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## RESEARCH PAPER

# The mismatch of geographical indications and innovative traditional knowledge

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*This article is about how geographical indications (GIs) cannot deliver the protection for traditional knowledge that indigenous peoples seek. There are three broad ways in which the protection of geographical indications appears to offer the possibility of providing legal mechanisms to protect traditional knowledge. These are the collective nature of the protection, the indefinite availability of the GI and the connection that GI owners perceive between their products and their land. Those seeking protection of traditional knowledge also seek a collective and an indefinite interest and frequently the relationship between their knowledge and the land is important for indigenous peoples. Yet, these similarities are superficial. GIs protect names and are used by Western farmers and sometimes rural communities to promote their products. This article concludes that GIs cannot deliver the protection that indigenous peoples seek in order to benefit from their traditional knowledge.*

## Introduction

There have been many suggestions that geographical indications (GIs) can and should provide some kind of protection for traditional knowledge (Downes, 2000; Blakeney, 2009; Gervais, 2011). The central rationale behind such suggestions is a view that GIs and traditional knowledge have features and even aims in common (Downes, 2000, pp.269–73). One feature that GIs and traditional knowledge share is that they have both become topics over which there is considerable debate in international intellectual property law. The two areas have become intertwined at a political level. This paper discusses the way in which the political debate has linked GIs and traditional knowledge. In addition to, and possibly as a development of, this political relationship there are thought to be several substantive similarities between the two areas. These similarities are, broadly, three. Firstly, GIs provide a potentially indefinite form of protection and those who seek protection for traditional knowledge also seek a kind of indefinite protection. Secondly, there can be a collective interest in GIs because they provide more than one trader with the right to use a GI. Indigenous peoples regard any interest in their traditional knowledge as a collective interest. Thirdly, GIs are frequently justified by a relationship between the land and the use of the GI, referred to as the *terroir*. Many traditional knowledge claimants also speak of how their knowledge comes from and is related to the land. The paper discusses these similarities and concludes that they are superficial

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similarities, insufficient to support the suggestion that GIs could play a major role in the protection of traditional knowledge. In reality, GIs protect only a name, usually of geographic origin, associated with a product.[1] The static nature of GIs is explained.

The paper looks at what some proponents of traditional knowledge, particularly indigenous peoples, seek to protect and analyses how that is quite different from the rationales and aims of GIs. In particular, a major aspect of the protection that indigenous peoples seek is not necessarily exclusivity over any kind of knowledge, but some kind of control over innovative uses of traditional knowledge, in order to benefit from those uses. Even in circumstances where traditional knowledge holders seek protection of a name, a GI may not be useful unless the traditional knowledge holder has an established business. GIs, at least in Europe, function to support a particular type of agriculture. They do not function to support innovative agricultural method, but rather to preserve existing agricultural traditions and to incentivise the continuance of those traditions. Those seeking to protect traditional knowledge do not use the same approach to incentives. In contrast, traditional knowledge is often innovative and it also has the capacity to contribute to innovation. The paper considers the effects of the mismatch of GIs and traditional knowledge, and concludes that geographical indications are, therefore, the wrong vehicle to protect most traditional knowledge and particularly innovative traditional knowledge.

## The international linkage between protection of traditional knowledge and geographical indications

Internationally, there is considerable disagreement over the parameters of protection of both GIs and traditional knowledge. These difficulties take different forms. The difficulty for traditional knowledge is that many are opposed to its protection altogether. Geographical indications offer a degree of internationally-agreed protection. The disagreement centres on how far this protection should expand.

The call for protection of traditional knowledge arises largely because developing countries and indigenous peoples have found that the developed world freely uses indigenous peoples' knowledge, and its associated cultural outputs or genetic resources, without any benefits necessarily flowing back to the source of that knowledge (Roht-Arriaza, 1996; Downes, 2000, pp.276–80). Additionally, the developed world's version of protection of intellectual property, exemplified in the standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), protects developed world knowledge assets and treats indigenous traditional knowledge as free for all to use. Global trade has exacerbated this imbalance in the protection of knowledge assets.

Some of the objections that those in the business of intellectual property make against the protection of traditional knowledge mirror general objections to aspects of intellectual property law. One concern is that the protection of traditional knowledge somehow would unduly inhibit use of the public domain. The continuous expansion of copyright and patents, for example, has been characterised as encroaching onto the public domain. When patents are granted too far up stream, research can be hampered (Dinwoodie and Dreyfuss, 2005). When copyright prevents information flows, there is a problem with copyright.

To explore fully the proposition that the protection of traditional knowledge might be deleterious to the public domain is beyond the scope of this paper, but

two points should be noted. Firstly, many indigenous peoples were not necessarily aware that the sharing of their knowledge meant it would be placed in the public domain, enabling it to be used without regard for its origins or any traditions that govern its appropriate uses (Frankel and Richardson, 2009). Secondly, all intellectual property protection is a taking from what would otherwise be the public domain. What is ring-fenced from the public domain in the name of intellectual property is primarily a matter of political choice that reflects the state of development or cultural values of a state. The more developed a country, the stronger its intellectual property law is likely to be. The TRIPS Agreement has meant, however, that some developing countries have higher standards of intellectual property law than is optimal for their level of development.

There has been considerable international institutional work in framing the situations in which traditional knowledge could be protected, the use of traditional knowledge compensated through benefit sharing, and how such protection might work in conjunction with existing intellectual property rights. There are several difficulties with these international frameworks. A key difficulty is that an international framework is unlikely to achieve what is the main objective for indigenous peoples, which is the ability to utilise their traditional knowledge for their own economic and social development. A legal framework is not, on its own, a development tool. Laws cannot create development. At most, laws can support development. However, an understanding of these frameworks is relevant here because it shows the linkages between traditional knowledge and GIs.

There are two forums at the forefront of the international framework for the protection of traditional knowledge. These are the Convention on Biological Diversity (CBD) and the World Intellectual Property Organization (WIPO). The Nagoya Protocol of the CBD includes an obligation on parties to provide for measures that require, in some circumstances, prior and informed consent (PIC) of indigenous and local communities and benefit sharing with these communities (Articles 5–7). Parties to the Protocol have PIC obligations in relation to the use of traditional knowledge associated with genetic resources and in relation to genetic resources where at domestic law indigenous and local communities have rights in relation to the genetic resources. The right that attaches to traditional knowledge is not dependent on a separate right existing at domestic law in the way that a right in relation to the genetic resources is dependent. There is considerable discretion in the Nagoya Protocol as to how these obligations will be enacted in domestic legal regimes. There is, for example, no definition of what 'associated with genetic resources' means, suggesting that parties may determine how strongly that association needs to be proven. Nevertheless, the Nagoya Protocol is a significant development on existing CBD rights, which tended to be aspirational in that they did not impose specific obligations.[2]

WIPO began its traditional knowledge project with a fact-finding mission to establish what the issues are. This grew into an intergovernmental committee (WIPO-IGC) that developed a series of objectives and principles in relation to traditional knowledge. Broadly, the WIPO-IGC's work is split into traditional knowledge as it relates to biological and genetic resources, and traditional knowledge as it relates to traditional cultural expressions. Traditional cultural expressions are cultural outputs, such as arts and crafts, stories and song. The principles and objectives at WIPO are quite broad and consequently controversial. The WIPO-IGC now has

the authority to draft a treaty, but completion of a treaty is not likely to come about in the foreseeable future.[3]

While the work of the CBD and WIPO-IGC is not to be underestimated, the role of the World Trade Organization (WTO) in the debate over the protection of traditional knowledge is key to the success of the protection of traditional knowledge. At first blush, it may seem incongruous that the protection of traditional knowledge has a place in an organisation established to liberalise trade. However, because the WTO has a role in intellectual property law, which impacts traditional knowledge, the traditional knowledge debate has found its way into discussions at the WTO. The WTO agreements include the intellectual property agreement, known as the TRIPS Agreement. Traditional knowledge protection must in some way interface with the TRIPS Agreement, even if TRIPS does not govern the details of traditional knowledge protection. Otherwise there is the likelihood that protection will have minimal impact on unauthorised uses of traditional knowledge because TRIPS-compliant intellectual property rights will prevail. In short, however, the WTO is extremely unlikely to provide a mechanism to protect traditional knowledge or provide an interface with the protection of traditional knowledge under other international instruments. The TRIPS Council has on its agenda a discussion about the relationship between the CBD and TRIPS. This discussion developed out of a review of the part of TRIPS which allows countries to provide exceptions to the patentability of plants.[4] No progress was made in the Doha round of WTO negotiations, which stalled. Some members of the WTO dispute that the TRIPS Council has a mandate to continue the discussion and at present it is not on the agenda of meetings.[5] Even before the discussion on the relationship between the CBD and the TRIPS Agreement came off the agenda of the TRIPS Council, the CBD was not authorised to have any participation or observer rights in the TRIPS Council discussion.

The TRIPS Council also has under discussion various GI issues, including whether to expand the higher level of protection that exists for wine and spirits to other areas,[6] and the development of a multilateral register of GIs for wines and spirits.[7] The issues became strongly linked when the European Union and developing countries (including India and Brazil) supported each other in the debate. The European Union supported an amendment to the TRIPS Agreement that would require patent applicants to disclose the origin of genetic resources in patent applications.[8] Some developing countries have supported the EU's position on expanding the international framework for the protection of GIs.

Some members of the TRIPS Council took the position that the Council had no mandate to continue the traditional knowledge discussion or the extension of GIs discussion and that a mandate existed only to progress the multilateral register of wines and spirits.[9] The Chair of the TRIPS Council effectively enforced that position and created special sessions for discussion of the register issue and expressed frustration that members nonetheless brought up traditional knowledge issues in those special sessions.[10]

The United States is opposed to both the European mode of the expansion of GIs,[11] and the protection of traditional knowledge. GIs also cause much controversy although, unlike traditional knowledge, GIs have some existing protection under the TRIPS Agreement (Articles 22–24). For a considerable period there was no consensus on the protection of GIs. The TRIPS Agreement resolved aspects of that through requiring GI protection, although in whatever form the members chose

[Article 1(1)]. There remains little consensus over the form of protection for geographical indications. Primarily, the division has been over whether there needs to be separate protection, an approach heralded by the European Union, or whether trade marks are adequate, the US position. However, when compared with international protection of traditional knowledge, there is considerable agreement on the international protection of GIs.

The relative progress of international protection of GIs and their protection through the TRIPS Agreement has tended to fuel the suggestion that they may provide protection for traditional knowledge. In part this is because GIs have found support from large developing countries, such as India, which also support the protection of traditional knowledge. If GIs provide some protection for traditional knowledge, then this is a very small aspect of traditional knowledge. Yet they are held out as offering great promise. This promise is problematic because the appearance of similarity between GIs and traditional knowledge obscures a chasm of difference.

## The appearance of similarity between GIs and traditional knowledge

There are ways in which GIs and the protection of traditional knowledge appear to be similar. Indeed, there may well be some instances where a GI might protect an aspect of traditional knowledge, such as a name, but that does not make GIs suitable for most claims to the protection of traditional knowledge. The purpose of protecting GIs is primarily to provide a legal means for exclusive use of the GI in relation to particular products. Even though the rationales may involve other goals, the right a registered GI gives is the right to exclude others from use of the name.

GI protection is premised on at least three rationales for protection. The first is a connection between a product and the place from which it comes. The second is to connect qualities to the product coming from a particular area. The third is that the combination of location and qualities may create some kind of evocative value of a special place (Hughes, 2006, pp.303–4). However, the protection does not give any exclusivity over that evocative value or quality – only over the name.

The primary purpose of protecting traditional knowledge is to provide its owners with some prospect of economic development and control of their knowledge and cultural identity in a globalised world. These aims of traditional knowledge are in a limited way also found in the traditions associated with products that are marketed under GIs. Because of some similarities between GIs and traditional knowledge protection, some proponents of GIs suggest they provide a good system for the protection of traditional knowledge. These similarities are, however, in many ways only skin deep. There are broadly three areas of apparent similarity:

- indefinite protection;
- collective ownership and interests; and
- relationship with the land (the *terroir*).

### *Indefinite protection*

Those who seek protection of traditional knowledge have a range of goals. These include the protection against offensive use of their traditional knowledge and also protection from economic exploitation of their traditional knowledge where no

benefit of that exploitation is returned to the people who are the source of the traditional knowledge. The WIPO-IGC principles put a lot of detail around these goals and, in some ways, appear broader. However, these goals are the core of most indigenous peoples' claims to indigenous knowledge, even though (because of the diversity of indigenous peoples) their interests in traditional knowledge are expressed in a variety of different ways.

The supporting rationale of claims to traditional knowledge is that the knowledge derives from the community and that the knowledge is tied to the community's identity and cultural heritage. It is this link that requires an indefinite form of protection. Identity and cultural heritage, while evolving concepts, are ideally indefinite. Struggle for survival of their cultural heritage underscores indigenous peoples' desire for traditional knowledge protection.

Trade marks and geographical indications are potentially indefinite. Usually once registered, indefinite protection is achieved as long as fees are paid to the registering authority. The reason that indefinite protection is part of the trade mark regime is that trade marks protect primarily names or logos as they relate to the origin of particular goods and services.[12] There is no economic or social policy reason that a name associated with a business should expire for as long as the business continues. Therefore the rational basis of trade mark protection supports indefinite protection.[13]

A similar analogy can be applied to GIs. The association between the GI owner and the GI does not terminate, unless the geographical term becomes generic. However, this reason for indefinite protection also reveals something of the limitations of both trade marks and GIs. Both legal mechanisms relate to protection of a name as applied to goods or services in trade. Neither legal mechanism protects any knowledge that lies behind the name nor does it necessarily protect against offensive use of the name.

This idea of the indefinite protection of knowledge is often seen as the most controversial aspect of protecting traditional knowledge. This is because all intellectual property rights purport not to protect knowledge. However, where that knowledge is embodied in an invention, patent law may provide protection for the invention and, in theory, the knowledge is available to others to use provided that the patent is not infringed. Where that knowledge is embodied in a creative work, copyright law provides protection for that work. Copyright law expressly recognises that it is only the particular expression that is protected, not the knowledge or idea, or facts conveyed in the expression [TRIPS Agreement, Article 9(2)]. In reality, however, the protection of intellectual property has a considerable impact on the distribution of knowledge and knowledge assets (Drahos and Braithwaite, 2002). This aspiration of indefinite protection appears to give rise to a head-on collision with patents and copyright because they have finite terms, but the protection sought is not the same as those rights. Traditional knowledge claimants do not seek indefinite copyright or patent-style protection.

### *Collective ownership*

A GI is not usually available for any one individual. Rather, provided a producer meets the criteria behind the GI, at least theoretically, anyone can make use of a GI. Anyone, for example, who meets the requirement of the champagne producers, including using grapes from a particular location and making the champagne in a

certain way, can use the GI 'champagne'. The class of those who can use the term 'Swiss chocolate' is not defined, but there must be an association with Switzerland and approval of the Swiss chocolate making authorities, known as *Chocosuisse*: Union of Swiss Chocolate Manufacturers.

Traditional knowledge holders seek a kind of collective control over their traditional knowledge. The collective nature is because no one individual owns the knowledge to the exclusion of others. Also, as knowledge has a connection to identity and cultural heritage, there is a collective interest. In common law countries where GIs are not necessarily protected as such, the interests of such entities are protectable through certification or collective trade marks. Collective trade marks can be used by people who are authorised by the owner of the trade mark.

There is, however, quite a different sort of collective ownership in the GI sense and in the traditional knowledge sense. The GI or trade mark collective owners are a group of qualified individuals who can use the GI for their independent business purposes, even though the GI has a kind of collective status. Each individual has an entitlement to the collective. The traditional knowledge collective ownership is primarily based on the view that no individual has an entitlement to the collective traditional knowledge. Rather, many indigenous peoples consider they have a responsibility to carry that traditional knowledge forward and even develop it for future generations. Also, there may be customary laws that govern which individual can make certain uses of knowledge and in what ways. Even then, however, the responsibility is collective for current uses and the benefit of future generations. In other words, the current users are guardians for appropriate current uses and development for future generations.

### *The relationship to the land*

The concept of *terroir* is that land gives special characteristics to the products with ingredients from the land. The *terroir* justification for GIs is in addition to other reasons given for GIs: 'GIs are supposed to tell us non-geographic characteristics of the product linked to the product's geographic provenance' (Hughes, 2006, p.356). Thus, the European Union argues, a GI can only be used accurately when it is used in relation to products that are associated with a particular *terroir*. The theory is that even if, for example, *Parmigiano-Reggiano*-making methods are imitated and even improved elsewhere in the making of parmesan, that parmesan can never be the real thing because *terroir* will always be different. The same reason is used to justify non-geographical names being protected as GIs. Feta is only feta if sourced from a certain part of Greece.

While products such as wine and cheese have characteristics and flavour resulting from where their ingredients are sourced, it is debatable whether such products merit exclusive rights for that reason alone. This exclusive *terroir* argument is hotly disputed, even among those who proclaim the importance of the *terroir* (Hughes, 2006). *Terroir* is, therefore, a conveniently narrow way of defining GIs just to make sure that the European Union has a purported reason, other than blatant rent seeking, to reclaim its generic wine and cheese names.[14]

Another problem with justifying GIs on the basis of *terroir* is that it can limit their availability to those in possession of lands for a long time. Many indigenous peoples have been removed from their land and have not had access to it. Nevertheless, many indigenous peoples' claims to traditional knowledge often emphasise the

importance of the relationship of the people, the knowledge, the land, and the flora and fauna of the land. The value of a connection to the land is perhaps the most convincing similarity between GIs and traditional knowledge. Traditional knowledge is closely linked to cultural identity and *terroir* is a symbol of identity (Gervais, 2011).

The comparison, however, has significant limitations. One limitation is what a GI in fact protects. It protects the name. Another limitation of the comparison is that traditional knowledge holders do not claim rights to their knowledge solely because of a connection to the land. Rather, the connection to the land explains their relationship with the knowledge, as holders and guardians of the knowledge and it is the relationship for which they seek protection. This is not to suggest that indigenous peoples do not seek to own their lands. The history of indigenous peoples is significantly about land claims. The point is that the claim to traditional knowledge is not only about the land. It is also about the indigenous peoples' relationship with the land and what lives and grows on it.[15]

## The nature of GIs

A GI is sometimes a claim to traditional knowledge put in more legally recognised language (Frankel, 2008, p.453). At most, a subset of traditional knowledge includes similarities to GIs. Blakeney (2009) suggests that some of the more famous GIs, such as champagne and roquefort, protect the underlying traditions of those products. These traditions are the ways in which the products are made. However, the GI really only protects the name (see Kur & Knaak, 2004). There may be something behind the GI, such as a government agency or a trade association, which requires its members to conform to various rules in order to use the name. The French *appellations de origins controlees* system has very strict rules about what grape varieties can be grown and used in particular regions and what regions can use particular appellations. However, it is a big step from the existence of these controls to the position that GIs protect traditional knowledge. The GI protects the name for use by those whom the associated bureaucracy deems to merit its use.

Where trade mark systems are used to protect GIs, then (as with all types of trade marks) the owners may have an interest in quality control to perpetuate their brand, but quality control is not policed or enforced. In many parts of the world, GI protection does not necessarily require compliance with traditions or methods of production. Although, for instance, Australia and the United States have government agencies that determine geographical areas and viticulture areas, they do not control methods of production (Hughes, 2006, p.333). The protection of GIs, by various legal tools, in New Zealand, Australia and the United States requires compliance with the demands of local law. Certification marks certify a standard, but the certifier does not control what the standard is. When GIs are protected through the common law doctrine of passing off, what is required is a reputation in a name, not proof that that reputation is deserved because of an adherence to strict rules.[16]

It may be in the interests of the GI users to maintain quality control, but it is not a requirement of most registration systems and even those systems that do have such controls, such as the *appellations de origins controlees*, seem to be somewhat flexible when it suits them. Indeed, the large production houses of Champagne have moved a long way from their traditional roots. A claim to exclusivity of the name because of reputation may be more genuine than the claim that it is deserved

because of adherence to the production methods of the seventeenth and eighteenth centuries. The idea of traditional farming has been described as a caricature in relation to champagne (Hughes, 2006, p.340).

More importantly, however, even French winemakers have extensively suggested that these intensely bureaucratic quality control systems inhibit innovation (Hughes, 2006). They cannot apply new methods of production because to do so might compromise the GI. Where the aim of protecting traditional knowledge is to support innovation, GIs are the wrong tool as they have been shown to preserve the *status quo* rather than directly enhance innovation.

Some GIs that are premised on quality standards may be supported by checks on compliance with those standards. Deviation from such standards is discouraged even when the deviation is for innovative purposes. Many French winemakers complain about the anti-innovation effects of GIs (Hughes, 2006). The clinging to tradition in the form of GIs is a static approach, which is also protectionist of the *status quo*. The nature of a GI is fixed. Because it is fixed, it is not a universal development tool. Its use for rural communities, predominantly in Western countries, does not transform the static GI into an all-purpose development tool.

In Europe, GIs also serve another protectionist purpose. They are part of European farming policy and represent a replacement for other subsidies. This policy is perhaps best described in the European Union GI Regulation of 2006, which provides that:[17]

(1) the production, manufacture and distribution of agricultural products and foodstuffs play an important role in the Community economy;
(2) the diversification of agricultural production should be encouraged so as to achieve a better balance between supply and demand on the markets. The promotion of products having certain characteristics can be of considerable benefit to the rural economy, particularly in less favoured or remote areas, by improving the incomes of farmers and by retaining the rural population in these areas; and
(3) a constantly increasing number of consumers attach greater importance to the quality of foodstuffs in their diet rather than to quantity. This quest for specific products generates a demand for agricultural products or foodstuffs with an identifiable geographical origin.

## Protecting innovative traditional knowledge

The call for protection of traditional knowledge is not premised on incentives that are analogous to the above rationales behind GIs. Traditional knowledge protection is not sought only to preserve traditional knowledge in a static way. Traditional knowledge has a number of highly innovative applications. This has been demonstrated, particularly by third parties, such as pharmaceutical companies, that use traditional knowledge. Knowledge of the properties of a plant can lead to a researcher making innovative uses of the plants. Such uses can be medicinal or cosmetic. When this sort of use of traditional knowledge takes place, there is frequently a suggestion that tradition and not innovation lies with the holders of the knowledge and the innovation is that of the modern users. This is not true. First, and perhaps most obviously, something innovative must have occurred for the indigenous

peoples to discover the use of the plant. Secondly, indigenous peoples can demonstrate that they have found new uses of plants to fit new circumstances (Riley, 1994). This is not to suggest that third party users do not do innovative things. They do. However, the innovation process is not solely theirs. Some examples are perhaps illustrative.

New Zealand manuka honey is renowned for its healing properties and particularly its antibacterial effects. It has been used by the Māori for many purposes and in some instances developed by the Māori for additional uses. It has also been commercialised in a range of cosmetics and antiseptic creams by both Māori and non-Māori. A university research group based in Dresden has isolated the active ingredient of manuka honey (Mavric *et al.,* 2008) and teamed up with a New Zealand company to create a standard that indicates the honey's intensity. The knowledge of manuka being effective and the importance of using it in different intensities was not dependent on the Dresden research. The contribution of this research was to pinpoint in Western terms exactly why the honey is so potent.

The manuka example is one of many where Māori knowledge about the uses of many New Zealand plants is well documented (Riley, 1994). The knowledge about plants is also reflected in many works of Māori culture and has become an integral part of Māori cultural identity. The *kowhai ngutukakau*, for instance, is found as part of the carving of many *wharenui* (meeting houses). Other examples of innovative uses of traditional knowledge include Australian Aboriginal practices used to control fires which are adapted to modern conditions (see Drahos, 2011). More broadly, indigenous peoples' ecological knowledge is used to varying degrees in a variety of environmental and conservation practices worldwide (Coombe, 2005).

What indigenous peoples seek is some control over their knowledge so that they can reap the benefits of uses of their knowledge. Unlike those who seek to expand the protection of GIs, indigenous peoples' primary aim is not to seek to confine their knowledge to make it static and thereby extract monopoly rents. Traditional knowledge is traditional because of its longevity, not because it is closed to development. There are some instances in which claims to traditional knowledge are static, but these claims are not premised on exclusive commercial rights. They are premised on respect for and preservation of cultural heritage; for example, for the protection of traditional knowledge from offensive use.

The innovative aspects of traditional knowledge are as convincing an argument for protection as any intellectual property right; and the reason that indigenous peoples should be able to reap the rewards from that innovation is because they need economic development. The protection that indigenous peoples seek will not necessarily exclude others from innovative uses of traditional knowledge; rather it aims to ensure that indigenous peoples are not excluded from the benefits of uses of this knowledge. Admittedly, this is a different model from that of mainstream intellectual property rights. However, it is perhaps analogous to the suggestion that intellectual property rights might shift focus from property to liability rules (Kur and Schovsbo, 2011). In any event, mainstream intellectual property rights are not strangers to changing boundaries. The adapting of patent laws to protect the changing needs of pharmaceutical companies is but one example.

One accusation levelled at those who seek to protect traditional knowledge is that 'indigenous activists talk about culture as if it were a fixed and corporeal thing' (Brown, 1998). To a certain extent this is true. The Declaration on the Rights of Indigenous Peoples, for example, asserts the right of indigenous peoples to the

control of their culture. This approach, however, is a push-back against incursions into indigenous culture rather than a statement that culture is fixed. The push-back is in pursuit of a greater share of global wealth.

Also, the corporeal model is one that those pushing back have adopted from intellectual property law. Although (as a matter of legal definition) intellectual property rights are intangible rights, their status as property depends on a mixture of justifications for property. These include the ability to define something from which others can be excluded (Bennett Moses, 2008). The ability to define, in part, comes about because intellectual property rights manifest themselves as things that are corporeal. The book, the film and the pharmaceutical are a few examples. The GI is the ultimate legal tool that is fixed and corporeal. When claims to traditional knowledge are overstated, there is an element of the fixed and corporeal. However, it is hardly surprising when the rules of the game have been set in the fixed and corporeal manner that the people who fight for part of the action also state their claim in a fixed and corporeal manner.

When scholars discuss the difficulties of protecting traditional knowledge, a recurring theme is the difficulty of defining culture. There is a disjunction between indigenous peoples' aims and what, for example, Jeremy Waldron (2000) might call 'cosmopolitan views of culture'. This disjunction is conspicuously overstated in the name of flexibility. Many areas of intellectual property rights are expanded beyond expectations and many might say beyond reason. If there is a cosmopolitan view of culture, then intellectual property cannot claim to be premised on a utopian view of cosmopolitanism. The melting pot of cosmopolitanism is secondary to the protective aims of intellectual property rights. Although the reason that indigenous peoples seek to protect their traditional knowledge includes protection of culture, this does not necessarily mean one has to define culture. Rather, once a reason for a right is identified, the framing of the exclusive rights requires the identification of what might be excluded, in what circumstances exclusion is justified, and who has the right to exclude (Bennett Moses, 2008).

The argument against the protection of traditional knowledge that is theoretically on more solid ground is the difficulty of defining what the rights are and who they belong to. At an abstract level, this can seem difficult. However, as some domestic regimes have shown, these difficulties can be overcome. For example, if the reason for protecting traditional knowledge is the relationship between indigenous peoples and their knowledge, and those claiming the relationship can be specified, then problems of identity can be resolved. The scope of the rights can also be defined by determining the scope of the relationship. This paper does not seek to define exhaustively who indigenous peoples are or to articulate all the rights of indigenous peoples to their traditional knowledge.[18]

## The effects of the mismatch of GIs and traditional knowledge

The problem with GIs being proffered as a form of protection for traditional knowledge is that GIs and traditional knowledge are, for the most part, fundamentally different. The nature and aim of GIs is not the same as the nature and aim of the protection of traditional knowledge. Geographical indications are European. This is clearly not a crime, but it is a concept that is a cultural construct of distinctive territorial origin. If people sit down to fine champagne and Bluff oysters, they can appreciate these products and might not object to GIs being applicable to them, but

they are a success because there is a business and there is an infrastructure behind these products that has helped them become well known. Such products are marketed and targeted at consumers of a certain income. All successful GI stories have a product success story behind them. The GI does not make the product, the product makes the GI. GIs are a marketing tool to sell products; if there is no product, there is no marketable GI.

GIs are oversold as tools of development. They are not developmental in any innovative way, but are rather tools of maintaining the *status quo*. GIs may serve to generate wealth for some developing nations. Undoubtedly, the protection of Darjeeling and Basmati may bring greater wealth to India. However, the creation of a GI will not suddenly open new markets for the knowledge held and products produced by indigenous peoples. This oversell of GIs can be found in many places. The European Commission's website states:[19]

> Over the years European countries have taken the lead in identifying and protecting their Geographical Indications. ... However, GIs are also important for developing countries. GIs can protect and preserve intellectual property related to traditional cultures, geographical diversity and production methods. All nations have a wide range of local products that correspond to the concept of a GI – Basmati rice or Darjeeling tea – but only a few are already known as such or protected globally.
>
> Better protection of GIs can be a useful contribution to increasing income, in particular in rural areas. It also encourages quality production and can promote the development of tourism. GIs grant protection to a community and not to individual right holders.
>
> Since consumers are often ready to pay more for GI products, people from outside the region may be tempted to appropriate the GI for their own products. This not only misleads consumers, but it also dilutes the GI value as well as discourages producers from making investment decisions or launching expensive marketing campaigns.
>
> Consequently gains resulting from marketing GIs need to be accompanied by prevention of their loss of value through copying, or free riding. This requires intense and costly legal efforts that small rural communities can rarely afford. This is why GIs need an enhanced protection. This is something the EU has been pushing for in the ongoing Doha WTO trade negotiations.

This overstates the value of GIs to some communities. Rural communities with developed industries may benefit from GIs (Giovannucci *et al.,* 2009), but a GI without a substantive existing industry is a hollow gain. Also, as the European Commission notes, protecting a GI is costly, and therefore frequently not worth the expense if what is really needed is development. The conclusion that GIs need enhanced protection is at best an assertion.

One view is that there is no harm to traditional knowledge if GIs protect some aspects. There is no reason why the businesses of indigenous peoples should not consider GIs as any other business might. That is not the same thing, however, as holding out GIs as a model for the protection of traditional knowledge. Additionally, the holding out of GIs as protection for traditional knowledge is not necessarily benign. Rather, it obscures the needs and aspirations of traditional knowledge holders and may not make it easy for traditional knowledge proponents to gain any traction outside the GI framework. Once GIs are enacted, the reaction

to traditional knowledge might be that GIs are enough. Enhancing GIs will, however, likely only enhance the prospects of the existing incumbents of the GI regime.

## Conclusion

The GI has been put forward as a way to protect some traditional knowledge. While analogies can be made between GIs and the protection of traditional knowledge, these analogies are superficial in many ways and problematic in other ways. They are superficial because GIs lead to the preservation of the *status quo* whereas the protection of traditional knowledge can create a mechanism to harness innovative aspects of traditional knowledge to support the development of indigenous peoples.

Geographical indications present a one-size-fits-all mechanism for traditional knowledge, which is, in fact, a diverse concept. This is a legal danger. The practical danger is that scarce resources might be wrongly directed to GIs in the hope that they will produce wealth. However, a GI cannot create innovative opportunities. At most it can support existing businesses in some circumstances.

The GI has been held out as promising more than it is likely to deliver and distracts from the real aspirations of indigenous peoples for development. Indigenous peoples seek to protect their traditional knowledge in order to provide their communities with financial resources and to have a stake in the development of innovative uses of traditional knowledge. These aims cannot be met by GIs.

## Notes

1. There are some exceptions where GIs are granted for non-geographical names, but because of an alleged geographical association. Feta is an example of a European GI for which no corresponding place can be located on any map of Greece.
2. Article 8(j) of the CBD provides that:

   > Each contracting Party shall, as far as possible and as appropriate: subject to national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices.

   The Nagoya Protocol is aimed at making a reality of this provision. The Declaration on the Rights of Indigenous Peoples contains relevant aspirational clauses. Article 31, for example, provides that:

   > Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

3. For the progress of talks, see the WIPO traditional knowledge website http://www.wipo.int/tk/en/ [accessed July 2011].
4. TRIPS Agreement, Article 27(3) provides that:

> Members may also exclude from patentability: (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

5. For the TRIPS Council agenda see http://www.wto.org/english/tratop_e/trips_e/intel6_e.htm [accessed July 2011].
6. TRIPS Agreement, Article 23(1). GIs are also protected under a WIPO-based system known as the Lisbon Agreement.
7. TRIPS Agreement, Article 23(4) provides that:

> In order to facilitate the protection of geographical indications for wines, negotiations shall be undertaken in the Council for TRIPS concerning the establishment of a multilateral system of notification and registration of geographical indications for wines eligible for protection in those Members participating in the system . . .

8. EU Directive 98/44/EC, 6 July 1998 provides for voluntary disclosure requirements of the origin of genetic resources in patent systems. See also WIPO (2004).
9. See submission from the United States, Australia, New Zealand and others, *Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits*, WTO Document IP/C/W/289.
10. Chairman's report, *Multilateral System of Notification and Registration of Geographical Indications for Wines and Spirits*, WTO Document TN/IP/20, 22 March 2010 and WTO Document TN/IP/21, 21 April 2011.
11. The United States has its own method for the protection of GIs, which it pushes in its free trade agreement agenda. The US negotiating text for the Trans-Pacific Partnership Agreement provides an example: 'The complete Feb 10, 2011 text of the US proposal for the TPP IPR chapter' at http://keionline.org.
12. The international standard for protection is found in the TRIPS Agreement, Article 15.
13. This can be disputed when trademarks relate to more than names or symbols, but embody expressive values, such as jingles or functional aspects, such as the shape of products.
14. Justin Hughes (2006, p.357) suggests the *terroir* claim is a response to competition from new world wines.
15. For a discussion of the Māori relationship with their *mātauranga Māori* (traditional knowledge), see the Waitangi Tribunal Report, *Indigenous Flora and Fauna and Cultural Intellectual Property*, WAI 262, chapter 2, available from http://www.waitangi-tribunal.govt.nz/news/media/wai262.asp [accessed July 2011].
16. Passing off is a judge-made doctrine that in England, Australia and New Zealand protects reputation in business goodwill from misrepresentation.
17. European Union Council Regulation No 510/2006, 20 March 2006, on the protection of geographical indications and designations of origin for agricultural products and foodstuffs.
18. For legal instruments addressing these issues, see *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity*, available from http://www,cbd.int [accessed July 2011], and *UN Declaration on the Rights of Indigenous Peoples*, available from http://www.un.org/esa/socdev/unpfii/en/drip.html [accessed July 2011].
19. European Commission, Trade, *Geographical Indications*, available from http://ec.europa.eu/trade/creating-opportunities/trade-topics/intellectual-property/geographical-indications/ [accessed July 2011].

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