<sup>3</sup>

Before going any further I want to define a few terms. There is no agreed upon definition for the concepts of “traditional knowledge” or “traditional cultural expressions,” which is the copyright related subset of traditional knowledge. “Traditional knowledge” at its broadest meaning covers a potentially large body of knowledge and practices, which have been handed down through generations. This includes a wide variety of spiritual and cultural beliefs and practices, tangible works, folklore, folk art, folk remedies, etc.<sup>4</sup> The traditional knowledge based movements in other fora, such as WIPO, recognize that separate treatment may be required for those works, which represent indigenous creativity, such as folk lore, art, remedies, and rituals. Hence, a subcategory of traditional knowledge was developed: traditional cultural expressions.<sup>5</sup>

Because the protection of access to genetic information is part of another panel, I will focus largely on the creative aspects of traditional knowledge, often referred to

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Comment: *Market Realities v. Indigenous Equities*, 26 BROOK. J. INT'L L. 1147 (2001); TRADITIONAL KNOWLEDGE AND INTELLECTUAL PROPERTY — ISSUES AND OPTIONS SURROUNDING THE PROTECTION OF TRADITIONAL KNOWLEDGE (The Quaker United Nations Office 2000), <http://www.geneva.quino.info/pdf/tkcol3.pdf> (last visited Oct. 6, 2004); Michael Blakeney, WIPO, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding the Value Chain - Roundtable on Intellectual Property and Traditional Knowledge, Geneva, Nov. 1-2, 1999, WIPO/IPTK/RT/99/3 (Oct. 6, 1999), available at [http://www.wipo.int/documents/en/meetings/1999/folklore/pdf/tkrt99\\_3.pdf](http://www.wipo.int/documents/en/meetings/1999/folklore/pdf/tkrt99_3.pdf) [hereinafter WIPO Forum on Intellectual Property]; WIPO, INTERNATIONAL FORUM ON “INTELLECTUAL PROPERTY AND TRADITIONAL KNOWLEDGE: OUR IDENTITY, OUR FUTURE,” INFORMATION NOTE ON TRADITIONAL KNOWLEDGE (2002) [hereinafter WIPO, INTERNATIONAL FORUM]; WIPO, THE ATTEMPT TO PROTECT EXPRESSIONS OF FOLKLORE AND TRADITIONAL KNOWLEDGE (2001) [hereinafter WIPO, ATTEMPT TO PROTECT EXPRESSION]; KEMBREW MCLEOD, OWNING CULTURE: AUTHORSHIP, OWNERSHIP AND INTELLECTUAL PROPERTY LAW (Peter Lang) (2001); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY (New York Univ. Press) (2001); LAWRENCE LESSIG, FREE CULTURE: HOW BIG MEDIA USES TECHNOLOGY AND THE LAW TO LOCK DOWN CULTURE AND CONTROL CREATIVITY (Penguin Press) (2004); Olufunmilayo B. Arewa, *From J.C. Bach to Hip Hop: Musical Borrowing, Copyright and Cultural Context*, 84 N.C. L. REV. 547 (2006); Bradford Simon, *Intellectual Property and Traditional Knowledge: A Psychological Approach to Conflicting Claims of Creativity in International Law*, 20 BERKELEY TECH. L.J. 1613 (2005).

<sup>3</sup> See generally, Nason, *supra* note 2; Torsen, *supra* note 2; Kuruk, *supra* note 2; WIPO, NEEDS AND EXPECTATIONS, *supra* note 2; Brown, *supra* note 2; Long, *supra* note 2; Daes, *supra* note 2; Riley, *supra* note 2; Drahos, *supra* note 2; Ramani, *supra* note 2; Correa, *supra* note 2; Blakeney, *supra* note 2.

<sup>4</sup> See generally WIPO, NEEDS AND EXPECTATIONS, *supra* note 2; Brown, *supra* note 2; Long, *supra* note 2; Daes, *supra* note 2; Riley, *supra* note 2; Drahos, *supra* note 2; Ramani, *supra* note 2; Correa, *supra* note 2; Blakeney, *supra* note 2.

<sup>5</sup> See, e.g., WIPO, INTERNATIONAL FORUM, *supra* note 2; WIPO, ATTEMPT TO PROTECT EXPRESSIONS, *supra* note 2.

currently as TCEs, although many of my comments have equal applicability in the broader area of traditional knowledge itself.

The title of this conference is “The Role of the United States in International Intellectual Property Law.” While preparing my comments for this presentation, in response to the conference’s title, I considered the fight over traditional knowledge, and said, “Okay, there’s an easy answer to that one.” If you were to ask me what the role of the United States is in the protection of the traditional knowledge, I would essentially say “not a whole lot.”

However, if you think about the subject as broader than simply support for the rights of indigenous peoples to control their traditional knowledge, and include consideration of who is entitled access to, and use of, the various types of information subsumed in the category of “traditional knowledge,” then the role of the United States is much broader. More specifically, when referring to the “United States,” I am including U.S. scholars, along with agencies and representatives of the United States Government. From this perspective, the impact may be broader than my initial skepticism.

In particular, I want to focus my remarks on the increasing scholarly dialogues about access to knowledge and information. When considering access to expression<sup>6</sup> and information, cultural commentators in the various debates over the relationship of copyright to culture protection generally conclude that copyright protection should be less strong, so that other people can freely use the works at issue.<sup>7</sup> Looking at such conclusions, one might think that, on the surface, they are in contradistinction to the idea of providing heightened protection for traditional knowledge.

With respect to the Draft Treaty on Access to Knowledge (“Draft A2-K”)<sup>8</sup>, it is inconsistent in its discussion of traditional knowledge. Draft A2-K seeks generally to expand public access to creative and innovative works, and to strike a balance between traditional intellectual property rights under copyright and patent (among others) and the enhanced informational demands of the Digital Age. However, it currently contains no section that directly addresses or even acknowledges the rights of indigenous peoples to participate in their culture through the critical rights of self determination or any other form of control.

Despite an acknowledgement in the preamble that among the purposes of Draft A2-K is to enhance “cultural affairs,” the treatment of traditional knowledge is inconsistent. While Article 4-1, which deals with patents, recognizes the traditional knowledge based right of equitable benefit sharing for biologics,<sup>9</sup> Article 3-7 appears to prevent any protection for the cultural expression side of traditional knowledge, which includes folklore and folk art. Article 3-7 contains language that basically

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<sup>6</sup> I am using the term “expression” to refer to materials, which are potentially subject to copyright protection, and therefore, protectable within the scope of such protection. Although the issue is beyond the scope of this Article, there is a statutory, and definable, distinction between protectable “expression” under copyright and unprotected “information.” *See, e.g.*, 17 U.S.C § 102.

<sup>7</sup> *See, e.g.*, McLeod, *supra* note 2; Vaidhyathan, *supra* note 2; Lessig, *supra* note 2; Arewa, *supra* note 2; Simon, *supra* note 2.

<sup>8</sup> *See* Treaty on Access to Knowledge (Draft) (2005), <http://www.cptech.org/a2k/consolidatedtext-may9.pdf> [hereinafter Draft A2-K].

<sup>9</sup> Draft A2-K, *supra* note 9, at art. 4-1.

prohibits any protection for works lacking in creativity. It states: “[W]orks lacking in creativity should not be subject to copyright or copyright-like protections.”<sup>10</sup>

Thankfully, Article 3 does not define “creativity,” which at least allows for some flexibility in Draft A2-K’s apparent condemnation of TCE protection. Draft A2-K’s language seems to clearly indicate that if one is on the folklore, or folk art side of traditional knowledge, one does not fit within present copyright regimes.<sup>11</sup> However, Draft A2-K is not necessarily at loggerheads with traditional knowledge protection. To the contrary, the two movements have a lot to say to each other.

Both the access to knowledge and traditional knowledge movements have, at their core, a fundamental goal of creating greater flexibility in intellectual property rights regimes. They can take a lot of information from each other. Moreover, allowing the two movements to inform, as opposed to contradict, each other may ultimately develop a stronger and fairer system — one that allows access, recognizes welfare benefits, and allows the development of new technology and all of the new works one wants. Such a system could still recognize the rights of indigenous peoples to control their culture and to self-determination when it comes to what aspects of their knowledge and culture may be used by third parties and under what conditions.

When people talk about the public domain, which is all the time, the discussions are no more monolithic than is the public domain itself.<sup>12</sup> In fact, as one moves to different areas of discussion regarding the role of the public domain, the concept of “public domain” loses its meaning. Consider the following discussions of what qualifies as the “public domain” (and why) in the following debates about access to knowledge and the public domain: Culture Industries and Economic Growth; Culture as a Human Right; the Determination of the Boundaries of the “Commons”; and the Overarching Goal of Bringing the Benefits of Innovation to Your Neighborhood. Each such example might well require a very different approach and a different balance to be struck between protection and access.

One of the interesting things in talking to indigenous peoples about the public domain is the response they provide. The concept of the public domain does not currently exist in many indigenous communities except in the form of “your public domain” versus “my cultural heritage.” When asked, indigenous peoples often respond with the same question. “How come ‘public domain’ is my stuff? Yours is copyrightable and mine is in the public domain. How did that happen?” The answer, of course, is that we have developed a nice approach to protection. New works get protected. Their works have been around too long.<sup>13</sup> Therefore, we all get to use them.<sup>14</sup>

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<sup>10</sup> *Id.* at art. 3-7.

<sup>11</sup> TCE usually lacks either an identifiable author and/or has been in existence beyond the period of most copyright terms of protection.

<sup>12</sup> For an excellent early discussion of the nature and value of the public domain, see Jessica Litman, *The Public Domain*, 39 EMORY L.J. 965 (1990). See also Yochai Benkler, *Through the Looking Glass: Alice and the Constitutional Foundations of the Public Domain*, 66 LAW & CONTEMP. PROBS. 173 (2003); Anupam Chander & Madhavi Sunder, *The Romance of the Public Domain*, 92 CAL. L. REV. 1331 (2004); Kimberly Christen, *Gone Digital: Aboriginal Remix and the Cultural Commons*, 12 INT’L JOURNAL OF CULTURAL PROP. 315 (2005).

<sup>13</sup> See Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, revised July 24, 1971, S. TREATY DOC. NO. 99-27, 828 U.N.T.S. 221 available at [http://www.wipo.int/treaties/en/ip/berne/trtdocs\\_wo001.html](http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html) [hereinafter Berne Convention] (noting

When people are dealing with traditional knowledge, admittedly, definitions are hard to create. However, what remains consistent with traditional knowledge, no matter what definition is used, is that it focuses on innovation, culture, and works that have been passed through generations. If knowledge is passed through generations from the Western copyright point of view, that knowledge is in the public domain. Yet, there is value in that generational passage and in the knowledge that has been perfected by such controlled transmission.

I think one of the greatest misconceptions people have about traditional knowledge is the mistaken notion that traditional knowledge means protecting the things that grandma did so that they never change. It is true that traditional knowledge is focused on a particular group in such a way that there is a cultural identification between the group and the knowledge at issue. Traditional knowledge, however, also changes in response to culture, environment, and the passage of time. It is a living active concept, and not just the snapshot of what used to be done back in the good old days.

There is no question that if protection for traditional knowledge is actually provided, some of the things that people think belong in the public domain, however one defines it, are going to receive protection and be removed from the public domain. People will not receive unimpeded access to certain items. In some instances, people will get no access at all. In others, people will get limited access and maybe limited rights. It will all depend on the type of traditional knowledge at issue, and the importance of that particular traditional knowledge to the relevant holder.

What we should be looking for is nuanced protection, and not hard and fast rules, the application of which would realistically change from group to group. In fact, such rules may well change from item to item, depending on the type of traditional knowledge to be protected, and the goals of such protection. What the access-to-knowledge-movement has in common with the traditional-knowledge-protection-movement is the idea of flexibility in the rules, and *not* the notion that any copyright concept is drawn as an immovable line in the sand.

The conflict between access to knowledge, traditional knowledge, and IP regimes is not as contradictory as it appears on its surface. Copyright has never had the inflexibility of which it is often accused simply because it has always had fair-use to mitigate against such inflexibility.<sup>14</sup> Therefore, no immutable line in the sand actually exists. More importantly, all these areas share a growing awareness that more flexibility is needed as the boundaries of protection for traditional knowledge

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that international copyright protection only lasts for the life of the author, plus fifty years). Some domestic laws provide for longer protection. *See, e.g.*, 17 USC § 302 (noting copyright protection currently lasts for life of the author plus seventy years, or a maximum term of ninety years when no human author exists). *See also* European Union Copyright Term Directive, art. 1 (recognizing that copyright lasts for the life of the author plus seventy years for most works). None of these terms, however, are long enough to save most traditional knowledge from being defaulted into the public domain.

<sup>14</sup> Once a work's term of copyright protection has expired, it automatically becomes part of the public domain and freely available for all to use.

<sup>15</sup> *See generally* 17 U.S.C. § 107 (2000). For an explanation of some of the nuances of fair use as applied currently by U.S. courts *see generally*, Harper & Row v. Nation Enterprises, 471 U.S. 539 (1985), Kelly v. Arriba, 336 F.3d 811 (9th Cir. 2003), Acuff-Rose v. Campbell, No. 91-5232, 1991 U.S. App. LEXIS 6094 (6th Cir. April 1, 1991), and Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417 (1984).

and other potentially protected works are established in the 21st Century. Instead of reducing the debate to rhetoric over hard and fast rules, more issues need to be put into the mix while deciding where those boundaries are going to be located. I am not necessarily saying traditional knowledge should get the same property protections as copyright and other forms of traditional intellectual property. To the contrary, certain types of traditional knowledge will require differing levels of protection that are achieved through more diverse mechanisms than pure property protection. The bottom line is that the idea of exclusivity has to give way to a broader discussion of what factors get put into the pot in order to determine the scope of protection traditional knowledge will receive.

While the current international approach to traditional knowledge has been to divide knowledge into the broad categories of traditional cultural expressions and traditional knowledge (generally meaning scientific and agricultural practices and innovations), this categorical division does not adequately address all of the variables that must be added into the traditional knowledge mix. Traditional knowledge in the form of folklore and folk art requires a different type of protection than traditional knowledge in the form of folk medicine and folk remedies.<sup>16</sup> Public necessity alone may justify different international regimes. Such differing regimes assure both adequate access, and fair representation of the rights of the indigenous people to control their culture and its use by others. There are some types of traditional knowledge where sharing, or commercialization, is acceptable to the traditional knowledge holder. Where commercial exploitation is acceptable, receipt of equitable benefits from what others earn from the group's traditional knowledge may be sufficient to meet the needs of both access and fairness. Aside from considerations of fairness, such equitable benefit sharing also allows indigenous peoples to improve their livelihood by building schools, roads, or whatever else they want to do with the monies earned from the commercialization of their traditional knowledge, ultimately allowing indigenous peoples to use their traditional knowledge to fuel their own economic independence.

Similarly, traditional knowledge in the form of folklore and folk art deserves a different level of protection than that of sacred traditional knowledge. Generally, indigenous groups are not willing to have their sacred traditional knowledge commercialized. Others may be willing to let people know about some of their sacred practices, but would be unwilling to allow others to use, market, or share it.<sup>17</sup> Such

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<sup>16</sup> For a more detailed discussion of the variables influencing the level of protection for the diverse forms of TK at issue, see generally Doris Estelle Long, *Traditional Knowledge and Data Access Demands: Untying the Gordian Knot*, Presentation at Yale Access to Knowledge Conference, (2006), available at <http://research.yale.edu/lawmeme/modules.php?name=News&file=article&sid=1754>. See also WIPO, *THE PROTECTION OF TRADITIONAL KNOWLEDGE AND FOLKLORE: SUMMARY OF ISSUES RAISED AND POINTS MADE* (2006); WIPO, *THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/EXPRESSIONS OF FOLKLORE: REVISED OBJECTIVES AND PRINCIPLES* (2005); WIPO, *THE PROTECTION OF TRADITIONAL KNOWLEDGE: OUTLINE OF POLICY OPTIONS AND LEGAL ELEMENTS* (2004); Daniel Gervais, *Traditional Knowledge and Intellectual Property: A TRIPS Compatible Approach*, 2005 MICH. ST. L. REV. 137 (2005); WIPO, *GENETIC RESOURCES: DRAFT INTELLECTUAL PROPERTY GUIDELINES FOR ACCESS AND EQUITABLE BENEFIT SHARING* (2004).

<sup>17</sup> See, e.g., *Yumbulul v. Reserve Bank of Australia* (1991) 21 I.P.R. 481 (Austl.). The practice of certain indigenous groups in Australia is to allow the sale of sacred morning star poles to museums for public display for educational purposes. *Id.* Commercialization beyond such



differential treatment requires a far different protection regime than one that merely affords assurances of adequate compensation for the rights-holder.

Considerations governing the protection of sacred and exploitable traditional knowledge in turn are far different from those where proper authentication may be the sole concern. For example, from the standpoint of an indigenous group, authentication may take the form of: "If you want to sell this, do not hold it out as traditional Maori-made if it is in fact not Maori-made, or if it is not made in accordance with our symbols and our traditions." I think the authentication issue may be easier once the authentication provider is determined. However, that question itself raises some interesting problems that are, unfortunately, beyond the scope of this article.<sup>18</sup>

I get nervous when people talk about traditional knowledge and they say, "Okay, let's have a traditional knowledge conference and talk about what the treaty should be." Even the World Intellectual Property Organization has split the discussion of harmonized standards into two groups: one for TCE, one for traditional knowledge. Hopefully, before any final decision is made on the protection regime for traditional knowledge and TCE, the different groups will reconnect. Cross-communication would be really helpful, because multi-fora discussions tend to promote people running off into different rooms and never talking to each other again. While such multi-fora standardization appears increasingly to be the norm in international IP regimes,<sup>19</sup> without cross-communication, wonderfully conflicting standards that fail to achieve any useful harmonization result.<sup>20</sup> Hopefully, when it comes to the issue of international protection for traditional knowledge, the necessary paths of cross-communication will remain open and productive.

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educational usage, however, is strictly prohibited. *Id.* See also *Bulun Bulun & Anor v. R & T Textiles Pty., Ltd.*, (1998) 41 IPR 513 (Austl.).

<sup>18</sup> See, e.g., Brown, *supra* note 2; SUSAN SCAFIDI, WHO OWNS CULTURE?: APPROPRIATION AND AUTHENTICITY IN AMERICAN LAW (Rutgers Univ. Press) (2005) [hereinafter Scafidi, *Appropriation and Authenticity*]; TERRI JANKE, WIPO, INDIGENOUS ARTS CERTIFICATION MARK WIPO CASE STUDY IN MINDING CULTURE (2003); Leanne Wiseman, *The Protection of Indigenous Art and Culture in Australia: The Label of Authenticity*, EUROPEAN INTELLECTUAL PROP. REPORTS, ISSUE 1 (2001); Susan Scafidi, *Intellectual Property and Cultural Products*, 81 B.U. L. REV. 793 (2001). See also Doris Estelle Long, Presentation before the Syracuse 9th Annual Conference on The Association For The Study Of Law, Culture and Humanities, Cultural Rights and the Diaspora: A Proposal (March 17, 2006) (transcript on file with the author). See, e.g., Laurence Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1; Graeme Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2000); Long, "Globalization", *supra* note 2.

<sup>19</sup> See, e.g., Laurence Helfer, *Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking*, 29 YALE J. INT'L L. 1; Graeme Dinwoodie, *The Development and Incorporation of International Norms in the Formation of Copyright Law*, 62 OHIO ST. L.J. 733 (2001); Long, "Globalization", *supra* note 2.

<sup>20</sup> A good example is the arguable conflict between the Convention on Biological Diversity (CBD) and TRIPS. Cross-communication during the development stages of the CBD might have reduced the inter-treaty battles currently raging over the impact of patent protection for pharmaceuticals and agro-chemical inventions on sustainable development. See generally, Michael Jeffery, "Intellectual Property Rights and Biodiversity Conservation: Reconciling the Incompatibilities of the TRIPS Agreement and the Convention on Biological Diversity," INTELLECTUAL PROPERTY AND BIOLOGICAL RESOURCES (Burton Ong ed., Marshall Cavendish Academic Press) (2003).

In addition to the discussion of the protection of traditional knowledge under current intellectual property regimes, one needs to consider other areas of impact as well. One can deal with some of the traditional knowledge protection issues by simply reconsidering and, potentially, reconfiguring the traditional treatment of trademarks, collective rights, authentication, and collaborative creativity to reflect traditional knowledge concerns.

One of the most difficult issues facing efforts to reconfigure copyright protection to allow some form of traditional knowledge protection is the present dichotomy between the individualistic authorship construct of present IP regimes and the collective or tribal authorship of traditional arts. For many indigenous groups, traditional knowledge, even in the form of folk art or other TCE's belongs to the group, as a whole. There is no individual author; the group is the author and owns the right to control such works. Such group authorship is not as radical or as untenable within present copyright systems as it appears on its face. Whether one calls it joint authorship or work for hire,<sup>21</sup> the concept of collective authorship already exists in IP rights regimes. Copyright law is already used to the idea that there does not have to be an individual author for protection to exist. Thus, there already are potential flexibilities on which one can rely as certain aspects of traditional knowledge are incorporated into an intellectual property style regime.

We should also reconsider the copyright side of ideas relating to generational use, generational creativity, and ideas about collaboration. While we reconsider these ideas, it is helpful to remember that similar issues are present in the digital world. Consider the debate over where to draw the boundaries on the protection of derivative rights with respect to music sampling.<sup>22</sup> The emphasis on collaborative creativity in much of traditional knowledge may provide helpful analogues in reconfiguring the contested area of derivative works and fair use in the Digital Age.

I also believe that the concept of fair use itself can be expanded as we explore other regimes and disciplines in our attempts to craft a workable international traditional knowledge solution. Such expansion may occur as a result of increased dialogues between IP rights, traditional knowledge, and human rights efforts to protect culture.

Article 27 of the Universal Declaration on Human Rights recognizes that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."<sup>23</sup> While the IP right protection paradigm focuses on private rights, the Human Rights paradigm has focused largely on communal rights. In fact, many of the human rights based treaties dealing with cultural rights do not seek to establish rights to "protect" culture per se, but instead use an education, self-determination, and collective

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<sup>21</sup> See generally 17 U.S.C §§ 101, 201 (defining work for hire, joint authorship, and authorship). See also *CCNV v. Reid*, 490 U.S. 730 (1989).

<sup>22</sup> See, e.g., 17 U.S.C. § 106 (granting to copyright owners the right to control the creation of derivative works). See also *Berne Convention*, *supra* note 13, art.8. Compare *Bridgeport Music Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005) (noting that the unauthorized three note sample of a sound recording qualified as infringing) with *Newton v. Diamond and Others*, 349 F.3d 591 (9th Cir. 2003) (noting that sample of flute is non-infringing).

<sup>23</sup> Universal Declaration of Human Rights, G.A. Res. 217 A (III), art. 27, U.N. Doc. A/810 (Dec. 10, 1948).

management model to give indigenous peoples a greater say in the uses of their culture.<sup>24</sup> Many human rights advocates talk about collective rights. They focus on group rights, which include self-determination and self-management for the group. These perspectives may provide a better conceptual “fit” for the collective rights based views of traditional knowledge holders.

The human rights advocates have also set up some interesting models for dealing with dispute resolution without necessarily running into court. These models utilize a mediation, as opposed to litigation, approach, the flexibilities of which can be successfully adapted to the many contentious issues that must necessarily be part of a workable traditional knowledge protection regime, including the fundamental question of which group “owns” what traditional knowledge. By utilizing concepts from traditional knowledge, access to knowledge, and consideration for human rights, the *flexible* traditional knowledge protection system we develop should ultimately contain a level of perceived fairness that will encourage greater participation and, hopefully, encourage greater innovation. This new system will recognize the rights of people who have been marginalized for a very long time and who, unfortunately, still do not seem to have a voice.

Just as consideration of human rights concepts can be helpful in creating a workable traditional knowledge protection system, valuable concepts can also be obtained from consideration of the models coming from the access-to-knowledge-regime. In particular, some of the licensing models could be very helpful.<sup>25</sup> Creative Commons and Open Source licensing models give individuals the right to control the use of their works, while providing an easy model for granting largely unencumbered rights. Such a model could be extremely useful for those kinds of traditional knowledge where the holders are willing to allow non-deculturizing uses of their traditional knowledge. Moreover, the ease of use of such models, where holders can actually go to the site and pick the models that they want to adopt, might encourage greater participation by indigenous and others in the system. In addition to royalty-free distribution agreements, the access to knowledge dialogue also provides useful models for protection regimes based on liability rules as opposed to a property based system.<sup>26</sup> As noted earlier, for certain types of traditional knowledge for which

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<sup>24</sup> See, e.g., OFFICE OF THE UNITED NATIONS HIGH COMMISSIONERS FOR HUMAN RIGHTS, INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, art. 27, (1976), available at <http://www.ohchr.org/english/law/ccpr.htm>; UNPO, UNIVERSAL DECLARATION OF THE RIGHTS OF PEOPLES, arts. 1, 5, 14–15 (2001) available at <http://www.unpo.org/en/rights/declaration.html>; OFFICE OF THE HIGH COMMISSIONER OF HUMAN RIGHTS, INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, arts. 1, 15 (1976), available at [http://www.unhcr.ch/html/menu3/b/a\\_cesr.htm](http://www.unhcr.ch/html/menu3/b/a_cesr.htm); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, AMERICAN DECLARATION OF THE RIGHTS AND DUTIES OF MAN, art. 13 (1948) available at <http://www.cidh.org/Basicos/basic2.htm>.

<sup>25</sup> See, e.g., Eric Kansa, Jason Schultz & Ahrash N. Bissell, *Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas Via a “Some Rights Reserved” Model*, 12 INT’L J. OF CULTURAL PROP. 285 (2005).

<sup>26</sup> See, e.g., J.H. Reichman, *Of Green Tulips and Legal Kudzu: Repackaging Rights in Subpatentable Innovation*, 53 VAND. L. REV. 1743 (2000); Tracy Lewis & J.H. Reichman, “Using Compensatory Liability Rules to Stimulate Innovation in Developing Countries,” INTERNATIONAL PUBLIC GOODS AND TRANSFER OF TECHNOLOGY UNDER A GLOBALIZED INTELLECTUAL PROPERTY REGIME (Keith Maskus & J.H. Reichman eds. Cambridge Univ. Press) (2005).

commercialization is acceptable, it is possible that all we need are equitable benefit sharing models for adoption.

Our next step in the process is to develop workable models and other soft laws to help promote the types of protection that the diverse forms of traditional knowledge require. Once we have developed these models, it will be easier for indigenous groups to examine their own traditional knowledge and make informed decisions on which uses they are willing to allow, and under which conditions.<sup>27</sup> It may well be that once such a process is in place many of the concerns over reduction of the public domain will prove evanescent. Traditional knowledge holders may elect to allow uncompensated uses of their knowledge, so long as such uses are not deculturizing<sup>28</sup> and as long as the users properly identify the source of the knowledge at issue.<sup>29</sup> With the appropriate models in place, parties can obtain authentication and use models from the access to knowledge arena, modify them, and devise a protection system that may actually solve some of the present disputes over protection of traditional knowledge.

Before I finish, I would like to discuss some of the tough issues that are still out there. The first problem, obviously, is the definitional problem of what exactly qualifies as protectable traditional knowledge. I believe that issue can eventually be resolved, although we may not necessarily get it right the first time. One of the things that I love about law is that if people do not get something right the first time, they will just keep refining it and refining it until they do get it right. However, for this trial and error process to work, we need enough minds in the room to make sure that the definitions created are actually adequate to meet peoples' needs.

Furthermore, when talking about types of protectable "traditional" knowledge, an interesting question arises: What happened to scientific knowledge? What happened to local knowledge? How should we treat the knowledge of non-indigenous minority groups within a country (immigrants) who have specialized knowledge? What happens to one's rights in traditional knowledge when an individual picks up and leaves the group? Does the diaspora have the right to continue to use such knowledge if an individual goes to another country, or if that person is outside the physical boundaries of the group? What happens to those who are expelled from the group, or if over time, due to cultural, political or religious disagreements a group separates?

There are many traditional knowledge debates right now where a border between two countries places members of a group in two different states. Undoubtedly, there is a great deal of work yet to be accomplished when it comes to figuring out which group, if any, will be granted control over their traditional knowledge, or how precisely to define such protected knowledge. However, I do not think such tasks are insurmountable.

I also think people need to focus more on the *type* of access rights that are being discussed, instead of simply drawing the border between TCEs and traditional

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<sup>27</sup> See, e.g., Riley, *supra* note 2.

<sup>28</sup> For a brief discussion of deculturization and its impact on traditional knowledge rights and uses, see generally Doris Estelle Long, *The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective*, 23 N.C.J. INT'L L. & COM. REG. 101 (1998).

<sup>29</sup> See, e.g., Scafidi, *Appropriation and Authenticity*, *supra* note 18.

knowledge and assuming that is the only relevant boundary that we need to consider. To the contrary, we need to go beyond such simple categories and re-focus on the broader public policy balances at the heart of the debate. We need to achieve more dialogue across each of the regimes in order to end up with a system that is *fair* and *workable*.

One of the positive developments in the nearly ten year international debates over traditional knowledge is that individual countries are starting to provide *sui generis* protection for domestic traditional knowledge. Countries such as New Zealand, Panama and Peru, among others, have recognized that individual groups should define which aspects of their traditional knowledge require protection. This identification process is critical. Such identification, however, must be undertaken in good faith. Understandably, some groups maintain that everything is a part of their heritage and culture and should therefore be protected against unauthorized uses.<sup>30</sup> Such broad based claims are not only doomed to failure, they may well taint the traditional knowledge protection process to such an extreme that no workable system arises. If everything is protectable, then realistically nothing will be protected. Many countries have actually established a registration system for traditional knowledge, in which group holders are requested to indicate the items, practices, and processes they are either willing to have licensed for use or are not willing to license for any use at all.<sup>31</sup>

Registration procedures admittedly present their own problems. One of the obvious difficulties is the honest concern that if indigenous groups register the practices, works, etc. that they do not want the public to use, those are precisely what end up being the first items to be commercialized by third parties. Although, despite these obvious limitations, at least a registration system, adequately funded and supported so as to avoid any undue burden on indigenous groups, should help begin the critical identification process. Whether traditional knowledge holders ultimately decide to register those works for which no third party use would be granted, such as in the case of sacred works, is less critical at this stage than that they begin the process of deciding how to respond to the increasing requests (demands?) for access to such knowledge.

At this stage, one of the remaining critical issues is the development of a workable mediation system that both resolves disputes and maintains a level of fairness to keep parties participating in the system. That is why I think the human rights model and its dispute resolution system are so interesting. Any decision regarding control over traditional knowledge should not be based on an adversarial trial system. The idea is that two groups are making heartfelt, legitimate claims to a

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<sup>30</sup> See Brown, *supra* note 2 (discussing distressing examples of the problems caused by over-inclusive claims to traditional knowledge rights, including one intriguing claim to the kangaroo as protectable traditional knowledge).

<sup>31</sup> See, e.g., Law Introducing A Protection Regime For The Collective Knowledge Of Indigenous Peoples Derived From Biological Resources, Peru Law No. 27811, (2002), available at <http://www.grain.org/brl/?docid=81&lawid=2041>; On The Special Intellectual Property Regime Upon Collective Rights Of Indigenous Communities, For The Protection Of Their Cultural Identities And Traditional Knowledge, Panama Law No. 20, (2000), available at <http://www.grain.org/brl/?docid=461&lawid=2002>; New Zealand Trademark Act, arts. 17(1), 177 (2002).

right to control their perceived traditional knowledge. A method must be developed following the mediation model that is used in connection with human rights issues, to resolve such disputes in a balanced manner.

In addition to developing a workable mediation system for resolving traditional knowledge disputes, we must also incorporate into the identification and licensing processes the concept of fair-use and equitable access. I do not mean to suggest that this fair use concept necessarily contains the same contours as the fair use doctrine present in copyright regimes.<sup>32</sup> However, the basic premise of this doctrine, which says that not everything gets protected on an exclusive basis and not every use that may be useful for society is an automatic fair-use, is a concept of equitable access that should apply with equal vigor in the context of traditional knowledge. When it comes to traditional knowledge, it is critical to go back to the groups themselves and say, “Think very hard about what it is you want to be certain that people do not use. Think hard about what you are willing to let people use.” As part of this deliberation process, the default position should be in *favor* of the requested use. Adding the concept that “it is better to share than not share,” to the deliberative process should help assure that use is only denied for a limited number of works and practices.

We need to have a balanced access paradigm. There will be some traditional knowledge that is protected so strongly that the public may actually be denied any use of such knowledge.<sup>33</sup> Ultimately, however, much traditional knowledge will remain available on the basis of moderated access.

To achieve a balanced access paradigm, we need to begin to identify what factors should be considered in deciding to grant or deny access to traditional knowledge. These factors should be scrutinized and reviewed by all interested parties, including indigenous groups. This list of factors would not be exclusive, but would hopefully provide guidance to indigenous groups and predictability for third party users to assure their utility. Ultimately, we need to realize that when dealing with access to information, unimpeded access is not always right. Unbounded protection is also not always right. However, in the case of traditional knowledge, the concerns and views of the holders of such knowledge must be given precedence in order to give voice to people who have largely been excluded from the process until now.

One of the articles that I am currently completing explores the imperialism of the 19th century and the imperialism that is being applied to traditional knowledge today.<sup>34</sup> The rhetoric of the two is frightening similar. We can avoid some of the pitfalls of those earlier years if we consider diverse approaches. Access to knowledge, human rights, intellectual property rights, *etc.* take the best of those approaches and devise a regime that makes sense for all parties. I would hope, sixty-five years from now, when we are all back here celebrating another anniversary for The John Marshall Intellectual Property Law program, that we will have a regime that actually makes sense for both the people who need access to traditional knowledge

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<sup>32</sup> See, e.g., 17 USC § 107. See also *Harper & Row v. Nation Enterprises*, 471 U.S. 539 (1985); *Kelly v. Arriba*, 336 F.3d 811 (9th Cir. 2003); *Acuff-Rose v. Campbell*, No. 91-5232, 1991 U.S. App. LEXIS 6094 (6th Cir. April 1, 1991); *Sony Corp. Of Am. v. Universal City Studios, Inc.*, 464 U.S. 417 (1984).

<sup>33</sup> Sacred works and symbols are likely candidates for exclusion.

<sup>34</sup> Doris Estelle Long, *Collaborative Creativity and Collective Rights* (working draft on file with author).

for commercialization purposes, and for the people whose traditional knowledge is being commercialized.