BOOK REVIEW

Evana Wright, *Protecting Traditional Knowledge: Lessons from Global Case Studies* (Cheltenham, UK, Northampton MA, USA, Edward Elgar, 2020)

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Paul Kuruk, *Traditional Knowledge, Genetic Resources, Customary Law and Intellectual Property: A Global Primer* (Cheltenham, UK, Northampton MA, USA, Edward Elgar, 2020)

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The knowledge of traditional and indigenous peoples is essential for the conservation and transmission of their cultural beliefs from one generation to the next. As Erica-Irene Daes, Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson of the Working Group on Indigenous Populations, reported in 1993:

> For indigenous peoples the world over the protection of cultural and intellectual property has taken on growing importance and urgency. The very concept of "indigenous" embraces the notion of a distinct and separate culture and way of life, based upon long-held traditions and knowledge which are connected, fundamentally, to a specific territory. Indigenous peoples cannot survive, or exercise their fundamental human rights as distinct nations, societies and peoples, without the ability to conserve, revive, develop and teach the wisdom they have inherited from their ancestors.[1]

She traced the first official recognition, in the United Nations system, of "the evil and continuing danger of ethnocide, and of the role Governments and intergovernmental institutions should play in preventing any further erosion of indigenous peoples' cultural and intellectual heritage" to a 1981 conference in

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[1] Erica-Irene Daes 'Discrimination Against Indigenous Peoples' E/CN.4/Sub.2/1993/28, 28 July 1993, para.1.

San José, Costa Rica.[2] However, nothing much was done to protect traditional knowledge (TK) for a number of years, partly this was because nations couldn't agree whether TK was an issue of heritage law or fell within some other body of law. The best that could be achieved was the 2003 United Nations Economic Scientific and Cultural Organization (UNESCO) Convention on the Safeguarding of Intangible Cultural Heritage which entered into force in April 2006. The principal purposes of this Convention were identified in Art 1 as safeguarding and ensuring respect for intangible cultural heritage. For the purposes of this Convention Art 2.1 defined "intangible cultural heritage" as

> … the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage.

Article 2.2 listed as "intangible cultural heritage":

> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
> ….
> (d) knowledge and practices concerning nature and the universe;

Article 11 of the Convention required that each State Party shall "take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory" and that among the safeguarding measures parties should "identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant non-governmental organizations." Article 12 provided for each State Party to draw up "inventories of the intangible cultural heritage present in its territory." Additionally, Art 13 required parties to endeavour to adopt policies, and designate or establish one or more competent bodies for the safeguarding of the intangible cultural heritage present in its territory and support this with appropriate legal, technical, administrative and financial measures.

Greater impetus for the protection of TK was provided by the realisation, particularly by developing countries, that TK was being used to identify and exploit the valuable genetic resources of those countries by unauthorised third parties. The first notorious example of this practice, characterized as biopiracy concerned patents granted in 1994 by the United States Patent and Trademarks

[2] Ibid. para.2.

Office (USPTO) and the European Patent Office (EPO) over extracts of the Neem tree (*Azadirachta indica*) by the US corporation W.R. Grace & Company and the United States Department of Agriculture. This patent concerned a method for extracting azadirachtin from neem tree seeds to be used as an insecticide.[3] A coalition of environmental NGOs challenged the patent on grounds that the patent lacked novelty and an inventive step because the fungicidal effect of hydrophobic extracts of neem seeds was known and used for centuries in India, both in Ayurvedic medicine to cure dermatological diseases and in traditional Indian agricultural practice to protect crops from being destroyed by fungal infections. This case generated a substantial campaign in India and other countries against perceived threats to the sovereignty of countries over their biological resources and despite the eventual revocation of the patent, it has come to be regarded as the quintessential example of biopiracy.[4] In 1995 and 2000 it was reported that University of Wisconsin scientists had patented and were exploiting patents on "brazzein" a protein extracted from the berries of *Pentadiplandra brazzeana* from Gabon. This protein is apparently 2,000 times sweeter than sugar, which makes it highly desirable as a natural, low calorie sweetener. Natur Research Ingredients, Inc, a US corporation, was reported in late 2008 to have acquired the sole rights to manufacture and distribute brazzein from the University of Wisconsin at MadisonThis was cited as an instance of biopiracy to the UK Parliament's Select Committee on Environmental Audit in 1999[5] and is referred to as the classic exemplar of biopiracy in analysing the concept of "justice".[6]

Compounding the concerns about biopiratical exploitation of developing countries and LDCs is the perception that many instances of the appropriation of a country's biological resources is facilitated by reliance upon the traditional wisdom of indigenous and traditional peoples in identifying those resources.[7] In

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[3] US Patent US5411736 A

[4] Eg see Vandana Shiva, 'The neem tree - a case history of biopiracy' available at http://www.twnside.org.sg/title/pir-ch.htm.

[4] US Patent No. 5,741,537 – April 21, 1998

[5] United Kingdom Parliament. Appendix 7 to the Minutes of Evidence of the Select Committee on Environmental Audit, 1999, available at http://www.publications.parliament.uk/pa/cm199900/cmselect/cmenvaud/45/45ap08.htm.

[6] Eg see B. A. Brody, 'Intellectual Property, State Sovereignty, and Biotechnology' (2010) 20 (1) *Kennedy Institute of Ethics Journal* 50-73.

[7] Eg See Daniel F. Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates*, London, Earthscan, 2010; M. Blakeney, 'Bioprospecting and Biopiracy' in B.Ong, Ed. *Intellectual Property and Biological Resources*, Singapore: Marshall Cavendish, 2004, 393-424; and and Edmonds Institute and the African Centre for Biosafety, 'Out of Africa: Mysteries of Access and Benefit Sharing'

almost all of the reported cases those peoples did not share in the commercial benefits which resulted from the exploitation of those resources. For example, in 1995 the South African Council for Scientific and Industrial Research (CSIR) obtained a patent on a compound found in the Hoodia cactus, used by the San People of the Kalahari Desert who had traditionally eaten the cactus to stave off hunger and thirst on long hunting trips. In 1997 CSIR licensed this patent to the UK biotech company, Phytopharm, which in 1998, allocated its right to the US pharmaceutical company Pfizer which marketed a Hoodia extract as a potential slimming drug and cure for obesity. Concern was expressed that the San, whose traditional knowledge (TK) had identified the utility of Hoodia, should have been consulted about the exploitation of their TK[8] and their entitlement to a share of the benefits from its exploitation.[9]

An attempt had been made in the Convention on Biological Diversity (CBD) to address this issue. Article 8j of the CBD had provided that TK holders should participate in the "the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices". However, the USA, one of the principal bioprospecting states refused to ratify this convention.
Since 2000 the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ("IGC") of the World Intellectual Property Organization (WIPO) has been engaged in formulating treaties concerning the protection of TK and genetic resources. This has been a long drawn out process, which has not yet been crowned by success, largely attributable to conflicts between bioprospecting and source countries, as well as to tensions between traditional and dominant communities.[10] The books by White and Kuruk address these issues.

White commences, after defining TK, by posing the question: why and how should we protect TK. She conceives of the why in a human rights context and repeats Daes' observation that "the protection of cultural and intellectual

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accessed at http://www.edmonds-institute.org/outofafrica.pdf, which lists in excess of 30 patents on African biological materials.

[8] See Marcelin Mahop Tonye, 'Biodiversity Regulatory Options. Involvement of Rural Communities in Decision-Making Processes in South Africa' (2005,) 8(6) *Journal of World Intellectual Property*, 809-.825.

[9] The market potential in the U.S alone was estimated at being over US$3 billion p.a., see R. Wynberg, 'Rhetoric,Realism and Benefit Sharing – Use of Traditional Knowledge of Hoodia Species in the Development of an Appetite Supressant' *Journal of World Intellectual Property*, (2004) 7(6), 851-876.

[10] See M. Blakeney, 'Protecting the Knowledge and Cultural Expressions of Aboriginal Peoples', (2015) 39 *University of Western Australia Law Review* 180.

property is connected fundamentally with the realisation of the territorial rights and self determination of indigenous peoples". In her concluding sentence, White says that "many countries, including Australia must…support the design and implementation of a nationally consistent framework for the protection of traditional knowledge based on the principles of self-determination, prior informed consent and mutually agreed terms. The prospect of any country, let alone Australia, respecting the self determination of its indigenous or traditional peoples is, with the greatest of respect, unreasonably optimistic, particularly in a world where indigenous peoples are being subjugated and exterminated.

Australia's record is particularly questionable, bearing in mind that it, together with Canada, New Zealand and the USA was one of four countries which had voted against the Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly of the United Nations on 13 September 2007. Some 143 Member States had voted in favour of the Declaration. The Declaration was a non-binding text which set out the rights of indigenous peoples to "maintain and strengthen their own institutions, cultures and traditions, and to pursue their development in keeping with their own needs and aspirations".[11] Article 31 of the Declaration recognised the rights of indigenous peoples to maintain, control, protect and develop their intellectual property over their cultural heritage, traditional knowledge, and traditional cultural expressions. Senator Marise Payne in a speech in the Australian Senate on 10 September 2007, gave various reasons why the Australian Government had opposed the Declaration. She explained that "as our laws here currently stand, we protect our Indigenous cultural heritage, traditional knowledge and traditional cultural expression to an extent that is consistent with both Australian and international intellectual property law, and we are not prepared to go as far as the provisions in the text of the draft declaration currently do on that matter."[12] She indicated the Australian Government's opposition to "the inclusion in the text of an unqualified right of free, prior and informed consent for indigenous peoples on matters affecting them" and because the text did "not acknowledge the rights of

[11] *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295 (adopted by the General Assembly 2 October 2007)
<http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf>.

[12] Commonwealth, *Parliamentary Debates: United Nations Declaration on the Rights of Indigenous Peoples*, Senate, 10 September 2007 (Speech by Sen Marise Payne)
<http://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansards/2007-09-10/0075/hansard_frag.pdf fileType=application%2Fpdf> p 53.

third parties—in particular, their rights to access indigenous land and heritage and cultural objects where appropriate under national law."[13]

With the change of government in Australia, Prime Minister Kevin Rudd announced on 3 April 2009 Australian support for the Declaration, but since that date Australia has had a number of changes of government but with no action to implement the Declaration.

In her second chapter White examines the lessons to be learn from biopiracy legislation in India and Peru. In India the Biological Diversity Act 2002 is referred to as giving effect to India's obligations under the CBD. However, this Act is not directly focussed upon the rights of indigenous peoples. Probably more relevant is the Scheduled Tribes Act 2007, which in s.3(1) (k) recognises the right of Scheduled Tribes (indigenous peoples) to "access to biodiversity and community right to intellectual property and traditional knowledge related to biodiversity and cultural diversity". Also relevant is the Protection of Plant Varieties and Farmers' Rights Act, 2001 (PPVFR Act). The PPVFR Act, unique among national schemes for the protection of plant varieties, contains a scheme of protection for 'farmers' varieties'. Section 2(l) of the PPVFR Act defines as a 'farmers' variety' as a variety that—

> (i) has been traditionally cultivated and evolved by the farmers in their fields; or
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> (ii) is a wild relative or land race of a variety about which the farmers possess the common knowledge

'Farmer' is defined in section 2(k) to mean any person who—

> ....
> (iii) conserves and preserves, severally or jointly, with any person any wild species or traditional varieties or adds value to such wild species or traditional varieties through selection and identification of their useful properties.

Section 24(1) of the PPVFR Act allows for benefit-sharing when commercial plant varieties are developed from traditional varieties.

White describes the biopiracy laws of Peru: Law 27811Introducing a Protective Regime for the Collective Knowledge of the Indigenous Peoples Derived from Biological Resources 2002 and Law 28216 on the Protection of Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous Peoples, 2004. These laws were drafted in consultation with

[13] Ibid.

indigenous peoples and proposed the establishment of a National Biopiracy Commission with the objective of protecting against the "unauthorised and non-remunerated access to and the use of biological resources or collective knowledge of indigenous peoples by others". A limitation of this national legislation is that it can have little effect on biopiracy by foreign actors. Thus, in October 2005 Peru notified the World Trade Organization (WTO) Council administering the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) Council of potential biopiracy arising from a series of patents and patent applications for skin preparations, cosmetics and food additives utilizing camu camu (*Myrciaria dubia*), a plant with very high levels of ascorbic acid (vitamin C), used by traditional peoples in the Peruvian Amazon. This notification was part of Peru's, to date, unsuccessful attempt to get the WTO to deal with biopiracy.

White then looks at the access and benefit sharing regime of the Nagoya Protocol to the CBD and then the role of databases and registers of TK in preventing patenting by destroying novelty claims which may have been made in relation to that TK.

Paul Kuruk's magisterial study covers some of the same territory as White. His first chapter deals with the definition of TK and the second chapter describes the social, cultural and economic value of TK. The third chapter looks at the relevance of intellectual property protection for the protection of TK. In this regard, Kuruk notes the difficulties of fitting TK into the concepts of ownership, novelty, fixation and duration which underpin patents, copyright and trademark protection. A more fundamental problem is that the IP paradigm is largely concerned with the exploitation of rights, whereas TK does not have a commercial focus, but is largely concerned with the conservation and transmission of indigenous and traditional cultures. Indeed, in some secret-sacred areas, the commercial exploitation of TK is offensive to those cultures. Thus, the use of intellectual property rights to protect TK simply be culturally inappropriate. The problem seems to be that the heritage rights approach of UNESCO which confines itself to documenting and cataloguing TK is rather a soft law approach. The resort to intellectual property rights has arisen because of the exploitation opportunities which have been identified by bioprospectors. The member states of the World Intellectual Property Organization (WIPO) have taken note of the commercial opportunities arising from that exploitation and the cultural misgivings of indigenous and traditional communities within those

member states have been over-ridden, particularly as those communities do not have representation in WIPO, or any other international organization.

Chapter 4 looks at the extent to which TK is protected in the various international conventions and chapter 5 describes initiatives by WIPO and UNESCO to protect TK. The likely prospect for success in these negotiations is quite limited. The Intergovernmental Committee of WIPO, by way of example, has been engaged in the task of agreeing a treaty on TK for the past 20 years. The governing body of WIPO at its last meeting in September 2020, announced that the IGC's work in the 2020/2021 biennium "will build on the existing work carried out by the Committee, including text-based negotiations, with a primary focus on narrowing existing gaps and reaching a common understanding on core issues".[14] The failure to agree core issues, including basic definitions over this long drawn out negotiation, does not suggest that success is likely. This is largely due to the opposed positions of bioprospecting and source countries.

Chapter 6 describes the international regime governing access to genetic resources. This is a subject of the CBD and the Nagoya Protocol. Both are hampered by limited implementation in key bioprospecting countries. WIPO is also trying to formulate a treaty on genetic resources, but is yet to come up with a draft treaty text.

Chapter 7 looks at the human rights implications of the protection of TK. As previously mentioned, when human rights is introduced to the equation this tends to lead on to questions of self-determination. An illustration of the passions raised in the TK context is the statement issued by the International Consultation on Intellectual Property Rights and Biodiversity organised by the Coordinating Body of the Indigenous Peoples of the Amazon Basin (COICA), held at Santa Cruz de la Sierra, Bolivia in September 1994. It declared that:

> All aspects of the issue of intellectual property (determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation) are aspects of self- determination.

The COICA Statement in Article 8 fulminated that

> Prevailing intellectual property systems reflect a conception and practice that is:

[14] https://www.wipo.int/export/sites/www/tk/en/igc/pdf/igc_mandate_2020-2021.pdf.

> -colonialist, in that the instruments of the developed countries are imposed in order to appropriate the resources of indigenous peoples;
>
> - racist, in that it belittles and minimises the value of our knowledge systems;
>
> - usurpatory, in that it is essentially a practice of theft.

It is probably not a surprise that the intellectual property approach to the protection of TK has not been crowned with success.

Part III of the book looks at regional and national measures which have been enacted in the absence of international action. Key among these are the Swakopmund Protocol developed by the African Regional Intellectual Property Organization and the African Modern Legislation prepared by the Organization of African Unity and taken over by the African Union. In relation to Australia and New Zealand reference is made to various government commissions of inquiry which have not led to anything. In 2017, IP Australia and the Department of Industry, Innovation and Science commissioned a discussion paper, *Indigenous Knowledge: Issues for protection and management*[15] From September 2018 to 1 February 2019 IP Australia sought comments from stakeholders with an interest in how Indigenous Knowledge is protected, used and managed and it issued a report on these consultations in August 2019.[16] Its website currently states that "We will continue engaging and consulting with stakeholders and other parts of government during 2020 to progress work on the protection of Indigenous Knowledge"[17]

The final part of the book is taken up with "the search for solutions". These include: the use of current intellectual property laws, the use of protocols and contracts and databases. It looks at the customary law option, which is important in those countries which recognise customary law. Australia claims to respect some of the customary rights of its Aboriginal and Torres Strait Islander Peoples through its Native Title law, but in but in *Western Australia v Ward*[18] The High Court rejected the proposition that access to sacred sites for Aboriginal Peoples, where artworks on rock were located, or ceremonies were performed could not be regarded as an incident of native Title. The joint judgement of Gleeson CJ,

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[15] https://www.ipaustralia.gov.au/sites/default/files/ipaust_ikdiscussionpaper_28march2018.pdf

[16] IP Australia, Protection of Indigenous Knowledge in the Intellectual Property System, available at https://www.ipaustralia.gov.au/sites/default/files/reports_publications/indigenous_knowledge_consultation_report.pdf

[17] https://www.ipaustralia.gov.au/about-us/public-consultations/indigenous-knowledge-consultation-2019

[18] *Western Australia v. Ben Ward (on behalf of the Miriuwung Gagerrong Peoples* (1997) 145 ALR 512.

Gaudron, Gummow and Hayne JJ took this to be the assertion of "something approaching an incorporeal right akin to a new species of intellectual property".[19] The joint judgement expressed the concern that the "'recognition' of this right would extend beyond denial or control of access to land held under native title. It would, so it appears, involve, for example, the restraint of visual or auditory reproductions of what was to be found there or took place there, or elsewhere."[20] The joint judgement referred to observations of von Doussa J in *Bulun Bulun v R & T Textiles Pty Ltd*[21], that "a fundamental principle of the Australian legal system was that the ownership of land and ownership of artistic works are separate statutory and common law institutions."[22]

The penultimate chapter of Kuruk's primer details the disclosure solution to the misappropriation of genetic resources. This option requires patent laws to oblige the disclosure of the source of biological material used by a patentee. However, this option requires national legislation which invalidates patents where access to the biological material was unauthorized.

The final chapter examines the possibility for TK to be protected through the principle of reciprocity. This entails the recognition of the rights of foreign bioprospectors in return for the recognition of TK in bioprospecting countries. Kuruk floats the possibility of including this reciprocity approach in the TRIPS Agreement. It should be noted that the failure to secure a consensus among TRIPS members has made the amendment of that agreement very difficult. A proposal to amend the TRIPS Agreement to require the disclosure of origin as a condition of patentability was a failure. Kuruk concludes by proposing the principle of reciprocity as a cornerstone of mutual recognition agreements (MRAs) between countries. This provides the possibility for a country to recognise TK rights without having a statute dealing with TK. Of course this would require some kind of TK enforcement machinery in the recognizing country.

Both White and Kuruk make important contributions to what has become a fairly intractable issue. In the absence of action by both national and international legislators academic commentaries assume a much greater significance than in other areas of law. Thus, both books are essential reading for policy makers, as well as students and researchers in this area.

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[19] Ibid, at para 59.
[20] Ibid.
[21] (1998) 86 FCR 244 at 256.
[22] [2002] HCA 28 at para. 60.