

4 PROTECTING AND REVITALIZING TRADITIONAL KNOWLEDGE AND EXPRESSIONS OF CULTURE: FOR AN EQUITABLE FUTURE IN FIJI

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ABSTRACT

The protection of traditional knowledge and expressions of culture (TKEC) has only recently become an important policy debate in the Pacific Region. It is widely agreed that mainstream intellectual property (IP) tools such as patents, copyright, trademark, geographical indications, and trade secrets may be tactically useful. However, traditional and indigenous property holders will experience numerous problems in trying to protect their property rights under existing IP law systems. In 2002, the Pacific Island Countries, recognizing the importance of intellectual property rights, introduced a *sui generis* Model Law for the Protection of Traditional Knowledge and Expressions of Culture as a model policy for protection. This paper argues that, while the Model Law offers excellent opportunities for countries such as Fiji to protect their traditional and cultural properties, total reliance on the Model Law will not be sufficient to achieve an ideal level of TKEC protection. The findings of this paper are not isolated, and may offer important insights into other small island developing States in the region.

Keywords: *intellectual property rights, traditional knowledge and expression of culture, Pacific Island Countries*

I. INTRODUCTION

The South Pacific Region, and specifically Fiji, is rich with vast cultural, natural and biological resources that are extremely valuable for socioeconomic development. The growing need for economic prosperity and the intensifying commercialization of these resources has posed a serious threat to traditional and cultural properties and their holders. Until recently very little had been done towards the protection and promotion of traditional cultural properties in the South Pacific.

In 2002, South Pacific Forum Economic Ministers recognized protecting intellectual property rights as a matter of priority, and accepted the importance of protecting traditional ecological knowledge, innovations and practices, and traditional knowledge and expression of culture.¹ Subsequently, the Pacific Forum Secretariat implemented the *sui generis* Model Law for the Protection of Traditional Knowledge and Expressions of Culture, 2002 (Model Law).²

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¹ Secretariat of the Pacific Community, 'Background for the Regional Framework for the Protection of Traditional Knowledge and Expression of Culture', PC/UNESCO/PIFS/RMOC/Information Paper 5 (26 August 2002), page 6.

² Secretariat of the Pacific Community, Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002) (hereinafter 'The Model Law'). See further Miranda Forsyth, 'Intellectual Property Laws in the South Pacific: Friend or Foe?' (2003) 7(1) *J South Pacific L*, and Don Marahare, 'Towards an Equitable Future in Vanuatu: The Legal Protection of Cultural Property' (2004) 8(2) *J South Pacific L*.

This paper argues that, while the Pacific Model Law offers excellent opportunities for countries such as Fiji to protect its traditional and cultural properties, a total reliance on the Model Law is insufficient to achieve maximum protection of TKEC, since the Model Law is wrought with major challenges in terms of its universality and practicability. The purpose of this article is therefore fourfold. It first examines the current laws and regulations on TKEC in Fiji. Part II discusses the importance of the Model Law as an alternative law for Pacific Island States. It then considers the variety of challenges and shortcomings of the current draft Model Law in place in Fiji. Part IV provides much needed recommendations for the future. This research is premised on the assertion that currently enforceable protections are insufficient to protect the rights of traditional owners and their properties.

II. PROTECTION UNDER THE CONVENTIONAL INTELLECTUAL PROPERTY FRAMEWORK

IP laws purport to provide protection to creators and their creations, including literary and artistic works, symbols, names, images, designs and inventive processes used in commerce. The exact origins of the laws that protect right holders in Fiji, such as the Copyright Act 1999, Trademarks Act 1933, Patents Act 1879, Merchandise Marks Act 1933, Industry Emblem Act 1973 and the United Kingdom Designs Protection Act 1936, are difficult to ascertain. What is clear is that these 'conventional legal frameworks' are based on Western IP laws and promote traditional western justifications for IP protection.

With the exception of the Copyright Act, these legislations were enacted late in the 19th century and early in the 20th century. Since these conventional legal frameworks were enacted before TKEC was considered a valuable commodity,³ they were formulated and enacted without any policy consideration given to TKEC regulation. The lack of relevant and significant law reform in recent years is evidence of the failure of the conventional legal framework to provide adequate protection for Fijian TKEC.

A. THE COPYRIGHT ACT 1999

Concerns have been raised both within Fiji and abroad with respect to the inability of the current copyright framework to fully accommodate and protect TKEC. The deficiencies of the current copyright regime stem from the failure of varied requirements – originality, duration, material form, ownership and authorship, and rights in derivative works – to account for the unique nature of TKEC. The conventional intellectual framework system vests copyright in the owner, who is generally presumed to be the author of the work.⁴ As Githaiga explains, 'Eurocentric discourse perceives the aim of copyright to be the encouragement and reward of individual creativity.'⁵ Contrastingly, the ownership of TKEC is vested in the whole community rather than with individuals. For example, the ownership of the traditional indigenous dance 'Meke' is vested in the whole community. However, the Copyright Act fails to protect these community creations.

³ Fiji ratified the WIPO Convention in March 1972, became a member of the World Trade Organization in 1996, and recently ratified the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage in January 2010.

⁴ Copyright Act, 1999, Section 21(1); see also *Crystal Clear Ltd v. COP & AG* [1988] SPLR 130 (HC).

⁵ Joseph Githaiga, 'Intellectual Property Law and the Protection of Indigenous Folklore and Knowledge', (1998) 5(2) *Murdoch Univ Electronic JL* 28, paragraph 10.

The Copyright Act requires a work to be the original work of the author.⁶ This means that an expression of culture will have to be an original work before it can be protected. A condition of originality conceptualized in this manner cannot be satisfied in most instances, since the majority of TKEC is inspired by pre-existing traditions and successive patterns of imitation over time. As the World Intellectual Property Organization (WIPO) has observed, the very nature of TKEC is that it is repetitive and relies on tradition, and the scope for interpretation and individual expression is limited.⁷ In Fiji, the issue of originality in relation to TKEC work is yet to be seriously addressed.

Moreover, to obtain copyright protection, a work must be written down or recorded in some permanent, tangible form.⁸ For example, a song's notes or words must be written down or recorded before copyright protection can be provided. The Copyright Act neither recognizes nor protects derivative works. However, even if it did, it is important to note that the protection of a derivative work is usually dependent on the consent of the first creator. As discussed above, the traditional owners of TKEC works are not necessarily its legal owners (under the current system) and therefore cannot claim legal control over its reproduction or use.

It is interesting to note that even if indigenous artistic or cultural works do satisfy the elements of copyright, it will be difficult to apply copyright law because of the nature of indigenous cultural expression and the traditional Western justification for copyright protection.⁹ Copyright law protects the form of expression of ideas, rather than the ideas themselves. Additionally, copyright only exists for literary works and not for languages, unless they are expressed in material form.

B. THE PATENT ACT 1879

The Patents Act 1879 confers upon an inventor the exclusive rights to his or her invention. An invention is defined in the Act as any manner of new manufacture, any new method of application of known processes, or the improvement or control of known processes.¹⁰ A letter of patent provides an inventor with a temporary legal monopoly over the using, selling or making and authorizing others to do so, for the term of fourteen years (14) from the date of the letters patent.¹¹ An invention is patentable only if it is new and has specific utility.¹² Patent protection will only be given to traditional knowledge that satisfies the requirements pursuant to the Act. This means that traditional knowledge must first qualify as an invention, although an idea is not patentable and a mere discovery cannot result in a patent, because the substance in question must be invented using a new method or must serve a new purpose.¹³

⁶ Copyright Act, *supra*, note 4, Section 14(1).

⁷ Attorney-General's Department, *WIPO-Australia Copyright Programme for Asia and Pacific* (Canberra: AGPS, 1987) 222, cited in Githaiga, *supra*, note 1.

⁸ Copyright Act, *supra*, note 4, Section 15(1).

⁹ Dean Ellinson, 'Unauthorized Reproduction of Traditional Aboriginal Art' (1994) 17 *UNSW LJ* 327, page 333. See also Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights* (prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, 1998).

¹⁰ Patent Act, 1879, Section 2.

¹¹ *ibid.*, Section 4.

¹² *ibid.*, Section 5.

¹³ *ibid.*, Section 2.

Moreover, traditional knowledge or cultural expression cannot by its very nature be 'new'. According to the Act, an invention must be novel and involve an inventive step.¹⁴ Most TKEC is thus excluded from patentability; since TKEC usually falls within the public domain and is held in perpetuity from generation to generation, it forms part of prior art. The Act defines 'inventor' widely enough to embrace traditional property holders, but is silent on whether an inventor can expressly be a group of people.¹⁵ Yet another difficulty is that under the Patent Act, any traditional knowledge linked to a patented invention will be in the public domain after 14 years. This default state is not warranted with respect to TKEC, since traditional owners usually prefer TKEC not to be freely accessible by those who are not members of the indigenous group.

C. TRADEMARK ACT 1933

There is growing concern that TKEC is being appropriated for use in business names and trademarks by non-indigenous individuals and businesses. The Trademark Act, 1933 confers on the owner of a trademark (which can be words, phrases, symbols, designs, or a combination of these) exclusive rights to the use of such trademark in connection with the goods in respect of which it was registered.¹⁶

Cultural property holders must satisfy statutory requirements before a trademark can be registered. Firstly, the property must qualify as a registered mark.¹⁷ This means that the TKEC in question needs to be transformed into a word, phrase, symbol, design (or a combination of these) before it can become a registrable mark. Therefore, a TKEC will be excluded if it is incapable of being transformed into an expression. The Act also requires that the TKEC be registered in respect of goods or classes of goods.¹⁸ Once the trademark is registered, the Act requires it to be used in connection with the goods for which it was registered.¹⁹

It is thus clear that the current regime of IP protection in Fiji is not being utilized to protect TKEC. In the absence of any clear empirical data regarding the scope of these conventional IP laws, it is difficult to suggest the extent to which TKEC will be covered under the current regime. Sadly, the concept of intellectual property itself, let alone TKEC, is still a new phenomenon in Fiji. The prosecution of IP law offences remains extremely rare.

D. NEED FOR NEW SOLUTIONS

However, there is an urgent need for vigorous legislative proscription to combat the growing concerns in IP breaches. As Justice Gerard Winter explains: 'Fiji possesses a rich and diverse artistic and cultural heritage. The music and oral traditions of the country are an integral part of our society. Accordingly, some thoughtful guidance on the application of such novel legislation will, in my view, enhance the administration of justice and not detract from it.'²⁰

¹⁴ *ibid.*, Section 5.

¹⁵ *ibid.*, Section 2. The Act defines an 'inventor' and includes within this scope the heirs, executors, administrators or assigns of an inventor.

¹⁶ Trade Marks Act 1978, Section 38.

¹⁷ *ibid.*, Section 2.

¹⁸ *ibid.*, Section 7.

¹⁹ *ibid.*

²⁰ *State v. Ali* [2007] FJHC 23 (HC).

III. PROPOSED SOLUTION FOR THE SOUTH PACIFIC REGION

A. REGIONAL INITIATIVE

The idea of setting up an alternative mechanism for the protection of TKEC that operates outside the current IP regime was discussed by the Pacific Islands Forum Secretariat at the Forum trade ministers' meeting in 1999. The Forum recognized that the region's traditional and cultural properties were being improperly exploited and due compensation was not being provided to rightful property holders. In 2002, the Model Law on TKEC was produced, and in 2003 the Secretariat of the Pacific Community (SPC) endorsed the Model Law for adoption by member countries. The Model Law became the first concrete effort by Pacific Countries to effectively protect their TKEC. In 2007, the Forum trade ministers agreed to implement an Action Plan to assist Forum Island Countries (FICs) members. The Action Plan seeks to assist FICs to develop policy and draft legislation based on the Model Law and the Traditional Biological Resources framework.²¹ It also proposes to establish a regional system of TKEC protection to maximize the benefits to Pacific countries in ways national systems are unable.

The Model Law aims to protect the rights of traditional owners in their cultural properties and promotes tradition-based creativity and innovation, including commercialization thereof, subject to prior and informed consent and benefit sharing.²² The unique feature of this Model is that it complements and does not undermine the IP regime.²³ The Model Law defines traditional knowledge to include properties of both traditional and indigenous peoples.²⁴ This is an extensive definition that covers rights in works that are generally outside the scope of the conventional IP regime.

Like the conventional IP regime, the Model Law allows property holders to produce, publish, perform, broadcast, translate and publish their materials on an electronic database for either commercial or non-commercial purposes.²⁵ Under the Model Law these rights are referred to as Traditional Cultural Rights (TCRs) and provide exclusive rights over their cultural properties. Moral rights developed from TCRs are given independent recognition as far as they are used for non-commercial purposes and due consent has been obtained. However, if they are used for commercial purposes, then the user must acknowledge the source of the TKEC and share benefits with the traditional owners.

The Model Law creates both civil and criminal sanctions against the improper use of TKEC. A person will be committing an offence if he or she uses TKEC in a non-customary way without the prior informed consent of the traditional owners.²⁶ A person can also be guilty of an offence if that person either acts or makes an omission that is inconsistent with the moral rights of the traditional owners in relation to TKEC.²⁷ The Model Law further regulates

²¹ Pacific Island Forum Secretariat, 'The Pacific Plan for Strengthening Regional Cooperation and Integration' Port Moresby, 2005.

²² Secretariat of the Pacific Community, Explanatory Memorandum - 'Model Law for the Protection of Traditional Knowledge and Expression of Culture' (Oceania, 2002), pp. 3 to 5.

²³ *ibid.*, page 11.

²⁴ The discussion on the definition of traditional and indigenous people for the purpose of defining traditional knowledge and indigenous knowledge can be found further on in this paper.

²⁵ The Model Law, *supra* note 2, Article 6-8.

²⁶ *ibid.*, Article 26.

²⁷ *ibid.*, Article 27.

improper use of sacred-secret materials.²⁸ A person commits an offence under clause 29(1) if the person imports or exports with knowledge an article or other thing that relates to the TKEC of a country.²⁹ The Model Law also provides a mechanism for traditional owners to institute court proceedings against a person who makes non-customary use of their TKEC in a situation where traditional owners have not given prior and informed consent. However, it will be interesting to see how traditional property holders are able to prove that they are the true owners of a particular TKEC.

B. THE FIJI SITUATION

Fiji is now at the integral stage of introducing comprehensive IP laws. The impetus for this comes from its various international law obligations, particularly when it became a signatory to WIPO in 1972 and subsequently acceded to the WTO and signed the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) in 1996. In 1993 Fiji also ratified the 1992 Convention on Biological Diversity (CBD). The Convention amongst other things recognizes and calls for preservation of the role of indigenous communities in the creation of their biodiversity, indigenous knowledge and technologies for their survival and sustainability.³⁰

Fiji has also ratified the UNESCO 2003 Convention for the Safeguarding of the Intangible Cultural Heritage. The protection of intangible Cultural Heritage (ICH) has long been neglected in Fiji, thus its implementation is by far the first and only instrument that addresses specifically the intangible cultural heritage. Another important convention which Fiji is party to is the International Labour Organization (ILO) Convention Concerning Indigenous and Tribal Peoples in Independent Countries (C169). The ILO Convention 169 recognizes the political and legal systems, land and resource rights, and cultural, linguistic and spiritual identities of indigenous peoples.³¹ The recognition of these conventions introduces TKEC dimensions into the debate and allows factors to be considered in the eventual promulgation of comprehensive IPR laws.

In 2003, the Government of Fiji recognized that TKEC, although in existence for thousands of years, remained bereft of legal protection and was 'at risk from physical threats, social and economic threats and psychological threats.'³² Fiji proposes to use the Pacific Forum Model Law and implement *sui generis* legislation to protect the intellectual property and communally owned traditional knowledge of the indigenous people of Fiji.

This proposed legislation is expected to serve dual functions. Firstly, it will provide protection to indigenous knowledge from misappropriation and non-customary use such as commercialization. Secondly, the proposed legislation aims to safeguard indigenous cultural intangible heritage for stability. The main objective of the new law is to safeguard and ensure that 'indigenous people' are recognized and are not exploited for commercial gain, and if so, some form of compensation is provided for the use of their properties. It is important to note

²⁸ *ibid.*, Article 28.

²⁹ *ibid.*, Cl, 29(1)(2)

³⁰ Strathern *Property, Substance and Effect* (The Athlone Press, London, 1999) at 183.

³¹ ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (5 September 1991).

³² 32nd Session of the General Conference of UNESCO for the Convention of the Safeguarding of Intangible Cultural Heritage (17th October 2003). It is important to note that the proposed legislation is in the early stages of policy formulation leading up to drafting.

that the proposed legislation is still being drafted and is in the early stages of policy formulation leading up to the draft bill.

IV. PERCEIVED WEAKNESS IN THE PROPOSED MODEL LAW

To harmonize the widening gap created by the conventional IP regime, Fiji decided to create a *sui generis* regime for the protection of its indigenous knowledge and expressions of culture (IKEC). Arguably, the Model Law may continue to suffer from practical difficulties even if it is implemented. Perhaps the 'most important constraint to the design and implementation of an effective "*sui generis*" system is that of skill and expertise in legal drafting and full knowledge of its implication in national development and international cooperation.'³³

A. OBJECTIVE AND PURPOSE OF THE MODEL LAW

Generally, the objective of adopting a *sui generis* system is to remedy the failures created by the IP regime and accommodate the interests of indigenous or local communities in protecting their TKEC. Clause 3(3) of the Forum Model Law states:³⁴

This Act does not affect or apply to contracts, licences or other agreements entered into by traditional owners before the commencement of this Act in relation to the use of traditional knowledge or expressions of culture.

Although the Model Law protects TKEC, it fails to provide protection to cultural property holders who have previously lost their TKEC to non-customary owners or third parties as a result of unscrupulous deals or through unfair contracts. The Act fails to provide any mechanism for custom owners to recoup their cultural rights. For example, the Kava plant, used by Fijian indigenous people for traditional and medicinal herbs for centuries, has been patented by international pharmaceutical corporations (such as L'Oreal) without acknowledgment or due compensation being provided to Fijian people.³⁵ It will be interesting to see how Fiji will protect its interest in this plant against such international companies. The Model Law has therefore turned a blind eye on what could have been an infringement of TKEC.

³³ JA Ekperere, 'Sui Generis Systems: The Case of the OAU Model Law on the Protection of Rights of local Communities, Farmers and Breeders and For the Regulation of Access to Biological Resources', International Seminar on Systems for the Protection of Traditional Knowledge (New Delhi 3-5 April 2002).

³⁴ The Model Law, *supra*, note 2, Article 3(3).

³⁵ There are a number of international companies seeking to patent kava as a means of treating hair loss in the United States, Canada, Japan, China, Germany, France, Italy, the United Kingdom, Spain, Hungary, and Poland (ETC Group 1997). There is a long list of examples of other multinational companies, including Willmar Schwabe GmbH, American Home Products, Merck, Pfizer, Rhone Poulenc, SmithKline Beecham, Boehringer Ingelheim, and Monsanto, endeavouring to identify unique aspects and uses of kava to which they can claim exclusive ownership; these qualities range from how the powder is prepared from the root to a whole variety of specific applications. See further Elisa Tuiloma, 'Kava (*Piper Methysticum*) and Benefit Sharing', *The Legal Lali* (2004).

B. THE NATURE OF TRADITIONAL KNOWLEDGE

The Fijian Model law only proposes to protect Fijian (indigenous) properties and interests.³⁶ This leaves other ethnicities' (mainly Indian societies) cultural properties either unprotected or protected under the current IPR system inherently unsuitable for TKEC. This means that a person is required to be a descendant of a Native Fijian to receive protection under the proposed Act. The Act uses the phrase 'traditional knowledge' but limits the definition of traditional knowledge only to indigenous people. There is an ongoing debate as to the exact meaning of the concept 'traditional peoples and indigenous peoples', but this paper eschews the use of these two words as synonymous. ILO Convention 169 defines 'indigenous peoples' as:³⁷

[P]eoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

According to Mugabe tradition peoples are³⁸:

[T]hose who hold an unwritten corps of long-standing customs, beliefs, rituals and practices that have been handed down from previous generations. They do not necessarily have claim of prior territorial occupancy to the current habitat; that is, they could be recent immigrants ...

Indians arguably are not territorial occupants of Fiji, but have lived in Fiji for more than 132 years since their arrival in 1879. Since then, the Indians have developed their own traditional agricultural and medical knowledge, biodiversity-related knowledge, and expressions of folklores that have been transmitted from generation to generation. In accepting this definition, it can be argued that Fiji-born Indians and other minority citizens of Fiji are not necessarily indigenous peoples, whereas native Fijians (now known as *iTaukei*)³⁹ are traditional peoples. The question that needs to be asked is why the proposed Act fails to protect Fiji-Indians' interest in their TKEC.

³⁶ 'Going Back to Our Roots', 2(5) New Dawn (13 March 2010), available online at: http://www.google.co.in/url?sa=t&rct=j&q=new%20dawn%20going%20back%20to%20our%20roots&source=web&cd=1&ved=0CCAQFjAA&url=http%3A%2F%2Fwww.fiji.gov.fj%2Findex.php%3Foption%3Dcom_docman%26task%3Ddoc_download%26gid%3D133%26Itemid%3D158&ei=bypVT8WUHOXd4QSRh_nTDO&usq=AFQjCNHKak4neyDG6B8Jpy2RF4vsB4thzg&sig2=GcxichysFiB_gdZ9b94khw accessed 12 February 2012.

³⁷ ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries (June 1989), Article 1.

³⁸ John Mugabe, 'Intellectual Property and Traditional Knowledge: An Exploration in International Policy Discourse' (WIPO 2000), available online at: <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/mugabe.pdf> accessed 12 February 2012.

³⁹ The current Government has ordered that all written laws (including the titles of any written law) and all State documents of any nature delete the word 'native' wherever it appears and replace it with the word 'iTaukei'. For example, The Native Lands (Amendment) Decree, 2011 and Native Land Trust (Amendment) Decree, 2011 made consequential changes to the Native Lands Act and Native Lands Trust Act respectively by renaming the Native Lands Act as iTaukei Lands Act and amending the Native Lands Act and all subsidiary legislation made under that Act, by deleting the word 'native' wherever it appears and replacing it with the word 'iTaukei.'

As far as traditional knowledge and indigenous knowledge are concerned, the World Intellectual Property Organization (WIPO) uses the term traditional knowledge to⁴⁰:

[R]efer to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. 'Tradition-based' refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are *generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment*. [emphasis added].

The UNEP defines indigenous knowledge as knowledge that is held and used by people who identify themselves as indigenous of a place based on a 'combination of cultural distinctiveness and *prior territorial occupancy* relative to a more recently-arrived population with its own distinct and subsequently dominant culture.'⁴¹ This means that indigenous Fijian and Indian knowledge is traditional knowledge but Fiji-Indians' traditional knowledge is not indigenous knowledge. As Mugabe argues, traditional knowledge is all knowledge and practices 'whether explicit or implicit, used in management of socio-economic and ecological facets of life.' Thus although the proposed Act is in line with the policy intended behind the Model Law to protect TKEC, it fails to recognize and protect all traditional knowledge existing in Fiji.

Figure 1. The Traditional Knowledge and Cultural Heritage System



Source: WIPO Fact Finding Mission on Intellectual Property and
Traditional Knowledge (1998-1999)

⁴⁰ WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, *Glossary of Key Terms Related to Intellectual Property and Traditional Knowledge*, WIPO/GRTKF/IC/18/INF/8, (Geneva 2011).

⁴¹ Traditional Forest-related Knowledge: Contribution by the Executive Secretary to the Preparation of the Report of the Secretary General for Programme Element I.3 of the Intergovernmental Panel on Forests, UNEP/CBD/COP/3/Inf.33, Annex 2.

C. DIFFICULTY IN IDENTIFYING OWNERSHIP

TKEC does not belong to any one particular individual. Normally the whole community or group has propriety rights over TKEC. The nature of TKEC makes it difficult to identify and categorize in a systematic manner. The Model Law defines traditional owners of TKEC as the groups, clan or community of people, or individuals in whom the custody or protection of TKEC is entrusted in accordance with the customary law and practices of that group, clan or community.⁴² While the Act attempts to define traditional ownership based on customary law, it will be difficult to prove with precision who is the true owner of a particular TKEC.

As Misiwaini explains, the 'dispute between members of local community regarding ownership is quite a challenge since it can affect the integrity of information provided by original custodians of information's'.⁴³ For example, indigenous Fijians are divided into 14 provinces, which are then divided into 76 subdivisions known as *tikina* or districts.⁴⁴ At each level, there are broad characteristics peculiar to specific groups. It means that some dialects are largely unintelligible in other regions. Although these dialects could be categorized according to provinces, it would be difficult to identify with precision which specific group is the true owner of these dialects.

D. DOCUMENTATION AND ARCHIVING OF INTANGIBLE CULTURAL HERITAGE

The Ministry of Fijian Affairs is in the process of conducting cultural mapping of diverse intangible cultural heritage (ICH) and indigenous knowledge that exist within the indigenous culture. The main objective of cultural mapping is to create a national registry of existing TKEC and its holders. Secondly, it aims to create and build links between custodians and the younger generation in order to encourage the transmission of knowledge and know-how-related cultural expressions, which are in danger of disappearing.⁴⁵ While this is a remarkable step towards identifying TKEC and its owners, the challenge will be ascertaining the reliability and credibility of these findings. There are many sacred forms of TKEC that the owners do not want non-customary persons to view or access. The use of sacred sites, repatriation and reburial of human remains, for instance, constitutes sacred cultural property. This view, however, is extremely difficult to incorporate into the legal parameters of 'culture'.

The advancement of technology can also threaten the security of TKEC available in a database. Establishment of a traditional knowledge database does not solve the problem of actually determining IP ownership. Cultural mapping aims to limit the difficulty of ownership, yet the problems of ownership (especially in recognizing community or collective ownership and whether this is desirable or appropriate) will persist. Questions can be raised as to how to protect all the information available on the database, since operation of the database within current IP paradigms would mean that the information contained within would fall into the public domain.

⁴² The Model Law, *supra* note 2, Articles 4.

⁴³ Misiwaini Qereqeretabua, 'Cultural Mapping: An Approach to Safeguarding Indigenous Fijian Intangible Cultural Heritage' (International Partnership Programme for Safeguarding of Intangible Cultural Heritage, Tokyo, 21-26 January 2008).

⁴⁴ RR Nayacakalou, *Leadership in Fiji* (Institute of Pacific Studies in the University of the South Pacific/OUP, Melbourne 1985), page 10.

⁴⁵ Sipiriano Nemani, Training Workshop on Field Research Methodology Designed for Cultural Mapping Field Officers, Ministry of Fijian Affairs, Culture and Heritage, Provincial Development, Institute of Fijian Language and Culture (Suva 2005).

There also remains the further problem of decontextualizing knowledge and knowledge practices from the locals that actually make it meaningful. Therefore, policymakers must consider questions such as: Where will the databases be located? Will indigenous peoples be able to access them easily? Who does the recording? What kind of literacy support (digital or other) is to be provided to participating communities?⁴⁶

E. PROTECTION BEYOND NATIONAL LAWS

The proposed legislation in question will also face difficulties in protecting TKEC beyond national jurisdiction. This is because the proposed Model Law primarily aims to provide protection at the national level. Simultaneously, traditional and commercial uses of TKEC are intensifying and falling prey to phenomena such as bioprospecting and biopiracy on an international level. As Griffith explains⁴⁷:

Frequently exploitation of traditional knowledge and culture occurs outside of enacting counties, so it is important that Pacific Island countries find a solution to protect traditional knowledge and expressions of culture between the different countries of the region.

Moreover, Pacific Countries cannot adequately address such infringements, unless there is a system to address them under a *sui generis* international treaty on traditional knowledge. As Olson explains⁴⁸:

While a regional system of protection would go some way to addressing infringements that take place between countries that are a part of that system, it can't address infringements beyond that. Hence, the need for an international treaty to address the problem on a global level is vital.

It is important to note that the protection of such treaty will only be accorded to countries that are signatories to this treaty. Therefore, in order to provide complete and effective protection of its TKEC, Fiji must work hand in hand with other Pacific Island Countries in the region to defend its interests. Perhaps the plan agreed by the Pacific Islands Forum Secretariat could be beneficial as it aims to integrate all Pacific countries in the effort to protect TKEC.

V. FRAMEWORK FOR SUPPLEMENTARY SOLUTIONS

The proposed Model Law adopted by Fiji to protect its IKEC from exploitation unfortunately still poses practical difficulties. Perhaps the most important challenges the policy implementers will encounter with such a *sui generis* system is the ability to produce proof that a *sui generis* regime is able to provide an 'effective' system of protection. Therefore, in order to fully and effectively protect the IKEC of local communities, Fiji needs to utilize other available legal mechanisms. The Convention on Biological Diversity, 1992, the Environment

⁴⁶ Jane Anderson, *Indigenous Traditional Knowledge and Intellectual Property*, Centre for the Study of The Public Domain, Duke University School of Law (2010), available online at: <http://www.law.duke.edu/cspd/itkpaper> accessed 12 February 2012.

⁴⁷ Press release, Secretariat of the Pacific Community, Cultural Affairs Programme, available online at: <http://lyris.spc.int/read/message?id=26873> accessed 27 May 2011.

⁴⁸ Tione Chinula, 'Culture: Guarding the Pacific's Cultural Heritage: Alternatives to Protecting Traditional Knowledge', (*Island Business* 2007).

Management Act, 2005, the establishment of an Inventory Database, greater recognition of customary laws, and vigorous public empowerment, could all provide alternative and equally beneficial avenues for protecting IKEC.

A. CUSTOMARY LAW

Customary law plays a vital role in the protection of traditional knowledge and could probably be the most appropriate source of protection. A number of jurisdictions, including the Pacific Countries, have already implemented *sui generis* protection for TKEC based on customary law.⁴⁹ Customary law can be useful in resolving the dispute over traditional ownership of TKEC. Terri Janke explains that:⁵⁰

Despite regional differences, each particular group has ownership of rights over its particular inherited cultural heritage. One common factor between all Indigenous groups is that there are generally customary laws governing rights to use and deal with Indigenous cultural and intellectual property.

Courts in Fiji have also recognized that customary law might be best in resolving the dispute over ownership of cultural properties.⁵¹

However, customary law or a *sui generis* system based on customary laws is dependent on the extent to which these laws are already recognized by a relevant legal system. In Fiji, both the legislature and the courts have used principles of customary law to resolve the disputes over the ownership of land rights. For example, Section 17(1) of the Native Lands Act gives power to the Native Lands Commission to resolve disputes concerning headship according to Fijian customary law.⁵² While courts have generally accepted the application of customary law

⁴⁹ Model Law for the Protection of Traditional Knowledge and Expression of Culture, 2002; Professor Mick Dodson recommended to the UN Permanent Forum on Indigenous Issues that the United Nations should:

[C]ommission a study, under its mandate to prepare and disseminate information, to determine whether there ought to be a shift in the focus on the protection of indigenous traditional knowledge away from intellectual property law to protection via customary law, and if so how this should occur. The study should consider how indigenous traditional knowledge could be protected at an international level by utilizing customary law, including the extent to which customary law should be reflected, thereby providing guidance to States and subsequently protection at national and regional levels.

Permanent Forum on Indigenous Issues, *Report of the Secretariat on Indigenous Traditional Knowledge*, UN ESCOR UN Doc [24] E/C.19/2007/10 (2007).

⁵⁰ Terri Janke, 'Pacific Indigenous People Unite to Protect Cultures: Report on the Symposium on the Protection of Traditional Knowledge and Expressions of Indigenous Cultures in the Pacific Islands' (1999) 4(3) *AU Indig LR* 26.

⁵¹ *Vosailagi v. Native Lands Commission* [1989] 35 FLR 116.

⁵² The Native Lands Act, 1905.

in settling disputes over indigenous leadership⁵³, they have also expressed the opinion that Fijian customary law often results in constant debate.⁵⁴

The actual recognition of customary law falls within the realm of the legislators. As then Chief Justice Tuivaga stated: 'only when those provisions are made part of the municipal law i.e. ordinary law of the land, will the Court be competent to adjudicate on matters pertaining to Fijian customary law'.⁵⁵ It is therefore strongly recommended that customary law should be recognized (especially for sensitive issues like TKEC) and be included in tangible form within the legal system of Fiji.

B. THE CONVENTION ON BIOLOGICAL DIVERSITY

The Convention on Biological Diversity is the first international covenant that acknowledges the role and contribution of indigenous and local communities in the conservation and sustainable use of biodiversity.⁵⁶ The convention gives new life to the protection of traditional knowledge, because it recognizes the need to 'respect, preserve and maintain knowledge' innovations and practices of indigenous and local communities and ensures equitable sharing of benefits derived from biodiversity.⁵⁷

Fiji is a party to the Convention on Biological Diversity, which came into force in 1993. The Convention offers opportunities for Fiji to realize the benefits of its traditional resources. For example, 'mutually agreed access contracts' will likely be the primary means to reflect an agreement for access and subsequent benefit sharing'.⁵⁸ Secondly, Article 15(5) of the Convention ensures that 'prior informed consent' of the indigenous people must be received before resources are shared.⁵⁹ As Rosell argues, prior informed consent 'is, therefore, an administrative process requiring full disclosure of all information that enables the government, as well as interested parties, to assess costs and benefits and thus to decide whether to grant access to bioresources'.⁶⁰ To maximize the benefits of Article 8(j) and 15(5) of the Convention, a number of contracting parties have developed suitable regimes for the protection of traditional natural resources and associated traditional knowledge.⁶¹

⁵³ In *State v. Native Lands Appeals Tribunal* [2009] FJHC 164, the High Court declared that '[i]n the context of the Native Lands Act, the Parliament has clearly indicated that it is Fijian customary law that should apply.' See further *Bulou Eta Kacalaini Vosailagi v. Native Lands Commission* [1989] FJHC 53.

⁵⁴ *Vosailagi v. Native Lands Commission*, *supra* note 53.

⁵⁵ *ibid.*

⁵⁶ Secretariat of the Convention on Biological Diversity Access to Genetic Resources, UNEP/CBD/COP/3/24 (Montreal, 1996), page 14, paragraph 52; see also Henrietta Fourmile, 'Using Prior Informed Consent Procedures under the Convention on Biological Diversity to Protect Indigenous Traditional Ecological Knowledge and Natural Resource Rights' (1998) Indig L B 84 and L Glowka, et al. with JA McNeely et al. (eds), *A Guide to the Convention on Biological Diversity*, IUCN Environmental Law Centre (Bonn 1994), pp. 80 to 82.

⁵⁷ Convention on Biological Diversity, Article 8(j).

⁵⁸ Glowka, et al., *supra* note 56.

⁵⁹ CBD, *supra* note 57, Article 15(5).

⁶⁰ M Rosell, 'Access to Genetic Resources: A Critical Approach to Decision 391 'Common Regime on Access to Genetic Resources' of the Commission of the Cartagena Agreement' (3) *Reciel* (1997) 274, page 278.

⁶¹ Countries such as the Philippines, Costa Rica, Thailand and the Andean Pact countries (Bolivia, Colombia, Ecuador, Peru and Venezuela) have done just that. The Organization for African

C. THE ENVIRONMENT MANAGEMENT ACT 2004

The Environment Management Act (EMA) was implemented as a direct result of Fiji recognizing and ratifying the Convention on Biological Diversity. The Act adopts some of the main policies of the Convention. Its underlying objective is to protect natural resources, control and manage developments and provide for waste management and pollution control. The EMA has three important features for sustainable development: firstly, the Act introduces a process for assessing the environmental impact of development projects;⁶² secondly, the Act creates an inventory for natural resources;⁶³ and thirdly, the Act also aims to prevent the introduction of genetically modified organisms into Fiji. However, concerns may be raised about the natural resource inventory project under the EMA, since the proposed Model Law also proposes the introduction of a TK database. There is concern that resources will be duplicated and this might cause significant difficulties for TK owners.

According to Sutton, 'Fiji's new EMA implements a process of integrating indigenous knowledge of environmental management, incorporating a context of indigenous worldviews of place and land.'⁶⁴ The EMA also prescribes both civil (a fine of no more than F\$250,000) and criminal (no more than three years imprisonment) sanctions for a list of offences.⁶⁵ The use of the EMA to supplement the TK provisions under the current IP regime ensures that non-customary users do not challenge or contravene established customary controls over the use of natural resources.

D. EDUCATION AND PUBLIC AWARENESS

There are a number of options available today to protect TKEC and its holders. The most significant mechanism is the use of public awareness and education campaigns, which promote greater public understanding of the value of cultural properties. Awareness campaigns could possibly reduce the incidence of appropriation of heritage, violation of customary laws and exploitations of TKEC. Awareness of IP issues, and the benefits accruing from safeguarding the centuries' old traditional cultural properties, remains extremely low. Greater public awareness can be achieved, *inter alia*, through public workshops, school curricula and textbooks, films on traditional issues, and museum exhibitions of indigenous art.⁶⁶ As the WIPO Fact Finding Mission acknowledged, owing to economic and other reasons, communities are unable to restrict access to their TKEC and to benefit from possible commercial exploitation.⁶⁷

The property holders in question (indigenous and traditional people) should be the primary targets of these education and awareness campaigns, to acquaint them more fully with the rights and remedies available in relation to their heritage. This paper therefore recommends

Unity (OAU) has authorized its 53 member States to adopt the Draft Legislation on Community Rights and Access to Biological Diversity prepared by its Scientific, Technology and Research Commission.

⁶² Environment Management Act, 2004, Section 28.

⁶³ *ibid.*, Section 25.

⁶⁴ Victoria Sutton, 'Custom, Tradition and Science in the South Pacific - Fiji's New Environmental Management Act and Vanua' (2005) 9(2) *J South Pacific L* 9.

⁶⁵ Environment Management Act, *supra* note 62, Part 6.

⁶⁶ Githaiga, *supra* note 1, paragraph 109; see also Erica-Irene Daes, UN Special Rapporteur, *Protection of the Heritage of Indigenous People: Final Report*, E/CN.4/Sub.2/1994/26 (21 June 1995).

⁶⁷ *Intellectual Property Needs and Expectations of Traditional Knowledge Holders*, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999) (April 2001 Geneva), Part II, page 78.

that Fiji implement curricula on IP-related issues, at the very least in tertiary institutions, and introduce awareness programmes for cultural property holders.

VI. CONCLUSION

The issues discussed in this article highlight one crucial point: an attempt to protect traditional knowledge and cultural properties within the conventional IP regime is ill-advised on both policy and practical levels. Interestingly, although TKEC is economically and environmentally valuable, and faces significant threats and challenges in terms of exploitation, it is currently under very little protection.

The South Pacific Countries, including Fiji, recognizing the importance of TKEC, have sought to develop alternative policies (outside mainstream IP tools) to protect it. This includes ratification of key international treaties, as well as regional and national initiatives. This paper, however, takes a cautionary approach, arguing that even if a *sui generis* system is implemented to bridge the knowledge gap between holders of traditional knowledge, there are still numerous factors to consider in ensuring complete and effective protection of TKEC. Finally, in addition to the basic *sui generis* system itself, countries should develop a holistic policy regime to ensure sustainable protection that includes other initiatives such as increasing public education and awareness of the value of TKEC.

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