CHAPTER 4 CURRENT INTELLECTUAL PROPERTY REGIMES AND INDIGENOUS PEOPLE

Industrialized society has lost all sense of the proper place of human beings in the scheme of things to the point where it believes that it is right to own, control and fundamentally change life itself. We have lost all sense of our appropriate place in nature. -- President, Guaymi General Congress

4.1 Introduction

The world has endured and continues to endure profound losses of indigenous peoples and rural groups and their knowledge about the natural world constructed from their intimate ties to land and place. These losses have been accompanied by neglect and the marginalization of their practices and beliefs, often figured as inferior forms of knowing to be replaced by universalized knowledge derived from the Western scientific tradition. While the latter tradition has great beauty, power and utility, attempts to apply it universally without regard for traditional knowledge systems has in many cases led to failures in sustainable resource use and the erosion of biological diversity (as discussed in Chapter 3).

This imposition of scientific management regimes without the participation of local communities has prompted debate on whether the neglect of traditional knowledge violates human rights, civil rights, and indigenous rights. Since the goal of protecting and promoting indigenous knowledge is to gain the maximum advantage for the relevant communities, the question of ownership is fundamental.

The World Intellectual Property Rights Organization (WIPO) is currently exploring ways of accommodating the indigenous knowledge of less developed countries, within the existing property laws. The question invariably arises whether there is a need to develop an alternative system specific to the ownership of indigenous knowledge.

The question of who owns, who has access to and who benefits from indigenous knowledge and the biological resources from which it is derived, is still a contentious issue. Current Western jurisprudence is limited in its conception of intellectual property and it therefore needs to be expanded to accommodate indigenous knowledge system notions of ownership.

4.2 Definition of intellectual property

What is intellectual property? To this question, there are two answers, one colloquial, and one legal. The colloquial description of intellectual property is that it simply comprises all those things that are created in the human brain, such as ideas, inventions, poems, designs and concepts. The legal description, however, differs from the colloquial in that it focuses upon the rights and powers that are enjoyed in the produce of the mind, rather than upon the produce itself. Thus, intellectual property rights are based on the notion that innovation is the product of the creative, intellectual and applied concepts and ideas of individuals.

According to Phillips & Firth (1990:6), intellectual property law is the aggregate of rights and duties that pertain to the control of intellectual property. Intellectual property law comprises of five different means by which the law can benefit the holder of intellectual property. They are, in descending order of legal cogency:

i) An absolute monopoly of the market to prevent all other persons from using that property within the market place governed by the law which protects it.

An example can be found in the rights enjoyed by the holder of a patent for an invention.

ii) A qualified monopoly in which the creator of intellectual property enjoys the right subject to one major qualification: he/she cannot stop another party "stripping down" his creation and thus effectively using it as a basis for his own creation. An example of this is the protection of new plant and seed varieties.

iii) A monopoly of the use of one's creation within the market which prevents others from copying or otherwise exploiting the work actually produced by him, but without the right to prevent the exploitation of an identical or similar work produced through the independent intellectual endeavor of another. Such a qualified monopoly is exemplified by the protection most frequently given by copyright law.

iv) A compulsory license, in which the intellectual property owner relinquishes his control over his intellectual product. Design and patent laws are both familiar with forms of this device.

v) The concept of unfair competition, which do not exclude others entirely from the use of any identifiable intellectual property, but which do ensure that their use of that property is fair.

4.3 The importance of intellectual property

Intellectual property plays a vital part in the physical well-being of the individual and in the vitality of the economy, since it encourages the creation of ideas and inventions, their disclosure for the benefit of all, not to mention their commercial exploitation so as to facilitate the greatest exploitation of their practical or concrete embodiments.

Aside from its practical and economic aspects, intellectual property law fulfils functions that have a purely moral content, for according to Phillips & Firth (1990:10), it is ideally capable of providing:

I) that no one other than the inventor, author or intellectual creator is falsely attributed as such;

ii) that the creator of a work may make legal objection to the distortion of his work by others, and

iii) that the author who has changed his mind about the validity of his intellectual product can retract it prior to the embarrassment of its publication by another person.

The rights described above are sometimes referred to as moral rights, since they protect the creator's moral rather than his pecuniary interest in his work.

Countries that provide for the protection of intellectual property also benefit in many ways. In addition to increasing the general pool of information and knowledge, adequate legal protection fosters investment and trade.

When looking for new markets or countries in which to expand manufacturing or distribution facilities, companies often look to countries that will protect their intellectual property. Companies that are active internationally often will not allow certain technologies or other intellectual property to be sold in countries that will not protect the property owner's rights.

Where the owner's rights are not protected, third parties may use the property and, therefore, unfairly reap the rewards of the owner's investment in developing and marketing the property. Thus, inadequate legal protection for intellectual property acts as a trade barrier. Finally, because intellectual property has independent value, the property may be used to secure financing in some countries. This could provide a vast benefit to especially Third World Countries.

4.4 Intellectual property law and its application to indigenous people

Indigenous knowledge is a sought after commodity in today's marketplace. However, since indigenous knowledge is mostly intangible (e.g. word-of-mouth indigenous medicine and remedies), legal protection is minimal and Western societies have not seen fit to offer proper protection under current intellectual property laws. Furthermore, intellectual property laws of developed countries are often inadequate to deal with the scenarios in which indigenous knowledge resides, especially because of cultural differences. The result is a disparity of access to existing intellectual property of others by indigenous and developing people.

Existing property systems in Third World countries are not in alignment and knowledge storage and transfer systems of indigenous people are not based on concepts of a Western individual ownership model. Intellectual property rights are concepts foreign to many indigenous people. Also, some cultures do not perceive intellectual property rights on the same plane. They perceive ownership, akin to Western traditions, as antithetical. They rely instead on communal or shared ownership. Concepts of possession have seldom developed in indigenous cultures, because the carrier of the knowledge is one and the same, immutable. It may be able to be transported, but the content cannot change because it is culturally significant or dependent. For a Western view of intellectual property, this means that the creativity or novelty of the artefact or process is quite low.

One could therefore ask whether a Western view should dominate and in the process dismiss alternative cultural perspectives. Because of these apparent differences in worldviews, one can only but grasp the immense task that lies ahead of achieving a harmonized and universal set of legal protection. It is important that laws should be changed or developed in order to uplift welfare and not to exploit but to equally distribute the benefits of economic growth.

It is therefore imperative that mechanisms such as international property agreements should ameliorate instead of worsen the condition of developing countries.

4.5 The history of the development of intellectual property

There is a lack of studies that trace the historical origins of intellectual property beyond Greco-Roman times. However, references are usually made to certain pre-Greco-Roman facts to suggest that elements of intellectual property had their origins in those distant times. In Egypt, for example, the use of marks on jars, tools and building stones was prevalent for 30 centuries BC The notion of literary property goes back to non-European peoples with more ancient civilizations. Among the Europeans, the Greeks were the first to repudiate slavish copying of existing works and to punish literary piracy (Phillips & Firth, 1990).

During Roman times, authors were not always satisfied with glory alone...they also drew some profit from their manuscripts. There thus emerged a pecuniary right of authors irrespective of the commercial value to them or the publishers.

However, this was far from the recognition of an exclusive reproduction right, because the Romans did not yet appreciate the distinction between the ownership of a manuscript and the exclusive right to reproduce it. This was the status quo right through the Middle Ages in Europe and until the renaissance in the XIIth century. The concern of lay authors in this period seemed to be to prevent "careless or unscrupulous scribes" from implicating the real authors by their alterations and distortions.

The invention of the printing press enabled works to be copied in an unprecedented manner. Hence statutes were introduced to protect individual creations and inventions; to encourage trade and to censor the wide circulation of undesirable ideas. Today's intellectual property laws originate from this era.

The fundamental elements of the intellectual property system was largely developed between 1450 and 1550 in the Republic of Venice preceding the English Statute of Monopolies and the parallel development of the patent system in France. Phillips & Firth (1990:14) contended, that in these times, "the city of Florence was not only a city of unsurpassable artists and poets, but also the financial center of Europe, creating the right atmosphere and demand for laws on ownership".[1]

Venice granted copyrights too, and by 1500, copyrights were granted indiscriminately for old and new books. In 1517 a general copyright statute was introduced on the basis of which only new books were able to obtain protection just as inventions had to be new from 1474. Further, an act of 1544 gave more recognition to the author's personality: It was expressly acknowledged that he could choose to keep his work unpublished. With the decline of Venice, the other countries in Europe and later on to the New World countries, from which the intellectual property laws still continue to evolve to this day, adopted most of its practices (Phillips & Firth:1990).

[1] The development of patent law at that early stage, is summed up by Mandich (in Endeshaw, 1996:12):

"It seems that Venice was the first to have continuously and constantly applied rules to patents of invention, instead of granting an occasional, isolated monopoly. Among these rules were these: that protection always was extended to an inventor, provided his invention was recognized as useful; that the patent term was limited; that the right was transferable inter vivos and mortis causa; that it was subject to a compulsory license in favor of the state; that a patent was forfeited by failure to use it within a certain term; and that it failed in case of prior knowledge within the territory of the Republic."

The passage of the Statute of Monopolies in 1624 was a landmark in the history of British patent law because it was the first English statute to refer specifically to patents for inventions. According to Phillips & Firth (1990:18), the first record of a reward to an author was a 1530 "patent" for a book teaching the French language.

The claim for royal grant was based on costs and risks that publishers suffered on account of cheaper imitations or imports. Yet, privileges were granted selectively "to repress the publication of forged, scandalous, heretical and seditious productions" – a matter of importance in the troubled times which followed the introduction of printing. In spite of this, however, the increasing power of the press in the 1550s prompted the Crown to take tougher measures against unlicensed works. This was attained by establishing a "Company of Stationers or Text Writers" in 1557 (Phillips & Frith, 1990:27), which meant that only members of this Society (who must also consent to the search, seizure and burning of all prohibited books) were permitted to print. The penalty for those who violated this, was imprisonment. A succession of ordinances was passed, seeking more to suppress sedition rather than to protect literary property.

The expiry of the last of the ordinances in 1694 and the impossibility of renewing it, as well as the repeated petitions from booksellers and printers, persuaded Parliament to come out with a statute (Queen Anne's) in 1709. The Statute of Anne reestablished monopoly rights, for a period shorter than before, not to the guilds alone, but to everyone. The passage of this Act can be attributed to the radical influences of the "new ideas of individualism, originality and aesthetic relativism" that were gaining ground in the 18th century in Europe. By encapsulating these new ideas in the form of legislation, granting exclusive rights of reproduction to authors, the 1709 statute became the first law on copyright in the modern sense of the term (Gurnsey, 1995:9).

By referring to the "author or proprietor" of a new work, the Act implied "authorship establishes a property, which can be transferred to the publisher" (Phillips & Firth, 1990:28). The Act's recognition, for the first time, of authors' rights forms a landmark in the development of the distinction between the abstract conception of the author's work and the tangible materials used, which...were the sole subjects recognized in early times as capable of ownership.

Furthermore, the recognition, in the Act, of the right of authors as different from the rights of publishers, ushered in a new period in which authors by themselves could claim copyright.

It seems overall, that intellectual property laws have always evolved in response to economic and political necessity. From the times when intellectual property emerged as a policy instrument of the state (during mercantilism) through the period of industrialization within the nation-state to the creation of an international economy, intellectual property laws have changed to accommodate newly emergent or perceived needs.

Further evolution of intellectual property forms in the leading First World (industrial) Countries (England and France) corresponded to rising levels of technology. As manufacturers and tool making (mechanical invention) superseded the guilds and crafts and printing became general activities, protection in the form of privileges gave way to detailed national laws enacted by governments to fix rights to intellectual creations.

With the development of the capitalist economy and the growth of industrial exports, intellectual property forms that suited protection of rights within the nation-state proved unable to do the same for citizens' interests abroad. Thus bilateral treaties became instrumental in protecting cross-border interests. Repeated forms of bilateral treaties were later codified in the Paris and Berne conventions.

4.6 Current International intellectual property laws

There is very little international law governing intellectual property. However, there is a remarkable amount of transnational uniformity, which results from treaties and international conventions. These treaties and conventions usually oblige member countries to provide minimum norms of intellectual property protection and to extend the protection for the benefit of foreign nationals. Several of the more important treaties and conventions are discussed below.

4.6.1 The Berne Convention

The Berne Convention, established in 1886, is the principal transnational convention relating purely to copyright protection.

The Berne Convention is based on national treatment, and imposes minimum norms of copyright protection. Like the Paris Convention, the Berne Convention grants foreign nationals the same protection and advantages as those granted to nationals of any member country, without discrimination. The membership of the Berne Convention has increased from an initial membership of 10 to over 90 countries including nearly all of the leading economic countries. Under the Berne Convention, and its six subsequent amendments, copyright protection is automatic throughout all member countries without the need to comply with any formalities (Endeshaw, 1996:28).

4.6.2 The Paris Convention

The International Convention for the Protection of Intellectual Property is probably the single most important multilateral treaty on intellectual property, and is better known as the "Paris Convention."

Most industrialized nations and many developing countries are parties to this convention and are referred to collectively as the Paris Union. To date, 56 countries have ratified the latest revision of the text, which covers a wide range of intellectual property rights including patents, industrial designs, trademarks, trade names, service marks, collective marks and unfair competition. The Paris Convention grants foreign nationals the same protection and benefits accorded to nationals of any other member country, without discrimination.

One of the most important provisions of the Paris Convention relates to "Convention Priority." An applicant's priority date is the date on which an application is first filed in the applicant's home country. According to Endeshaw (1996:24), the convention allows the applicant to claim this date as the effective date on which an application for the same patent, industrial design, utility mark or trademark was filed in any other member country, provided that the application is filed within 12 months (for patents and utility marks) or six months (for industrial design and trademarks) from the claimed priority date. This removes the need and cost to file all the separate country applications at the same time to obtain effective protection. Under the convention priority filing system, intervening third party applications cannot act as bars to the owner's application if the owner files within the prescribed time.

4.6.3 International Filing Systems

There is currently no single way to obtain truly international protection of intellectual property. The closest current approaches to such international protection are those provided by the following conventions establishing international application filing systems.

4.6.3.1 European Patent Convention ("EPC")

The EPC created the European Patent Office ("EPO"), which is based in Germany. The convention currently applies to most European Economic Community member states and to several other European countries. The EPC provides for a single application in English, German or French, on which a central search and examination is carried out. Once the patent is accepted for grant, and the appropriate fees and translations are submitted, the single application is converted into a bundle of individual national patents. The system also allows an opposition to the grant to be lodged at the EPO within nine months from patent grant. Subsequent issues of validity, however, must be dealt with on a country by country basis by individual national courts (Endeshaw, 1996:26-31).

4.6.3.2 Patent Cooperation Treaty (PCT)

This system, which includes many countries in addition to European countries, similarly provides for the filing of a single application designating the member countries from which patents are desired.

Although the single filing takes place under the auspice of the World Intellectual Property Organization (WIPO), a specialized agency of the United Nations system that seeks to promote international cooperation in the protection of international property, the actual filing is made either in the United States or the EPO. The single application is searched, and it is possible to request a non-binding opinion on patentability. After the payment of the appropriate fees and the filing of appropriate translations, the application is converted into a bundle of individual national applications, which are then subject to examination by individual national patent offices (Endeshaw, 1996).

4.6.4 GATT/TRIPS

Led by the United States of America (and with the compliance of the EEC and Japan), the pressure for "universal" forms of intellectual property gathered momentum in the Uruguay General Agreement on Tariffs and Trade (GATT) Round and managed to push through the Trade Related Aspects of Intellectual Property Rights (TRIPs). In spite of their different approaches, the First World Countries aimed to extend the scope of international conventions by superimposing a so-called intellectual property "code" on the enforcement mechanisms of the GATT (Drahos, 1997:201).

The Uruguay Round of international trade negotiations, launched under the auspices of the (GATT) in Punta del Este, Uruguay, in December 1986, came to a conclusion six years later on December 15, 1993 (Phillips & Firth, 1990). The result of the negotiations was a comprehensive set of agreements, including one on TRIPS.

The TRIPS agreement is considered to be among the most important parts of the world trade pact. In essence, the agreement requires member countries to adopt a certain minimum standard of international property protection. For example, in the area of trademarks, the agreement defines which types of marks are eligible for protection, and states that internationally well-known marks shall enjoy additional protection.

In the area of patents, it expands protection such that offers for sale of the patented invention without permission - as well as actual sales - constitute infringement.

Under the TRIPS agreement, member countries are obliged to rewrite national laws to make them conform to internationally agreed norms for the protection of patents, trademarks, copyrights, industrial designs, trade secrets, and integrated circuits (semi-conductor chip mask works).

It also broadens the areas of protection to include technological areas -- such as pharmaceutical products, computer software, and inventions and works arising from new technologies - that are not currently protected in many countries.

The TRIPS agreement also attempts to prevent any use of geographical terms that may mislead consumers as to the origin of goods. Some aspects of the agreement relating to the use of such geographical terms have not been completely resolved, but the TRIPS agreement does provide for future negotiations on unresolved issues. For example, during the GATT/TRIPS negotiations the United States and others argued that the term "champagne" had become a generic term for a certain type of beverage; the European Union argued the contrary view. Ultimately, the United States passed GATT legislation requiring the Patent and Trademark Office to treat all false geographical indications for wines and spirits (e.g., BORDEAUX wine originating from anywhere other than the Bordeaux region of France) as unregisterable.

In the area of copyrights, the agreement requires compliance with the latest (1971) rules of the Berne Convention. Under the TRIPS agreement, countries will amend their national legislation and practices to conform with the agreement's provisions according to the following timetable: developed countries over one year; former Soviet block and developing countries over five years; and less developed countries over 11 years.

The TRIPS accord includes enforcement provisions which provide for the use of improved international dispute settlement procedures under the World Trade Organization (WTO) for disputes between countries. The accord also permits cross-sectoral retaliation for a violation of TRIPS obligations; if a country fails to protect patents, for example, it could face retaliation in an unrelated sector (Phillips & Firth, 1990).

The US proposition (and unilateral practice) of using trade sanctions as a means of beating any divergent positions into line may have drastic consequences for Third World Countries. A likely effect of the TRIPs arrangement, now forming a treaty obligation of World Trade Organization (WTO) members, on Third World Countries, might be to force them to introduce legislation identical to those in First World Countries.

The newest and perhaps most important phenomenon in the globalisation process is the emergence of trade agreements as key instruments of economic liberalisation and as mechanisms used by the major countries to have disciplines and rules placed on developing countries in a wide range of issues. Trade agreements, that are legally-binding and have strong enforcement capability, have become the most important vehicles for disseminating and implementing economic and social policies across the world, policies that have been planned by the few developed countries for developing countries to follow. The World Trade Organisation, which is the organisation of the multilateral trading system, has in fact become the main vehicle of choice of industrialised countries for organising and enforcing global economic governance (Drahos, 1997:202).

The change-over from the old GATT to the new WTO with expanded powers and jurisdiction marked the arrival of the age of trade agreements in a new phase of the globalisation of policy making.

Due to the extension of issues beyond trade into other areas such as intellectual property, investment and investment measures, and the environment, the WTO is no longer only a "trade" organisation. "Trade" in the context of the multilateral system has become a code-word to include all issues that have come or may come under the purview of the WTO.

Moreover the WTO agreements have the most significant implications for non-economic matters; for example the WTO services agreement and the specific agreements on communications and information technology will have far- reaching effects on the culture of countries around the world (Hamelink, 1998:160).

4.7 Ownership in the Indigenous Culture

Indigenous people view the world in which they live as an integrated whole. Their beliefs, knowledge, arts and other forms of cultural expression have been handed down through the generations. The many stories, songs, dances, paintings and other forms of expression are therefore important aspects of indigenous cultural knowledge, power and identity. Therefore, all these elements of heritage should be managed and protected as a single, interrelated and integrated whole.

According to the a report published by the United Nation's Economic and Social Council (Lewis & Davidson, 1993:1), "...heritage includes all expressions of the relationship between the people, their land and the other living things and spirits which share the land, and is the basis for maintaining social, economic and diplomatic relationships - through sharing - with other peoples. All the aspects of heritage are interrelated and cannot be separated from the traditional Territory of the people concerned. "What tangible and intangible items constitute the heritage of a particular indigenous people must be decided by the people themselves" (King *et al*, 1996:2). Furthermore, indigenous cultural heritage is collectively owned and socially based and evolving continuously. In other words, heritage comprises all objects, sites and knowledge, the nature or use of which has been transmitted or continuous to be transmitted from generation to generation, and which is regarded as pertaining to a particular indigenous group or its territory.

More specifically, heritage includes (Deliwe, 1998:4):

- Literary, performing and artistic works (including songs, music, dances, stories, ceremonies, symbols, languages and designs).
- Scientific, agricultural, technical and ecological knowledge (including cultigens, medicines and the phenotypes of flora and fauna)
- All items of immovable cultural property (including sacred and historically significant sites and burial grounds).
- All items of movable cultural property
- Documentation of indigenous people's heritage in archives, film, photographs, videotape or audiotape and all forms of media.
- Human remains and tissues.

Thus, the heritage of an indigenous people is a living one that needs to be protected.

Although heritage is collectively owned, there is often an individual or group who is the custodian or caretaker of a particular item of heritage. The traditional custodians are empowered as trustees in relation to the particular item of heritage only in so far as their actions conform to the best interests of the community as a whole. This type of relationship was noted in the case of *Milpurrurru v Indofurn* (Blakeney, 1995:1). This case demonstrated that the unauthorized reproduction of designs that are of significance to Aboriginal culture could be extremely damaging. An artist may have the authority to depict a traditional, pre-existing design in their artwork by virtue of their birth or by initiation. Whilst they have this right, they hold the knowledge embodied in the work on trust for the rest of the clan. The case revolved around the concern relating to the possibly damaging effect of the use of reproductions of traditional Aboriginal designs on products such as key rings, tea towels, wall hangings and T shirts.

It is evident that, although there has been a step forward in the court's willingness to recognize Aboriginal interests in the protection of their artistic works against unauthorized use, the Copyright Act's requirement that the creator of a work be able to assert copyright ownership creates a problem where the design which is the subject of a claim dates back more than 50 years before the infringing act. This case is an example of the importance of comprehensive legislation to protect expressions of Aboriginal folklore.

According to western beliefs, the actual copyright owner, however, is the cultural producer or author. This author-function was used to help determine the constitution of cultural works as intellectual property through the use of copyright law. What was at stake in this circuit was the limitation of reproduction; it was through the constitution of cultural works as intellectual property, and the allocation of limited rights of reproduction, that the potential instability inherent in reproduction made possible by modern technologies of culture was constrained.

The way in which the author-function was put into law, differed within different judicial systems. So, for example, what might be called an author's rights regime developed in France in which author's were accorded a special category of personal rights. This was done by explicitly linking the ownership of intellectual property rights, including the rights of reproduction or copying, with the particular conception of the author as creator.

In "Ownership of the image" (Edelman, 1979:7), Bernard Edelman examines the nature of this connection, and suggests that it was grounded in the French moral rights tradition, that is, the principle of the rights of personality including the rights of paternity ("the right to be identified") and integrity ("the right to object to derogatory treatment of work"). Within this tradition, the work of art could be legally defined as property because it was regarded as the creative expression of what the artist already owned: his self or personality. Thus, it was in relation to the rights of personality that the rights of copying or reproduction were contained in France.

This regime stands in contrast to what might be called a "copiers" (or copyright) regime in England and in the USA (and in most common-law countries). In this regime, the rights of reproduction are vested in the copyright owners rather than directly in cultural producers. "Property was the right to make copies - not the right to authorship". It was only with the Statute of Anne (1709) and the series of legal decisions culminating in the judgement in 1774 that there came to exist an alienable right in text itself (Edelman, 1979: 24).

Given that indigenous knowledge is collectively owned, only the group as a whole may consent to the sharing of indigenous cultural and intellectual property. Such consent is given through specific decision-making procedures that differ depending on the nature of the particular item. Consent procedures may differ from group to group. Furthermore, consent is not permanent and may be revoked. As Daes (in Deliwe, 1998:13) notes: "Heritage can never be alienated, surrendered or sold, except for conditional use. Sharing therefore creates a relationship between the givers and receivers of knowledge. The givers retain the authority to ensure that knowledge is used properly and the receivers continue to recognize and repay the gift."

4.8 Intellectual property laws in Third World Countries

It is often forgotten that African countries had indigenous law making and enforcement institutions and mechanisms before the arrival of the colonial powers.[2]

[2] Allot, a leading authority on African law, wrote (in Endeshaw, 1996):

"In the pre-colonial era, indigenous legal institutions were evolving, more rapidly than is sometimes appreciated, on a tribal or local basis. Each was autonomous, though there was some cross-cultural influence and the laws of macro-ethnic groups tended to keep their similarity. The laws were unwritten, except where Islam and the law of the sacred texts had intruded...

However, the independent evolution of laws in Africa as well as the vast majority of other Third World Countries today, was interrupted by colonialism. The 1884 Congress of Berlin which formalized the subjugation of practically the whole Africa set the scene for the "transfer of law" to African countries on the assumption that the imperial powers ought to "civilize" their subjects.

Basically two legal systems were imposed on African colonies and remain entrenched in them even after the so-called decolonization or independence: the Roman-Germanic system from the continental colonial powers (Spain, France, Belgium, Portugal and Italy) and the common law from England. The various laws were applicable in the respective colonies of those powers and still remain thus, to this day.

The most pronounced impact on the African intellectual property legal regime came not from any single effort but from the emergence of two poles of IP organization and laws, namely the African Intellectual Property Organization (OAPI, according to its French acronym) in 1962 and the African Regional Industrial Property Organization (ARIPO) in 1976 (Phillips & Frith, 1990:44). Their coming into existence was in no small measure due to the support of the former colonial powers (often through the WIPO), thereby reflecting the strength of earlier linkages and allegiances to the two principal legal systems, that is common law and continental law.

Now that intellectual property laws operating in First World Countries have been shown to have evolved under economic and technological circumstances that differ substantially from those in the non-industrial Third World Countries, one would expect that the latter would opt for entirely new solutions in intellectual property.

Although deriving mainly in theory from ancient custom, in state, tribal, or local authorities and on judicial formulation of adjudicators or arbitrators for many of their detailed rules and for the modification of rules to suit changing circumstances."

Indeed, a few writers who have approached the problem of intellectual property in Third World Countries from the point of view of the economic and technological reality that obtains in them have suggested complete discarding of the intellectual property system imported from First World Countries. Others have advised reforming the intellectual property laws in First World Countries to make it "appropriate" for the conditions of backwardness or underdevelopment in Third World Countries; they contend that intellectual property laws may have failed in Third World Countries, because the peculiar circumstances of the latter have not been taken care of.

Still others (such as WIPO) maintain that the intellectual property system has no problems of its own, except that Third World Countries do not understand properly or do not have the resources to implement it. Nevertheless, the introduction and application of intellectual property laws in Third World Countries have long undergone difficulties stemming from obvious causes and although much has been written on the need of Third World Countries to embrace, wholly or partially, forms of intellectual property laws developed and applied in First World Countries, it is still questionable whether intellectual property laws developed in First World Countries are of any relevance to Third World Countries.

Until recently, it was considered unlikely that intellectual property rights could pertain to the special features of indigenous cultural heritage material. However, indigenous songs, dances, stories, lifestyles, knowledge, biogenetic resources and resource management practices are becoming of increasing value to modern society as property which can be applied commercially. In the light of these developments, indigenous people worldwide are seeking to protect their cultural and commercial interests.

4.9. Case Studies:

4.9.1 Evolution and Current Status of Intellectual Property Laws in Ethiopia

The earliest known law in Ethiopia, the *"Fetha Negast"* (Endeshaw, 1996:69) permitted, as "suitable for Christians", trades that were "necessary to sustain the body" directly or indirectly. While it warned against turning the "whole attention" to any one trade as a way of life, it provided for contractual relations between artisans and those who commissioned them. The artisan was able to keep the work "from its owner" until he was paid. It is interesting that the law recognized no ownership under other circumstances. Perhaps because of the restrictions by the *"Fetha Negast"*, makers of artifacts were generally frowned upon and considered social outcasts, although this never prevented anyone from buying their works and using them. Rulers of the land at all levels in Ethiopia kept at their courts such artisans, scribes and musicians as they needed and remunerated them more favourably than their ordinary retinue. It might thus be said that patronage was the first form of reward for Ethiopian creators.

Consequently, creators of literary, artistic and musical works (both written and oral) in Ethiopia, have received material benefits as well as social recognition over many centuries. Sanctions of a social character were imposed against anyone who faked another's poetry and recited it as their own. Such a person was considered a thief and openly confronted and shamed by an audience which would retort to a recital of the poetry: "It has been said before" (Endeshaw, 1996:72). In fact, it was often the practice that those who were caught plagiarizing would be beaten and condemned in the same way as anyone stealing money.

Religious musical compositions known as *"Woreb"* (Endeshaw, 1996:73), were recognized by the name of the composer and their public performance allowed only if this fact was acknowledged.

Aside from these two exceptions, the free use of others' creations was the general rule around the end of the last century.[3]

A change in attitude came about as a result of increased contact with the outside world during the 19th century. The failure of the Ethiopian government to bring about economic transformation prevented any establishment of legal rules that promoted and protected creativity. The Italian occupation of Ethiopia in 1936 was only a confirmation of that failure. According to Phillips & Frith (1990: 57), after liberation in 1941, a new drive for economic and technological progress was launched and legal reforms were initiated.

However, the development of intellectual property laws in Ethiopia indicates many deficiencies and gaps. Laws of copyright, confidentiality and unfair competition have been in code for nearly forty years now (since 1960) and courts have attempted to apply them, though with divergent interpretations and inconsistencies.

The main problems in the codes appear to be ambiguity, on the one hand and overlapping or contradictory provisions and conceptions, on the other. These problems have been compounded by translation errors and conceptual misplacement involved in using English legal terms of art to cover continental equivalents. The practice of registration of trademarks and patents legally provided for since 1943, has not showed any significant increase in domestic applications.

[3] Zeyohannes (in Phillips & Frith, 1990) notes: "The fact that a scholar's works were being copied by others, gave the author a feling of being respected rather than that of an infringement of his rights. The only [sic!] customary restriction imposed on students of traditional church schools, was that one had to copy down word by word without the slightest alteration. The primary purpose of passing down literary and heritages to generations was, thus served."

4.9.2 South Africa and its search for the protection and promotion of its indigenous knowledge

In comparison with what happened in the rest of the developing world, South Africa is rather unique in the way in which its indigenous knowledge was used/misused, protected and promoted. . This country is one of the few countries in Africa and elsewhere in the world, that have adopted the alternative approach of protecting and promoting indigenous knowledge by formulating a separate legislation dealing with specific indigenous knowledge. Not only has the country drafted a bill on the " Protection and Promotion of South African Indigenous Knowledges" but it has also taken other initiatives to protect and promote its rich wealth of indigenous knowledge.

These initiatives include, *inter alia*, the establishment of an Indigenous Knowledge System Programme (IKSP), the initiation of research projects to determine how indigenous knowledge and indigenous technologies can contribute to innovation in South Africa, setting up research projects to determine the value of traditional medicine.

All these initiatives are taken within the ideological context of the African Renaissance – an concept that was coined by the president of South Africa, Mr. Thabo Mbeki. This notion promotes the rebirth of the African people and the forging of a new identity, whilst moving away from the "dark ages" of colonialism and apartheid. In this context the Indigenous Knowledge Systems are seen as a national heritage.[4] As such, indigenous knowledge is seen as one of the major contributors to the further development of the country.

[4] President Mbeki himself denoted this as: "...the unique creation of African hands and African minds" (Indigenous Knowledge Systems, 1997:2) .

Although a country that was subjected to and exploited by colonial powers (and apartheid as a political system), South Africa's rich wealth of indigenous knowledge was never commercially exploited on a full scale, and neither were there any recorded cases of legal actions that were taken by indigenous peoples against possible misuse or exploitation of their indigenous knowledge or artefacts. There were also no official efforts to protect or promote South Africa's indigenous knowledge.

A variety of reasons contributed to this situation. Since indigenous knowledge is mostly tacit knowledge and mainly transmitted in an oral way or by means of demonstration, it is therefore very seldom available in a tangible medium. It is not theoretical knowledge but rather experimental, gained by means of trail and error, and it therefore changes constantly and can easily get lost (Bosman & Marais, 1998:20). It was therefore highly difficult to protect indigenous knowledge under previous and current intellectual property legislation in the country.

Furthermore, there is a vast gap between traditional African and Western beliefs. Most indigenous people in South Africa believe that ownership is rarely vested as a property right, and that knowledge as a benefit should be shared freely with others. The concept of "immaterial legal objects" does therefore not exist in the legal terminology of these people (Boonzaaier, 1993 & Boersma). The lack of legal cases against the (mis)use of their knowledge can therefore be explained by their perspective on "ownership of knowledge".

Also, for a long time, the West perceived African indigenous knowledge as inferior and bearing little or no scientific value. This knowledge was largely regarded to be of academic concern limited to the field of social anthropology and often perceived as superstition.

Indigenous people were seen as pre-logic people with alternative modes of *thinking*, relying on intuition rather that reason, and ignorant of science (Augusto, 1997:4).

To illustrate the vast difference in worldviews, indigenous people regard heritage as relationship, whilst Western world regards it as a bundle of economic rights. This notion probably explains why these indigenous knowledge (and/or artefacts) were not exploited in full in South Africa.

However, the perception of indigenous knowledge in South Africa has radically changed since 1994 when the system of apartheid was finally ended and replaced by a democracy. There was an urgency amongst politicians, academics and local people that South Africa was to "rediscover the value of their indigenous knowledge" (Adam, 1997:7). This indigenous knowledge was suddenly seen as an untapped resource that could contribute to the development of poor communities. For example, the highly rated research institution in South Africa, the Human Sciences Research Council (HSRC), illustrated how indigenous knowledge could be used in Social Impact Assessment studies.[5]

South Africa has realised that the sharing of indigenous knowledge within and across communities can help to enhance the process of cross-cultural understanding and the promotion of the cultural dimension of development. It also acknowledged that indigenous knowledge can provide a basis for problem-solving strategies for local, poor communities. It is in this context that one must understand and interpret the initiative of the South African Department of Arts, Science and Technology to link indigenous knowledge to the National System of Innovation in South Africa to try to establish how, and in which manner, indigenous knowledge can contribute to innovation and development in South Africa (Adam,1997:6).

[5] In one of these projects the HSRC came to the following conclusion :" The real value of local knowledge, in our opinion, is that it has made us aware of the need to challenge every facet of the concept of development (Bosman & Marais, 1998:23).

Recently South Africa has formulated a White Paper on the Protection of Indigenous Knowledge which will be presented to Parliament. The main aim of the draft bill on the "Protection and Promotion of South African Indigenous Knowledges" is to protect and promote indigenous knowledge. It is proposed that this must be done by means of the establishment of an independent South African Indigenous Knowledge Regulatory Authority. This Regulatory Authority will have the power to seize and detain indigenous knowledge or suspected indigenous knowledges imported, exported to entering or leaving South Africa. In the preamble of the draft bill it is also stated that indigenous knowledge systems represent an important part of the living culture heritage of the nation, and that South African must recognise the need to identify resources that are unique to South Africa.

Two important underlying principles of the draft bill reads as follows: "Global and international responsibilities relating to indigenous knowledge must be discharged in the national interest" and "'The indigenous knowledges is held in public trust for the people, and the beneficial use of resources must serve the public interest and the resources must be protected as the people's common heritage".

Apart from the legal efforts to protect and promote indigenous knowledge in South Africa, there are also initiatives to integrate traditional medical knowledge into the existing allopathic medical research projects. This is not only done to promote indigenous knowledge, but also to learn from it. One good example is a programme of the South African Medical Research Council to test plants, which were provided by traditional healers of elders of communities, for a the cure of malaria. It was agreed that, if any outcomes were to be positive, the royalties will be shared 50/50 (Mowszowski, 1998:1).

4.10 Conclusion

The intellectual property laws in force in Sub-Sahara Africa today largely originated in colonial laws received during colonial rule and have continued to be applied beyond independence, without any fundamental change to them.

This is no surprise because, even the entire system of laws imposed on them during colonialism has in large measure been kept in the respective ex-colonies, though a number of changes have been introduced through new statutes. To date, there have been no real attempts to reform the laws thoroughly.

While most indigenous societies recognize some form of "ownership" of traditional knowledge, such ownership rarely is vested as a property right. Even when a person possesses knowledge unique to his or her experience or training, the community views that knowledge as a benefit to be shared freely with others.

As a result of such deep-seated sentiments, the marriage of intellectual property rights to traditional knowledge in indigenous societies is, at best, a shotgun wedding. Moreover, experience has shown that the application of such rights has not had a dramatic impact on the economic well-being of indigenous people. For this reason, it is difficult to refute the notion that it may be better to minimize the importance of intellectual property rights and focus instead on the human rights of indigenous people.

The protection of human rights will remain an elusive goal among many developing nations in the years ahead. Therefore, step-by-step negotiations, and efforts to protect intellectual property rights will continue to be among the most important tools for limiting the exploitation of indigenous peoples.