INTELLECTUAL PROPERTY LAWS IN THE SOUTH PACIFIC: FRIEND OR FOE?

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The protection of intellectual property in the countries in the South Pacific region[1] has recently become a hot issue. Increasingly, intellectual property laws are being claimed to be a solution to a wide range of problems, from poor economic performance, to disintegration of cultural knowledge[2], to bio-piracy by multinational companies[3]. Consequently there has been an explosion of intellectual property legislation[4] and public calls for the introduction of more protection[5]. At the recent South Pacific Forum Economic Ministers meeting, the importance of protecting intellectual property rights was recognised as being a matter of priority. It was also noted that traditional ecological knowledge, innovations and practices, and traditional knowledge and expressions of culture, are key resources for the region.[6] Pressure to strengthen and reform intellectual property laws is also being applied on some countries in the region by the World Trade Organisation ("WTO") through the Trade Related Aspects of Intellectual Property Rights Agreement ("TRIPS").[7]

The first section of this paper considers the justifications and historical development of intellectual property system in Europe and contrasts it with the traditional approaches to intellectual property in the South Pacific prior to colonisation. It then considers the current main needs for intellectual property protection in the region; and classifies them into three parts: as an incentive for economic development; protection of traditional knowledge and culture; and protection for genetic resources. Third, it provides a brief outline of current systems of intellectual property protection in the South Pacific. Fourth, it considers whether or not the existing laws are protecting or advancing the needs that had been identified in the previous section.

The final section of the paper is devoted to examining ways to improve intellectual property protection in the region. In particular, it considers whether the best way forward is to continue with the current trend of introducing legislation modelled to a large degree on Anglo/American legislation. It argues that it is both ideologically and practically impossible for western-style intellectual property systems to meet the current needs for protection. For the purposes of this paper, western-style intellectual property systems are taken to mean copyright, patent, trademark, and design legislation; their accompanying registration offices and administrators, for example, patent and trademark attorneys; and the specialised courts and tribunals which apply them.

This paper does not go so far as to suggest that western-style intellectual property laws should never be introduced. However, it suggests that careful attention should be given to crafting solutions to problems within the context in which they will operate, instead of merely copying a foreign system. As Corrin-Care notes:

> [I]n most countries of the region the constitution makes it clear that introduced law was

> 'saved' as a transitional measure. This approach is emphasised by those preambles that stress the importance of indigenous values and by the 'cut-off' dates imposed to prevent continued application of foreign law. The countries of the South Pacific were not intended to be bound forever to English common law.[8]

Thus, this paper argues that intellectual property protection is an area where a start can be made in thinking afresh about the issues involved, to create a system specifically designed with the needs and realities of the region in mind.

1. The History and Rationale of Intellectual Property Protection in the West and in the South Pacific

Intellectual property is property that does not have a physical existence, for example a song. Although the song may be written down on a piece of paper, the property in the song is different from the property in the piece of paper. In Europe it was not initially recognised that intangible property was a type of property over which rights could be held. Then, in the sixteenth and seventeenth centuries, artists and inventors began to argue that they should be given special rights over their works as an incentive to expend time and creative labour in producing them. Why should we spend years developing a new song, the argument went, if as soon as we sing it in public everyone else learns it and sings it as well without returning any benefit to us? Eventually, it was agreed that authors and inventors should have certain exclusive rights to their works for a period of time. Intellectual property rights were thus introduced for two policy reasons: first because it seemed "unfair" that, as intangible property can be copied so easily, an author who has expended time and labour reaps no benefit; and second because giving protection to creative works was thought to encourage the production of more works.

This philosophical justification of the western intellectual property system has given rise to a certain number of distinctive features of the system. The first is that the protection given is limited protection. The aim is to give just enough protection to provide an incentive to create, but not enough that the advancement of science and the arts would be hindered by too much personal ownership. The biggest limitation is in terms of years of protection – 20 years for patent[9], and the life of the author plus fifty years for copyright. After the term of protection has expired, works go into the "intellectual commons", or public domain as it is sometimes called, – a place where everyone is free to use them without the permission of anyone else. The reason for the intellectual commons is to ensure that there is a ready pool of ideas and works which can be drawn upon to form the basis of new creations. It is what Boyle terms the 'implicit quid pro quo of intellectual property'.[10] The second feature of this system is that protection is predicated upon the public being given access to the work. In the case of industrial property this is done by providing that it is only once an invention, trademark or design has been registered that protection is available. For copyright, there are compulsory licensing provisions and fair use provisions that ensure public access to works.

The origins of intellectual property protection in the South Pacific region are a lot harder to identify. What is clear is that the concept of ownership (either by individuals, families or communities) of songs, dances and other forms of traditional knowledge and custom has been well established for a long period of time. Jolly states that the knowledge of styles of singing and dancing, of sculpting slit-gongs or weaving mats, of myths of origin told in local language, together with the associated rights of performance, was a commodity exchanged between local groups in the past.[11] Dr Jacob Simet, Executive Director of the PNG National Cultural Commission stated:

> We have had songs, traditional knowledge and so on for hundreds of years. There was no doubt as to who originally owned them – they were originally owned by one person who passed them on to his or her clan. There were clear customary laws regarding the right to use the songs and the knowledge. There was no problem in the past.[12]

Traditionally rights to certain songs and carvings were protected by *tabu* and often magic.[13] Rights to use such songs and designs could be purchased with payments of food, mats and other forms of currency.[14] For example, on the island of Ambrym in Vanuatu there is a famous ceremony known as *ole Rom*. This ceremony involves dancing in highly elaborate costumes. As legend has it, a local girl made the first costume to seduce a young man from her village. She enticed him into the bush where she revealed how the costume was made. Once he knew the secret he killed her and sold the rights to make copies to other men. It is still *tabu* to see a *Rom* costume being made. If someone transgresses this rule they must pay a fine (a pig) to the chief, then have their backs whipped with the leaves of a stinging plant called the *naggalat*, the poison from which burns the skin like fire for several days.[15]

Traditional intellectual property protection in the region was different from western intellectual property protection in that it was not based on the premise of a limited time span nor public disclosure. Thus, traditionally in the region, no meaningful distinction was drawn between tangible and intangible property. Rather, just as a community owned an area of land, they owned the right to certain intangible property such as dances, songs and knowledge about the medicinal uses of plants.

This background is necessary to understand the developments and issues in the law of intellectual property in the region today.

2. What is the need for Intellectual Property Protection in the South Pacific Today?

There are three problem areas in the South Pacific that intellectual property is being called upon to solve. The first is the region's lack of development of new technologies and economic advancement. Some commentators argue that more protection for intellectual property in the region will increase foreign investment and stimulate growth. For example, Mohammed Ahmadu argues:

> The limited scope of protection offered by the present patent system, may have been responsible for the low level of direct foreign investment from transnational pharmaceutical companies. This is because of the fear that their innovations may not be fully protected by the legal system. . . . . To this end, for any new patent system to succeed in stimulating the development of a pharmaceutical-industrial-complex in Vanuatu, it has to direct itself to the attraction of foreign investment, which would in turn develop the appropriate pharmaceutical technology that is needed.[16]

Similar arguments are also being used by the Intellectual Property Office for Papua New Guinea ("IPOPNG"). The IPOPNG argues that an intellectual property regime is justified on the following bases: it promotes development through innovation and creativity, it promotes investment, it promotes quality of products and creates employment.[17] These arguments are also being used by international organisations such as the WTO (through the TRIPs agreement) and UNESCO. UNESCO:

> . . . encourages governments to adopt measures which promote creativity and increase the production of national literacy, scientific, musical and artistic works, with a view to reducing dependence on foreign sources. A first step in this direction is to help them prepare legislation, and appropriate enactment policies, and to encourage them to adhere to the various international conventions on the protection of copyright and neighbouring rights.[18]

The other two major issues or needs for intellectual property in the region today are: protection of genetic resources; and protection of traditional knowledge and culture. The South Pacific is extremely biologically diverse and is rich in natural resources. Many of the plants have been used by the indigenous population for centuries to provide cures for various illnesses. This has led multinational drug companies to come to

the region looking for resources from which to manufacture new drugs and conduct experiments. These drugs are then often patented outside the territory with no benefits being returned to the indigenous population. The best example of this is the kava plant, the pulverised roots of which make a ceremonial and social drink in many countries in the region. The medicinal and sedative properties of kava were initially only known in the South Pacific but today there are growing numbers of kava-based preparations in European and United States markets, some of which have been patented.[19] For example, L'Oreal has obtained patents on the use of kava to stimulate hair growth in the United States and Europe, with profits in the millions.[20] It appears that no benefit has gone back to the South Pacific.

On an even more personal level, human genes from South Pacific islanders have been appropriated by multi-national companies for commercialisation. For example, in 1994 the U.S. Patent and Trademarks Office approved patents on the cells lines of a Hagahai man from Papua New Guinea.[21] The patents were granted to the U.S. Department of Health and Human Services and the National Institutes of Health (NIH). However, after a public outcry, NIH abandoned the patent in 1996. Despite the outcry, the issue of exploitation of genetic resources of Pacific Islanders has not gone away. Recently the Cook Islands have been mooted as a possible site for hosting pig-cell transplants in volunteers in an effort to find a cure for diabetes.[22]

The complaint that is made about these developments is that the plants (and people) from which these drugs are made belong to the indigenous people. Often their traditional knowledge is also what leads scientists to the plants' medicinal qualities. The "wrong" that is complained of here is that the indigenous peoples' traditional knowledge is taken and profits made, with no returns going back to them.

The last issue for which intellectual property protection is looked to for a remedy is the increasing exploitation and inappropriate commercialisation of their traditional knowledge and expressions of culture.[23] This is a similar complaint to the complaint about biopiracy. For example, there are concerns in the Cook Islands that entrepreneurs in Hawai'i are profiting by marketing elements of Cook Islands culture, including drumbeats, dances and songs.[24] This issue again has a basis in the traditional South Pacific concept of intellectual property, as it sees traditional knowledge and representations of culture as deserving the same level of protection as tangible property.

3. Brief Outline of Existing Intellectual Property Laws

Intellectual Property protection in the South Pacific region can be classified into three parts: indigenous intellectual property systems, inherited intellectual property laws from the UK, New Zealand, or Australia and national legislation. The first system is based on the South Pacific rationale for protection, while the latter two are based on a western justification for intellectual property.

As has been discussed above, intellectual property rights were pervasive in many of the countries in the region prior to colonisation. However, the efficacy of these traditional systems of protection is predicated upon the existence of small and closely knit communities. As the forces of globalisation and urbanisation loosen the traditional ties of these communities, the intellectual property systems lose much of their power. Thus today these systems play a continually dwindling role in the protection of indigenous intellectual property. They still exist, however, as is demonstrated by a current dispute between people from North and West Ambrym in Vanuatu over who has the right to carve certain wooden carvings known as *tamtams* associated with a mythical story.[25] Newspaper reports of this dispute show that reliance is still placed on customary law at a local level to determine who has the right to make these *tamtams*.[26] Customary law was also relied upon by the Supreme Court of Vanuatu in the case of *In the Matter of the Nagol Jump*[27] where one group of applicants tried to prevent the respondents from performing the Nagol jump (a traditional ceremony, akin to bungy jumping, which originated on the island of Pentecost) on the island of Santo. The Chief Justice based his decision on 'substantial justice' and 'in conformity with

custom' and ordered that the Nagol jumping should return to Pentecost from whence it came.

The second category of intellectual property laws are those that have been adopted in their entirety from the UK, New Zealand and Australia. Thus, the Cook Islands, Niue and Tokelau are subject to the *Copyright Act 1962* (New Zealand), the *Trademarks Act 1953* (New Zealand) and the Patent *Act 1953* (New Zealand). [28] Both Kiribati and Tuvalu have also adopted parts of the *Copyright Act 1956* (United Kingdom). In Nauru, somewhat confusingly, the copyright law is English[29] while the trademark law is Australian.[30]

Four countries in the region have patent and trademark protection only for patents and trademarks that have already been registered in the UK. Thus the only patent legislation that exists in Kiribati, Vanuatu, the Solomon Islands and Tuvalu is the *Registration of UK Patent Act*.[31] Similarly, in these jurisdictions the only trademark legislation is the *Registration of United Kingdoms Trademarks*.[32] In Nauru, the *Patents Registration Act 1973* only applies to patents already filed in Australia, the UK or the USA.[33] In regard to the *Registration of United Kingdoms Patents* [CAP 80] (Vanuatu), Mohammed Ahmadu notes:

> There is nothing covering locally generated innovations by residents or nationals of Vanuatu. It seems also that no protection will be offered to any invention that has not been patented in the United Kingdom. This practice could have been understandable prior to 1980 [date of independence], but cannot have any credible justification at present.[34]

Finally, some countries in the region have national intellectual property legislation. Samoa has a Trademarks Act[35], Patent Act[36] and Copyright Act[37]; Fiji has a Trademarks Act[38], a Patents Act[39] and a Copyright Act[40]; Papua New Guinea has a Trademarks Act[41], a Patents Act[42] and Copyright Act[43]; The Federated States Of Micronesia has a Copyright Act[44]; Kiribati has a Copyright Ordinance[45]; The Solomon Islands has a Copyright Act[46]; Tonga has a Copyright Act[47]; and Tuvalu has a Copyright Ordinance.[48] All of these national laws are based on Western intellectual property laws and hence the western justification for protection.

4. Is the Current System Addressing the Needs Identified Above?

In order to address this question it is necessary to determine first what is being asked of the system. The South Pacific region is relatively technologically undeveloped, and hence intellectual property disputes of the sorts that arise in the west, are unlikely to occur, at least in the immediate future. Leaving to one side for the present the issue of economic development, the areas where protection is immediately needed have been identified as the protection of traditional knowledge, natural resources and expressions of culture. Thus, whether or not the current systems are providing remedies in these areas is the mark against which their success or otherwise can be judged.

It is clear that the current regimes of intellectual property protection in the South Pacific are not being utilised to protect intellectual property. This is shown by the fact that to date there has only been two reported trademark cases[49], three copyright cases[50], and no patent cases in the whole of the region.[51] In addition, many of the enforcement agencies essential to the efficacy of the system are not operational. For example, in PNG it appears that although the new copyright legislation is in force, there is uncertainty over which body is responsible for its administration.[52] In the Solomon Islands, although the *Copyright Act* [CAP 138] was passed in 1987, by late 2001 it was reported that nothing had been registered under the Act and that the Registration Office is not yet ready to register anything under the Act.[53] Similarly in Fiji there is provision in the Act for a Copyright Tribunal, but as yet there has been no appointment to the Tribunal.[54]

There have been a number of international forums at which the issue of the effectiveness or otherwise of existing intellectual property legislation in the region in protecting traditional knowledge was discussed. All the countries that replied to the World Intellectual Property Organisation ("WIPO") Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge in September 2001 agreed that intellectual property laws are unable to protect traditional knowledge.[55] Further, at the South Pacific Council Symposium in 2002 it was concluded that:

> Existing legal systems in the region were found not to address the crucial issue of protection against improper use of pacific Island peoples' traditional living heritage. Appeals for specific legislation were strongly voiced among common requests.[56]

The Final UNESCO Report of the Symposium on The Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands in 1999 notes that Australia, New-Zealand and Papua New Guinea are involved in an in-depth study of overall protection for "indigenous cultural and intellectual property", having found that the system of intellectual property protection currently in force is ill adapted to protect these areas.[57]

The South Pacific Commission notes that:

> Pacific Islanders' traditional knowledge and expressions of culture are increasingly being appropriated and commercialised for profit by non-indigenous interests. At present there is no international or regional regime now in place that affords legal protection to traditional knowledge and expressions of culture.
> Existing protection for intellectual property rights give priority to individual ownership, impose strict interpretations of invention, and have a limited life. In contrast, traditional knowledge and expressions of culture are characterised by collective ownership, are normally held in perpetuity from generation to generation, and are incremental, informal and subject to change over time.[58]

5. Which Way Forward?

The fundamental question is whether to try to amend western style intellectual property laws so that they better fit with the prevailing conditions in the region or whether to start afresh with a new system.

There have been recent attempts to adapt western-style legislation to the specific needs of the region. For example, both Vanuatu's new *Copyright Act* (which has been assented to but is not yet in force) and Papua New Guinea's *Copyright and Neighbouring Rights Act 2000* are largely based on Anglo/European models but are modified slightly to allow for local conditions. In the former there is a specific provision dealing with the protection of "expressions of folklore."[59] This is defined to mean 'a group-oriented and tradition-based creation of groups or individuals reflecting the expectation of the community as an adequate expression of its cultural and social identity, its standards and values as transmitted orally, by imitation or by other means.'[60] In the latter, provision is made for protection of 'Indigenous culture' which is defined to mean 'any way in which indigenous knowledge may appear or be manifested.'[61]

These are both still untested pieces of legislation, but it seems justified to speculate that they will face problems as they carry within them inherent contradictions. They are trying to solve the problems of the

lack of protection of traditional knowledge with a system based on principals that do not recognise the value of such protection.
The protection that is required is permanent protection for knowledge and expressions of culture that have been developed and passed down through generations. Often this knowledge is community owned and the result of collaborative efforts. Further, often protection is wanted without the necessity for public disclosure, as is the case for sacred knowledge and rituals. As should be clear from the discussion above, protection of this sort falls outside the aegis of western-style intellectual property laws.

On a practical level, western intellectual property legislation is predicated upon a highly developed, literate and bureaucratic society with a strong State to administer and enforce law. These are not characteristics of many South Pacific countries. As an anonymous commentator in the World Intellectual Property Organisation ("WIPO") Report of its Fact Finding Mission to the South Pacific stated:

> One should not attempt to amend western laws to cater for indigenous peoples. Attempts to do so will be doomed because the IP system and the needs of indigenous peoples are too distinct.[62]

There are also fears about the effect of intellectual property laws on the use of resources by the indigenous population. This was aptly summed up in Samoa's response to a questionnaire circulated by WIPO regarding existing protection for cultural knowledge. The response stated:

> The requirements for [Intellectual Property Rights ("IPRs")] are consistency, novelty and creativity, thus removing communal benefit. Any implementation of the IPRs removes traditional practices and lifestyles of the Samoan people accordingly. It offers neither right nor protection to the Samoan people.[63]

Sue Farran has also noted the dangers of introducing western style intellectual property protection in the context of natural resources:

> At the same time bringing plants and natural resources under intellectual property laws could have a negative impact on the people of the islands, for whom the use of plants and natural resources is an everyday feature of life. To suggest that, for example, the use of certain medicinal plants in a certain way is to be prohibited or restricted because someone has the intellectual property right to exclusive exploitation would run contrary to the communal nature of much of this property, and the fact that it has been used and exploited by many people in different ways over the passage of time.[64]

In regard to the issues of intellectual property and development, the first "need" identified above, there is no compelling evidence that a western-style intellectual property system will aid economic growth and technological development. At the Symposium on The Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands in 1999 the point was made that '[s]ince there is little likelihood that Island countries may have the financial and technical capability to claim patents, one can wonder what are the real benefits Island countries will get from international conventions.'[65]

Further, there is no conclusive economic evidence for the beliefs that intellectual property laws create wealth. Suchman states:

> Although legal economists have devoted a great deal of attention to the evaluation of Western intellectual property law, their efforts often end with bland assertions that the current regime has both costs and benefits and that the balance between the two remains an open question. Empirical work in this area is rare, and cross-cultural comparisons are rarer still.[66]

Another prominent commentator has noted that this field is 'one of the least productive lines of inquiry in all of economic thought' and that:

> [t]he ratio of empirical demonstration to assumption in this literature must be very close to zero . . . [I]n the current state of knowledge, economists know almost nothing about the effect on social welfare of the patent system or of other systems of intellectual property.[67]

So, if we conclude that western style intellectual property protection cannot meet the needs of indigenous intellectual property, what can? There has been a great deal of discussion of this issue at an international and regional level. One of the responses that have been suggested is *sui generis* protection. Successful examples of the use of traditional knowledge and natural resources also suggest another solution, namely contract. These two ideas will be discussed in the remaining section of this paper.

(a) Model Laws – *Sui Generis* Protection

As a result of the belief by many in the region that traditional intellectual property laws cannot be modified to suit the needs of the South Pacific region, there have been calls for *sui generis* protection. These ideas have given rise to the *Model Law for the Protection of Traditional Knowledge and Expressions of Culture* (2002) ("the Model Law"). The Model Law was reviewed and finalised at a meeting, jointly organised by the South Pacific Commission ("SPC"), Pacific Island Forum Secretariat and UNESCO, before being endorsed by the First Conference of Ministers of Culture of the Pacific Region at SPC in 2002.

The policy objective of the Model Law is to protect the rights of traditional owners in their traditional knowledge and expressions of culture and to permit tradition-based creativity and innovation, including commercialisation thereof, subject to prior and informed consent and benefit-sharing.[68] The model is intended to be a draft for Pacific Island countries to adopt and adapt as they see fit. Ideologically it seeks to achieve a balance between protecting traditional knowledge and expressions of culture and encouraging their commercialisation. The Model Law consciously encroaches on the "intellectual commons" that lies at the heart of the western justification of intellectual property law. This was specifically recognised by the drafters of the law, who stated in their Background Paper:

> The approach taken in the model law is to create new rights in traditional knowledge and expressions of culture which previously might have been regarded, for the purposes of intellectual property law, as part of the public domain.[69]

It is clear that the Model Law utilises the South Pacific rationale for intellectual property protection – that there is no distinction between the protection of tangible and intangible property – rather than the western justification of limited rights.

The Model Law carefully positions itself to regulate only those uses of traditional knowledge or expressions of culture that are not regulated by either customary law or intellectual property rights.[70] The law is retrospective in its application and applies to "traditional knowledge and expressions of culture" ("TKEC"). The definition of TKEC is extensive and aims to overcome the limitations of western style intellectual property regimes by expressly including works not in material form, works that have

been transmitted from generation to generation, and works that are collectively originated and held.[71]

The protection given to TKEC under the Model Law is referred to as Traditional Cultural Rights. Traditional Cultural Rights are similar in some respects to western style intellectual property rights but differ in other respects. They include the right to reproduce, publish, perform and to make available online TKEC. However, the rights are inalienable and continue in force in perpetuity.[72] In addition, as in European intellectual property regimes, the Model Law also provides for moral rights of authors. These are the right of attribution, the right against false attribution and the right against derogatory treatment in respect of traditional knowledge and expressions of culture.[73]

In effect the Model Law establishes a framework for exploiting TKEC through the use of contract. It contains detailed provisions to ensure that TKEC is only dealt with in a non-customary way after prior and informed consent has been obtained from the traditional owners. It provides for two ways of seeking authorisation: directly through a custom owner and indirectly through a Cultural Authority. The Cultural Authority is essentially the administrator and enforcer of the Model Law. The Model Law provides that each country may either create a new Cultural Authority or designate an existing body to take on the new responsibilities. This may overcome the present problems discussed above that many countries in the region are experiencing in enforcement of intellectual property laws, although it is possible that the same problems would be experienced with the new authority.

One aspect of the Model Law that has the potential to be problematic is its relationship with traditional intellectual property rights. The policy of the Model Law is to complement and not undermine intellectual property rights.[74] Thus, clause 11 provides that traditional rights are in addition to, and do not effect, any rights that may subsist under any law relating to copyright, trademarks, patents, designs or other intellectual property. In theory there therefore seems to be a clear separation - intellectual property laws have “priority” over the Model Law where a work falls under both their protection. The problem arises in practice in determining whether or not intellectual property protection applies. This is particularly difficult in the case of copyright for which there is no system of registration, and for which there are no bright lines. An example should demonstrate the difficulty that may arise. A new work is created that appears to fall under the copyright system. It is then alienated by the author to a third party. Eventually it becomes clear that in fact the work is not protected by copyright but falls under the protection of the Model Law. An offence has therefore been committed by the alienation of the work. Given that such an offence can be punished by imprisonment, this is a serious consideration.

It would seem absurd that it is necessary to go to court for a determination that copyright subsists in a work before the provisions under the Model Law could be safely dispensed with, and yet there is currently no other apparent way around the problem. Perhaps a new defence could be incorporated of parties dealing in good faith with a work as if it was protected under an intellectual property regime.

A further example of the difficulties of the Model Law’s relationship with intellectual property law is the moral rights provisions. Clause 12 of the Model Law provides that even a derivative work that falls under the intellectual property regime is subjected to the moral rights requirement of the Model Law.[75] This seeks to impose restrictions on the uses to which a work can be put under the intellectual property regime and cannot be said to be in accordance with the policy of fully respecting intellectual property rights.

It is not clear why intellectual property rights are given priority over the Model Law. One could speculate that it is due to international pressures to maintain the status quo. However, the system created under the Model Law appears to have found a balance between protection of culture and encouragement of commercialisation of culture that is specifically designed for the South Pacific. It therefore appears infinitely preferable over the intellectual property regimes whose shortcomings have been detailed above.

The Model Law has not yet been enacted into law in any country in the region.

(b) Contract

Contract can also prove to be a valuable tool to ensure that local communities are given a share of profits that come from the exploitation of natural resources by multinational companies.

An example of the successful use of contract in dealing with multinational companies is the development of a potential anti-HIV/AIDS drug from a compound found in the bark of a Samoan tree.[76] The compound, which comes from the "mamala" plant, was “discovered” and patented by Brigham Young University, Utah and the U.S. National Institute of Cancer in the 1990s after a batch of plants was sent to the USA from the village of Falealupo, Savai‘i.
Prior to the commencement of his research, the scientist who discovered the compound agreed with the Samoan chiefs that the village would share the benefits of the research. This promise was formalised by an agreement in September 2001 that gave the Samoan government 12.5% of the profits and 6.7% of the profits to the village of the healers who provided the information that led to the discovery.[77]

Approval of contract as a way of protecting the interests of local communities was voiced at the Symposium on The Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands in 1999. Professor Puri stated:

> Access to traditional knowledge and genetic resources must be jealously protected through contractual and legal agreements, since patent laws that are used and abused by multinationals offer inadequate protection[78]

It was noted that in the Solomon Islands contracts are being formally signed between researchers and representatives of the community, area council, provincial council and Government, with royalties going back to the community.[79]

There are also some obvious dangers in the use of contract. One of these is the unequal bargaining power of the two parties as a result of their disparity in, amongst other things, information about the potential value of the intellectual property. It is noteworthy that in the case of the development of the Samoan mamala plant the development agency was a not for profit institution. To try to remedy the problems inherent in unequal power relationships between contracting parties, one commentator suggests the creation of a national biodiversity institute which is vested with legal autonomy and given the task of negotiating “bioprospecting” contracts.[80] Another possibility is to set out minimum terms and conditions for bio-prospecting arrangements in legislation.

The creation of an independent body to negotiate contracts would also help to avoid the problems of unscrupulous governments signing contracts authorising the exploitation of resources against the wishes of the people. This problem arose recently in Tonga when an Australian genetic company, Autogen, signed an agreement in November 2000 with the Tongan Ministry of Health to establish a research project aimed at ‘identifying genes that cause common diseases using the unique population resources in the Kingdom of Tonga.’ As a result of a huge public outcry over this contract when it was disclosed, Autogen pulled out of the project, at least for the time being.[81]

Perhaps another way to proceed would be to expand the system created under the Model Law discussed above to include dealings with natural resources and genetic materials. This would help to ensure that

genetic resources are not removed from their environment without the informed consent of the traditional owners. Such models are in the process of being created by numerous different organisation, see for example the Protection of Traditional Knowledge and Expressions of Culture Act (2001, draft) drafted by the Genetic Resources Action International.[82]

(c) Other Strategies

There are a range of other possible "tools" for use in regulating the exploitation of indigenous intellectual property. Foremost among these is awareness-raising among communities of the potential value of traditional knowledge and genetic resources. In the WIPO Fact Finding Mission it was suggested that awareness-raising be introduced in schools.[83]

A further point arising from awareness-raising is the need for traditional knowledge holders to be aware of ways of restricting access to this knowledge. The WIPO Fact Finding mission acknowledged that communities need to be able to restrict access to their knowledge and associated genetic resources if they wish to protect them and to benefit from their possible commercial exploitation, but noted that 'for economic and other reasons, they are unable to do so'.[84] Attention must therefore be given to finding practical ways for local communities to restrict access to their natural resources. Perhaps other state institutions, such as customs control, could be utilised to provide such assistance.

The use of national heritage policy and legislation can also play an important role in the preservation of traditional cultures and knowledge systems. For example, the PNG National Culture Commission is directly involved in the preservation, protection, development and promotion of the cultures of the people of Papua New Guinea, in both traditional and modern cultural forms.

Conclusion

The discussion above has demonstrated at the present stage of development in the region, the real need for protection is in the areas of traditional ecological knowledge, innovations and practices, and traditional knowledge and expressions of culture. It has shown that western style intellectual property laws are ill-suited to protecting these areas of intellectual property on both a policy and a practical level. Despite this, the current trend has been to introduce such laws and there are strong pressures on governments in the region to continue with this trend, not least from international organisations such as the World Trade Organisation.

This paper has also demonstrated that there has been a lot of well researched and innovative development at an international and regional level in regard to the protection of traditional knowledge, expressions of culture and natural resources. This research shows there are many possible ways to protect traditional knowledge and culture and natural resources other than by introducing western-style intellectual property laws. Governments in the region should try to be inventive and to give consideration to some of these suggestions before continuing down the path of adopting western-style intellectual property protection. Further, if systems to protect the intellectual property needs outlined above are specifically crafted to meet the ideological and practical requirements of the countries in the region; then it can be hoped that when new sorts of intellectual property require protection, these systems can be modified to protect them as well. Thus the intellectual property system would be one that grows from grass-roots support, rather than one that is imposed from the top down, which would surely give it greater legitimacy and relevancy.

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[1] For the purposes of this paper the South Pacific Region comprises: the Cook Islands, Federated States of Micronesia, Fiji Islands, Marshall Islands, Kiribati, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tokelau, Tonga, Tuvalu, and Vanuatu.

[2] For example, a headline in a newspaper article urging the introduction of a new Copyright Act for the Cook islands states "Politicians Hold Key To Rescuing Cooks Islands' Culture" *Cook Islands News* (Cook Islands) August 21, 2001.

[3] 'Cook Islands: Bio-Colonialism – An Area We Dare Not Ignore', *Cook Islands News* (Cook Islands), July 4, 2002.

[4] In the past five years Fiji, Papua New Guinea, and Samoa have introduced Copyright Acts and Vanuatu has assented to a Copyright Act which has not yet come into force. PNG has introduced a Patent Act. A Cook Islands Copyright Bill was proposed in 1992, but it has yet to become law.

[5] Fiji's new Copyright Act was "welcomed by both sides of parliament as long overdue" ('Fiji Passes New Copyright Bill' (February 5, 1999) Pacific Islands Report http://pidp.eastwestcenter.org/pireport/graphics.htm accessed 1 March 2003.
Artists in New Caledonia planned demonstrations at the 8th Pacific Arts Festival to protest the lack of copyright protection ('New Caledonia Artists to Protest Pacific Arts Festival' (August 30, 2000) Pacific Islands Report http://pidp.eastwestcenter.org/pireport/graphics.htm accessed 3 March 2003.

[6] South Pacific Commission, '*Background For the Regional Framework For the Protection of Traditional Knowledge and Expressions of Culture'*, SPC/UNESCO/PIFS/RMOC/Information Paper 5 26 August 2002 at 6.

[7] The Agreement on Trade-Related Aspects of Intellectual Property Rights was concluded in 1994 as part of the Marrakesh Agreement establishing the World Trade Organisation. The TRIPS Agreement came into force on January 1, 1995. Current members of the WTO in the South Pacific Region are: Fiji (14 January 1996), Papua New Guinea (9 June 1996), and the Solomon Islands (26 July 1996). The following countries are in the process of joining the WTO: Samoa (application lodged 15 July 1998), Tonga (application lodged 15 November 1995), Vanuatu (application lodged 7 July 1995). Under TRIPs, member states classified as "Least-Developed" have until January 1, 2006 to ensure their intellectual property laws are in conformance with certain standards: 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders', World Intellectual Property Organisation ("WIPO") Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), (April 2001, Geneva) Part 1 at 33.

[8] Jennifer Corrin Care , "Cultures in Conflict: The Role of the Common Law in the South Pacific" , (2002) 9 (1) *Journal of South Pacific Law.*

[9] TRIPs, art 33.

[10] James Boyle*, Shamans, Software and Spleens* (1996) 139. See also Lawrence Lessig, 'Commentary: The Law of The Horse: What Cyberlaw Might Teach' (1999) 113 *Harvard Law Review* 501 at 527.

[11] Margaret Jolly, "Custom and the Way of the Land: Past and Present in Vanuatu and Fiji" (1992) 62 (4) *Oceania* 330, 341

[12] WIPO Report, above n 7 Part II at 8.

[13] For a fascinating discussion of the use of magic to enforce intellectual property rights in preliterate societies see Mark Suchman, 'Invention and Ritual: Notes on the Interrelation of Magic and Intellectual Property in preliterate societies' (1989) 89 *Columbia Law Review* 1264 at 1277, 1280.

[14] When the author visited Vao, a small island off the coast of Malekula in Vanuatu in March 2002 she spoke to a chief who took her to visit a nasara (place where ceremonies were conducted). There was a two faced tam tam inside the nasara and the chief stated that only he and his descendants had the right to carve

that particular design and that if anyone else was caught carving it then they would have to pay a heavy fine, including a pig.

[15] Denis O'Byrne, et al, *Lonely Planet Guide to Vanuatu*, 3rd Edition (1999) at 199.

[16] Mohammed Ahmadu, 'Vanuatu's Accession to the WTO and the WIPO: A Reflection on Patent and Pharmaceutical Technology' (1998) 2 *Journal of South Pacific Law.*

[17] 'Reasons Why there is Need to be in Place an Intellectual Property Regime to Protect IP Rights', Intellectual Property Office of Papua New Guinea http://www.ipa.gov.pg/ipo.htm accessed 8 March 2003.

[18] UNESCO http://www.unesco.org/culture/copyright/ accessed 19 May 2003

[19] WIPO Report, above n 7 Part II at 9.

[20] Christy Harrington , 'Globalisation Not Neutral For The Pacific, But Women Will Have To Learn To Negotiate', *Pacific Magazine,* November 2002.

[21] Margaret Lock, 'Symposium: Genetic Diversity And The Politics Of Difference' (1999) *Chicago-Kent College of Law Chicago-Kent Law Review*, 83 at 99.

[22] 'Cook Islands: Bio-Colonialism – An Area We Dare Not Ignore', *Cook Islands News* (Cook Islands), July 4, 2002.

[23] South Pacific Commission above n 6 at 1.

[24] "Politicians Hold Key To Rescuing Cooks Islands' Culture" *Cook Islands News* (Cook Islands) August 21, 2001.

[25] "Ambrym man lays claim to Bekelaw tamtam" *Trading Post* (Port Vila, Vanuatu) 25 February 2003.

[26] Ibid.

[27] [1980-1994] Van LR 545.

[28] This was extended to Cook Islands and Tokelau by Section 627 of the *Cook Islands Act 1915* and to Niue under the *Niue Act 1966.*

[29] Under the *Custom and Adopted Laws Act 1971* (Nauru) the common law and statutes of general application in force in England on 31 January 1968 are adopted as part of the laws of Nauru (Section 4).

[30] By virtue *The Trademarks Regulations Adoption Ordinance (No. 3) 1964* - the regulations made under the *Trademarks Act 1955-1958* (Australia) are applicable in Nauru.

[31] *Registration of United Kingdom Patents Act* [CAP 80] (Vanuatu); *Registration of United Kingdom Patents Act* [CAP 87] (Kiribati); *Registration of United Kingdom Patents Act* [CAP 179] (Solomon Islands); *Registration of United Kingdom Patents Ordinance* [CAP 61] (Tuvalu).

[32] *Registration of United Kingdom Trade Marks Act* [CAP 81] (Vanuatu); *Registration of United Kingdom Trade Marks Act* [CAP 88] (Kiribati); *Registration of United Kingdom Trade Marks Act* [CAP 180] (Solomon Islands); *Registration of United Kingdom Trade Marks Ordinance* [CAP 63] (Tuvalu).

[33] *Patents Registration Act* 1973, section 5.

[34] Mohammed Ahmadu, above n 16.

[35] *Trademarks Act 1972* (Samoa).

[36] *Patent Act 1972* (Samoa).

[37] *Copyright Act 199 8*(Samoa).

[38] *Trademarks Act* [Cap 240] (Fiji).

[39] *Patents Act* [Cap 239] (Fiji).

[40] *Copyright Act 1999* (Fiji).

[41] *Trademarks Act* [Cap 385] (Papua New Guinea).

[42] *Patents and Industrial Designs Act 2000* (Papua New Guinea).

[43] *Copyright and Neighbouring Rights Act 2000* (Papua New Guinea).
[44] *Copyright Act 1981*(Federated States of Micronesia).
[45] *Copyright Ordinance* [Cap 16] (Kirabati).
[46] *Copyright Act* [Cap 138] (Solomon Islands).
[47] Copyright Act [Cap 121] (Tonga).
[48] Copyright Ordinance [Cap 60] (Tuvalu).

[49] *W Weddel & Co (New Zealand) Ltd v Kumpulan Bakarath SDN BHT* (Unreported, High Court of Fiji, No 0061 of 1997,1997), http://www.vanuatu.usp.ac.fj/Paclawmat/Fiji_cases/Volume_U-Z/W_Weddel_v_Barkath.html (Accessed 18 February 2003); *Carlton Brewing Limited (Fiji) v Western Bottling Company* (Unreported, High Court of Fiji, HBC0228 of 1996, 1996) <http://www.vanuatu.usp.ac.fj/Paclawmat/Fiji_cases/Volume_A-C/Carlton_Brewery_v_Western_Bottling1.html (Accessed 18 February 2003).
[50] None of these are substantive copyright cases either, they are more procedural tactics. See: *Fiji Video Library Association v Attorney General and Ministry of Justice & Ors* (Unreported, High Court of Fiji, Civil Action No 0310 of 2000, 2000) <http://www.vanuatu.usp.ac.fj/paclawmat/Fiji_cases/Volume_D-F/Fiji_Video_v_AG.html> (Accessed 18 February 2003); *Crystal Clear Video Limited v Commissioner of police v Attorney-General* [1988] S Pac.LR. 130; *Robert Tweedle Macahill v R* (Unreported, Criminal Appeal No. 43 of 1980, Fiji Court of Appeal).

[51] The difficulties of accessing decisions in the region means that make such a statement is risky. There may have been a handful more cases that have not been reported, but the point remains. The author has definitely confirmed that there have been no cases brought under any of PNG's new intellectual property legislation (Email from Miranda Forsyth to Gai Aranga, IPOPNG, 7 March 2003).
[52] In response to an emailed query the author sent to the Intellectual Property Office of PNG she received the following reply:" On the question of administration of the Act, the functions, responsibilities and titles of the Copyright legislation currently falls under the Ministry of Justice. Although, the Intellectual Property Office of PNG was initially given the mandate by the National Executive Council to administer all regulatory functions and powers under the new copyright legislation. Both the National Cultural Commission and IPOPNG are working in close consultation in the implementation of the legislation and the formulation of a structure for collective management societies in PNG." (Email from Miranda Forsyth to Gai Aranga, IPOPNG, 7 March 2003). See also the Papua New Guinea Investment Promotion Authority's Website at < http://www.ipa.gov.pg/ipo.htm>.
[53] The assurance that "Efforts are however on the way to prepare for registration" is less than convincing. See the Solomon Islands' response to WIPO's 'Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge' WIPO http://www.wipo.int/globalissues/questionnaires/ic-2-5/solomon.pdf accessed 9 March.
[54] 'Copyright Act 1999' Munro Leys Lawyers http://www.munroleyslaw.com/alert/cact99a.html accessed 6 March 2003.
[55] The countries that responded were: PNG, Samoa, the Solomon Islands, Tonga and Tuvalu.
'Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge in September 2001 – Compilation of All Replies Received', WIPO http://www.wipo.int/globalissues/questionnaires/ic-2-5/index.html accessed 7 March 2003.

[56] South Pacific Commission, above n 6 at 1.

[57] UNESCO 'Report of the Symposium on The Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands in 1999' UNESCO http://www.unesco.org/culture/copyright/folklore/html_eng/symposium.shtml accessed 10 March.

[58] South Pacific Commission at 19 May 2003 < http://www.spc.org.nc/Culture/activities_legal.htm>

[59] *Copyright and Neighbouring Rights Act (2000*) Part V.

[60] Ibid. section 2.

[61] *Vanuatu Copyright Act 2000.*

[62] WIPO Report, above n 7 Part II at 7.

[63] Samoa's Response to WIPO's Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge above n 55.

[64] Sue Farran, 'Overview of Intellectual Property Laws Relating to the South Pacific', in *International Encyclopaedia of Laws*, Kluwer Law International, The Hague, supplement 21 Vol 3, (not yet published) at chapter 7.

[65] Secretariat of the Pacific Community, 'Report of Meeting' (1999) Noumea, New Caledonia at 17.

[66]Mark Suchman, above, note 13 at 1290.

[67] Priest, 'What Economists Can Tell Lawyers About Intellectual Property: Comment on Cheung' (1986) 8 *Res.L. & Econ*. 19, 21 in Mark Suchman, above, note 13 at 1290.

[68] South Pacific Commission, above n 6 at 4.

[69] Ibid. at 5.

[70] Explanatory Memorandum, *Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002*) at 1, 3.

[71] *Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002),* clauses 4, 8.

[72] Ibid. clauses 9,10.

[73] Ibid. Part 3.

[74] Explanatory Memorandum above n 70 at 1.

[75] Ibid. at 7.

[76] Samoa News Staff, ' Drug Developed From Samoan Tree Bark Could Eradicate HIV Virus' *Samoa News*, Samoa, November 16, 2001.

[77]" Samoa signs Revenue-Sharing Agreement Pertaining to Experimental HIV/AIDS compound", *Samoa News*, Samoa, December 14, 2001.

[78]Secretariat of the Pacific Community, above n 65 at clause 35.

[79] Ibid at clause 31.

[80] Christopher Hunter, 'Comment: Sustainable Bioprospecting: Using Private Contracts And International Legal Principles And Policies To Conserve Raw Medicinal Materials', (1997) 25 *Boston College Environmental Affairs Law Review*, 129 at 168.

[81] Bob Burton, 'Opposition Stalls Genetic Profiling Plan for Tonga', (February 20, 2002) Inter Press Service/Asia Times Online http://pidp.eastwestcenter.org/pireport/graphics.htm accessed 3 March 2003.

[82] See the Genetic Resources Action webpage http://www.grain.org/brl/brl-model-law-pacific-en.cfm accessed 19 May

[83] WIPO Report, above n 7 Part II at 78.

[84] Ibid. at 79.