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1 Introduction

The current intellectual property system by and large ignores so-called "traditional knowledge." Rooted in western notions of individualism, the intellectual property system concentrates almost exclusively on discrete new knowledge produced by a particular author or inventor. But a great deal of valuable knowledge does not fit this mould. Much of human knowledge ranging from folk music to technical know-how concerning the healing characteristics of a particular plant — results from communal rather than an individual effort. Such knowledge is not discrete and static, but instead evolves in response to the particular needs of a group or culture. Because of these characteristics and others, such traditional knowledge[1] does not fit well within the current paradigm, and accordingly tends to be overlooked in discussions of intellectual property.[2]

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1 Anyone attempting to discuss "traditional knowledge" immediately faces the threshold issue of defining exactly what that term means. Fortunately, this article need not concern itself with a precise definition. It focuses more on the mode by which traditional knowledge would be protected, rather than the sorts of knowledge that might qualify for protection. Generally, this article refers to traditional knowledge as defined by the World Intellectual Property Organization in its ongoing discussions of traditional knowledge protection. The WIPO definition is functional rather than technical. It lists various characteristics that traditional knowledge tends to exhibit. See WIPO 2008(b) www.wipo.int [hereinafter "TK Draft Gap"]; WIPO 2008(a) www.wipo.int [hereinafter "TCE Draft Gap"]. Under the World Intellectual Property Organization (hereafter WIPO) definition, traditional knowledge is handed down from generation to generation, is held communally, and reflects a community's sense of cultural identity. Compare TK Draft Gap 4, at 15 with TCE Draft Gap 4, at 8.

2 Actually, there are two distinct aspects to the traditional knowledge "problem" in intellectual property. Intellectual property law tends to ignore traditional knowledge in two quite different ways. First, intellectual property protection has historically been unavailable to holders of traditional knowledge, either under the existing laws or a special regime. Second, legal systems have on occasion ignored pre-existing traditional knowledge when granting intellectual property rights. In a handful of highly-publicised cases, an individual author or inventor claims to have come up with something "new," when in fact the same knowledge has existed in a particular

During the past two decades, several nations have extended the umbrella of intellectual property law to cover traditional knowledge.[3] In 2008, South Africa took a major step toward joining this group of nations. The Intellectual Property Laws Amendment Bill, 2008 (hereinafter the "Bill") would amend several of South Africa's intellectual property laws to afford protection to some forms of traditional knowledge. While the Bill deals mainly with traditional cultural expression such as performances, music, fabric designs, and visual art, and not with traditional technical knowledge such as medicines,[4] it nevertheless represents a sea change in South Africa's approach to traditional knowledge.

The Bill contains an intriguing mix of new and old ideas. Perhaps the most cutting-edge aspect is the proposal that rights be administered by a national agency — the National Trust Fund for Traditional Intellectual Property — rather than in the cultures themselves.[5] This trust-like relationship could, if properly executed, deal with some of the practical problems raised by any system of traditional knowledge rights.[6] On

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culture as traditional knowledge for centuries. In the most egregious cases, the knowledge was actually copied from the culture, perhaps with slight improvements. Two of the best-known cases are the patents for use of turmeric to heal wounds and for using the Neem tree as a fungicide, in the United States and Europe, respectively. What is often omitted from the story is that both patents were later held invalid for lack of invention. Commission on Intellectual Property Rights *Integrating Intellectual Property Rights* 76-77. This paper deals with only the first of these issues. While both issues are important, they involve very different considerations, and call for different resolutions. The second problem — the grant of intellectual property to someone who merely copies existing traditional knowledge — is the largely unintended consequence of quirks in various intellectual property laws, such as the rule in United States patent law that existing knowledge is "prior art" only if it is recorded in a writing. 35 USC at paras 102(a) and (b). Given that much traditional knowledge is not written down, it may not prevent an inventor from obtaining a patent on the same idea. Because the problem stems largely from the way the rules are drafted, the second part of the traditional knowledge debate could be largely resolved by revising the statutes to ensure that existing traditional knowledge, in whatever form, bars someone from obtaining rights in the same knowledge. In fact, in this author's opinion, it would greatly help to reduce the confusion in the so-called "traditional knowledge debate" if the two distinct issues were recognised as such and discussed separately. The WIPO proposals make significant progress in this regard, distinguishing between a "negative right" to prevent others from obtaining rights and a separate right in the culture to obtain its own exclusive rights.

3 Several nations have adopted domestic schemes of protection for traditional knowledge. See eg WIPO 2003(a) www.wipo.int, 8 Compiled Laws of the Republic of Azerbaijan - a 406 (unofficial translation); Guatemalan *Penal Code* - a 332A; *Special System for the Collective Intellectual Property Rights of Indigenous Peoples Panama Law Act* 20 of 2000; and Peru *Traditional Knowledge Law* No 27811 of 2002.

4 While the provisions dealing with trademarks and geographic indicators could apply to a mark used on medicine, the rights created by the provisions are trademark rights, not rights to the technology itself.

5 Bill clause 16 (adding new sections 40A, 40B, 40C, and 40D to the Copyright Act 98 of 1978).

6 Some of these problems are identified below at text accompanying notes 30 to 33.

the other hand, when it comes to the nature of the rights themselves, the Bill proves far less innovative. Rather than create a *sui generis* scheme like that employed by other nations, the Bill would essentially extend to traditional knowledge the existing protections set out in South Africa's current performers' rights, copyright, trademark, and design laws.[7]

In this second respect, the Bill goes against the international trend. Early proposals for protecting traditional knowledge tended to try to bring that knowledge within the core intellectual property system, granting modified forms of patents and copyrights.[8] More recently, however, the trend has been to turn to other, non-property-based, modes of protection. This is perhaps nowhere more apparent than in the leading international project dealing with protection for traditional knowledge — the efforts of the World Intellectual Property Organization's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The recent proposals from this Committee eschew a property model of protection in lieu of a form of protection based on principles of unfair competition.[9] The main impetus for this shift in direction was a consensus that the property model did not fit

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7 See hereafter the text accompanying notes 11 to 28.

8 Some of the national laws cited above in note 3 exhibit the essential features of a property-based system. See a 9 of the Azerbaijani law (gives the state a right to prevent use of folklore by third parties when the work is distorted, or when no credit is given to the originating culture); a 332A of the Guatemalan law (limited to tangible cultural attributes such as artifacts); and a 15 of the Panamanian Law (allows indigenous community to establish conditions for use and commercialisation).

9 The current WIPO proposals — which admittedly remain the subject of a fierce debate — are set out in two documents: WIPO 2006(b) www.wipo.int [hereinafter referred to as “WIPO TK Proposals”] and WIPO 2004 www.wipo.int [hereinafter referred to as "WIPO TCE Proposals"]. The WIPO proposals draw several distinctions between scientific/technical knowledge and cultural expression. For traditional technical knowledge, Article I of the substantive provisions provides, "Traditional knowledge shall be protected against misappropriation." WIPO TK Proposals 13, a I, § 1. The remainder of a I defines misappropriation, and includes acts involving "unfair or illicit means", § 2, and those that mutilate or distort the underlying knowledge, § 3(v). The provisions governing traditional cultural expression are similar, with one important exception. Aa 3(b) and 3(c) of the substantive provisions limits protection to situations involving wrongful acts such as failure to attribute or distortion. WIPO TCE Proposals 19-20. a 3(a), however, does provide a form of property protection. If the traditional cultural expression is "of particular cultural or spiritual value or significance to a community", the proposals allow the culture to register it. Once the expression has been registered, the culture has the right to prevent *all* "reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography)" of the work. This broad right is similar to a property right like a copyright.

the unique situation of traditional knowledge.[10]

This paper will explore whether property-based forms of protection like those set out in the Bill are a proper way to protect traditional knowledge. It deals with that issue at the higher — and admittedly more abstract — level of intellectual property policy. Resolving the threshold issue of whether property is an appropriate mode of protection is an essential first step in creating any system of protection. There are certainly a number of pragmatic problems with affording property rights in traditional knowledge. There may be ways to work around these problems, some of which are reflected in the Bill. However, if property rights contradict underlying policy, then there is no reason to develop a mechanism to deal with the day-to-day problems in administering a property rights system.

Before beginning the discussion, it might be helpful to define what this paper means by a property right. The term “property” has several different meanings in the law. As applied to the realm of human creation, however, property generally refers to a right to exclude others from deriving all or part of the value of a certain defined object. Thus, regardless of whether performance rights, copyrights, design rights, and trademarks are “property” in some universal or technical sense of the word, they do give their owners a significant ability to exclude others. When this paper mentions property rights or a property model of protection, it is referring to any sort of legally enforceable right to exclude others from using or benefitting from the protected thing. Whether those rights are property in any other way really does not matter.

The first part of the paper briefly demonstrates how the Bill generally incorporates and builds upon the existing property model, even though it makes several important modifications to that model for traditional knowledge. The second part discusses the typical objections to a property model for traditional knowledge, focusing especially on the arguments that the core justifications for intellectual property rights do not apply to this knowledge. The last part refutes these objections, demonstrating how

[10] See, eg, WIPO 2005 www.wipo.int . 88, 94, 135, and 147.

the standard arguments for when intellectual property rights are appropriate are both inaccurate and incomplete. The last part continues by demonstrating how, once all of the justifications for a property model are considered, a policy case can be made for granting property rights in traditional knowledge.

To be clear at the outset, this paper does not advocate an intellectual property system for traditional knowledge. It is not meant as an endorsement of the Bill, which has its share of serious policy and technical flaws. The paper is instead agnostic on these issues. Its only purpose is to demonstrate that the common policy objections to using property rights do not stand up to criticism. However, even if a property rights regime makes sense as a matter of policy, there remain very real practical, administrative, and distributive justice problems with such a system. This paper makes no attempt to resolve these technical issues, and accordingly takes no position as to whether a fair and effective property rights regime can ever be implemented.

2 Property right aspects of the Bill

As indicated above, the Bill would cover only certain forms of traditional cultural expression, including performances,[11] copyrights,[12] product designs,[13] and trademarks.[14] Traditional technical knowledge such as medical treatments and agricultural methods lie completely outside the Bill's purview. In addition, rather than crafting a new form of protection, the Bill extends South Africa's existing intellectual property regime, with certain modifications, to these expressions. If enacted, the Bill would amend the Performers' Protection Act 11 of 1967, the Copyright Act 98 of 1978, the Trade Marks Act 194 of 1993, and the Designs Act 195 of 1993, to include these traditional cultural expressions.

Each of these four existing statutes employs a property-based mode of protection. However, the Bill alters how the basic property model applies to traditional knowledge. First, it changes how ownership is allocated. Ordinary copyrights, performers' rights, design rights, and trademarks vest in the person (in some case, a legal person such as a corporation) responsible for originating the expression. Under the Bill, by contrast, the *individual* responsible for developing the expression has no rights. Instead, ownership of traditional design rights and trademarks vests in the indigenous community in which the expression originated.[15] In the case of copyright, the Bill vests ownership in the National Trust Fund for Traditional Intellectual Property.[16] While there is no explicit provision dealing with ownership of performance rights in traditional performances, the overall structure of the Bill's performance provisions suggests that the Fund, rather than the indigenous community, also owns

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11 Bill clauses 1 to 4.
12 Bill clauses 5 to 16.
13 Bill clauses 27 to 36.
14 Bill clauses 17 to 26. The trademark provisions also deal with geographic indications.
15 Bill clause 19 (trademarks; the indigenous community has the right to register the mark); clause 27 (designs; indigenous community defined as the "proprietor" of the design).
16 Bill clause 11. The Bill defines the Trust Fund as a pool of money. Bill clause 16. Nowhere does the Bill give the fund any of the attributes of legal personhood. To this author — who is admittedly not well versed in the nuances of South African law — it is difficult to comprehend how a pool of money can own intellectual property rights. Nevertheless, this usage is consistent throughout the Bill. Several sections of the Bill contemplate the Fund taking acts with legal significance, such as negotiating royalty agreements.

these performance rights.[17]

On the other hand, other aspects of the Bill make formal "ownership" more a technicality than an issue of major practical import. Regardless of whether it owns the right, the Fund retains significant control over all four forms of protected expression. That control is most obvious in the case of copyrights and performance rights, where the Fund owns the right, and can make decisions as to how to commercialise the intellectual property. On the other hand, the Fund also retains significant control over designs and trademarks, notwithstanding that these rights are technically owned by the indigenous community. Although the indigenous community may own the right, any *member* of that indigenous community who receives a commercial benefit from using a design or mark must pay a license fee to the *Fund* rather than the community.[18] In essence, the Fund manages those expressions on behalf of the community.[19]

These license provisions represent a second, subtler way in which the Bill alters the ordinary intellectual property model as applied to traditional knowledge. Again, the linchpin of an intellectual property right is exclusivity. Reduced to its essence, an intellectual property right is the right to say no to another's use of the property.[20] In the case of traditional cultural expression, however, the Bill limits this basic right to say no. Consider the provisions discussed in the prior paragraph, which require a member of an indigenous community to pay a fee when she uses a design or trademark in a way that results in commercial gain.[21] The Bill provides that this license fee will ordinarily be set in negotiations between the member and the Fund, or when applicable, collecting rights agencies.[22] However, the Bill goes on to provide

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17 As discussed in more depth below, the Fund can command a royalty payment whenever anyone — including, apparently, a member of the originating community itself — receives a commercial benefit from performing a traditional performance. Bill clause 2.

18 Bill clause 22 (trademarks); clause 34 (designs).

19 In this regard it is also worth noting that any income earned by the Fund from managing traditional knowledge must be applied for the benefit of the indigenous community.

20 This "right to say no" is, of course, subject to several limitations. The most common limitation is a compulsory license scheme, in which the rightholder must agree to license the intellectual property at a rate set by a neutral decisionmaker.

21 Bill clauses 22 and 34.

22 Bill clauses 2 (performances), 10 (copyright), 22 (trademarks), and 34 (designs).

that if the member and the Fund cannot agree, the license fee will be set by a court or in arbitration.[23] The Bill's copyright provisions employ a similar mechanism in the provision dealing with use by the originating indigenous culture of a copyright work owned by the Fund.[24] In all three of these situations, the Bill converts what has been a "property rule" — the ability to refuse to allow use, often enforceable by injunction — into a "liability rule," where a party may infringe provided she is willing to pay compensation.[25] This switch from property to liability-based protection is even more extensive in the case of traditional performances. While the liability rules for copyright, design protection, and trademark apply mainly when the originating indigenous culture wants to use its expression,[26] the performance provisions appear to adopt a liability rule for *all* uses of a traditional performance, including those where some third party outside the originating traditional cultural is involved.[27] In essence, the Bill would completely abandon the property right model for traditional performances, and provide only a right to be compensated.[28]

At least with respect to traditional works, designs, and trademarks, however, the Bill generally preserves the property model when dealing with infringement by third parties. Of course, in many respects it is easier to build on existing foundations, as opposed to crafting something new. But in the case of law, traditional doctrines do not always prove to be a good "fit" for situations they were not designed to cover. The property model that applies in the field of intellectual property is based on certain foundational policies and principles. Because traditional knowledge differs in certain significant ways from other intellectual creations, these same policies and

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23 Bill clauses 2 (performances), 10 (copyright), 22 (trademarks), and 34 (designs).

24 Bill clause 10. Like the design and trademark provisions, this provision applies only when the community derives a commercial benefit from use of the work. If the use does not result in commercial benefit, the originating community may use the work for free.

25 These provisions somewhat resemble a compulsory licensing scheme. However, unlike a typical compulsory license, it appears that the rate can be set *after* the use has occurred. In those cases, the royalty operates more like an award of damages.

26 The design protection and trademark provisions also employ a liability rule in situations where a prior user — who may or may not be a member of the community — wants to continue using a mark or design that she used prior to enactment of the protections contemplated by the Bill. In such a case, the user may continue to use the mark or design, but on condition that he pay a royalty to the Fund.

27 Bill clause 2.

28 This liability rule is not necessarily objectionable. Some scholars have suggested that a liability rule is preferable to a property rule when traditional knowledge is involved. Reichman and Lewis "Using Liability Rules" 337. See also Hilty 2009 *IIC* 886 (Hilty dubs these "remuneration rights").

principles may not apply with equal force. The remainder of this paper will discuss whether a property model of protection — whether in the form contemplated by the Bill or some alternative — can be justified in the case of traditional knowledge.

3 Objections to property rights in traditional knowledge

South Africa is by no means alone in choosing to protect traditional knowledge within the existing intellectual property system. As noted in the Introduction, several of the early proposals for traditional knowledge attempted to provide protection by adapting intellectual property rights. Those attempts, however, immediately encountered a number of significant objections. A number of the more recent efforts, including WIPO's ongoing discussion, have abandoned the property model in lieu of other approaches.[29] On closer consideration, policymakers have determined that the property model simply does not work well for traditional knowledge. At the risk of oversimplification, the arguments against use of a property model can be classified into two groups: practical objections and policy objections.

[29] The WIPO proposals are cited above in note 9.

3.1 Practical objections to intellectual property rights

The exclusive nature of property rights poses an immediate obstacle to any system of intellectual property rights in traditional knowledge. Who exactly would "own" the underlying property right? In the case of other intellectual property rights, ownership usually vests in the person responsible for developing the invention or work. Given that traditional knowledge developed in a particular culture, it would by analogy stand to reason that the culture itself would own and control the property. But a "culture," unlike other legal fictions like a corporation or a nation, does not necessarily speak with a single voice. Determining who within the culture can make decisions concerning the property presents intractable difficulties.

Similar issues stem from the nature of cultures. First, exactly what is a culture? Some cultures are self-defining, others are not. Even if a culture defines itself, its sociological boundaries may be far from clear. Moreover, a culture is not a static object. Cultures change over time. Further compounding the problem, cultures may split into subgroups, each proceeding along its own path. In the case of knowledge that may have been in existence for centuries, if not millennia, determining the "originating culture" can require herculean effort. Although traditional knowledge need not be ancient, some of the most valuable items of traditional knowledge have been around for centuries.[30]

Finally, intellectual property rights also tend to differ from ordinary property rights in that they have a limited term. Most proposals for rights in traditional knowledge, however, either gloss over the term issue or presuppose protection for all time.[31] Should property rights in traditional knowledge be limited in time? If so, how would that time be measured? Given that much traditional knowledge is ancient, does it make sense to create rights now for those cultures?

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[30] Not all traditional knowledge is ancient. Like cultures, traditional knowledge is evolutionary. Not only does prior knowledge continue to change and develop, but cultures also develop new knowledge over time. However, the older the knowledge is, the more difficult it is to assign it to a particular group that exists today.

[31] For example, the WIPO proposals cited in note 9 do not specify a time limit for protection.

As noted in the Introduction, it is not the goal of this article to answer these serious questions. They nevertheless warrant mention, as they may ultimately prevent any regime of traditional knowledge protection — either property-based or otherwise — from proving workable. Moreover, due credit should be given to the proponents of the Bill for trying to deal with some of these concerns. For example, the decision to vest much of the control (if not outright ownership) in the National Trust Fund rather than in a "culture" helps to alleviate some of the practical difficulties in identifying and granting rights to groups that are not clearly defined. Similarly, the Bill does provide for limited terms for many of the rights. Copyright, for example, is available only for those traditional works either created after the Bill takes effect, or within the fifty-year period preceding that effective date.[32] The term would expire fifty years following the later of the effective date or the date the work was first made public with the authors' consent.[33]

3.2 Policy objections to property rights

The other main category of objections to intellectual property rights in traditional knowledge is rooted not in pragmatism but instead in intellectual property policy. When the first intellectual property rights were granted, the rights were not seen as serving any particular social policy. Early intellectual property rights were often granted simply as a favour to someone who had pleased the government. Today, however, nations usually justify intellectual property rights as useful tools to improve the general lot of society. If a grant of exclusivity does not further these social goals, the argument goes, the grant is improper. Many of the current objections to the use of a property-based system for traditional knowledge assert that a grant of rights would run afoul of these fundamental policy concerns.

Why do legal systems grant exclusive rights in inventions and expressive works? After all, unlike other forms of property, inventions and works are essentially "public

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32 Bill clause 7.
33 Bill clause 7.

goods." Unlike a parcel of land, a computer, or even an intangible like a bank account, an invention or work can be used by any number of people without diminishing the utility of the item to any single user.[34] Granting exclusivity to any particular user, then, would deny many the benefits of this use without preventing any immediately ascertainable harm to the person with the exclusive right.

Intellectual property rights exist because society also has various long-term goals. The standard argument involves what can be dubbed the "reward for creativity" theory. True, any number of people can share a work or invention without diminishing the utility to any one person. However, one of those people — the author or inventor who came up with the work or invention — is in a sense "special." If not for the author's or inventor's creativity, there would be no work or invention to share — and society would, as a whole be worse off.

This basic argument should be immediately familiar to anyone versed in the rudiments of intellectual property law and policy. The "reward for creativity" theory is easily the leading policy justification for intellectual property rights.[35] The theory actually has two main variants. Under the "natural rights" view, the grant of a property right is society's reward to the innovator for his creative efforts.[36] The other variation is the "incentive" theory. Under this view, society gives the author or inventor a property right in her innovation not out of some vague sense of justice or natural right, but instead for a primarily economic reason; namely, as a financial incentive to encourage innovative activity. If the innovator has an exclusive right to

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34 Trademarks, however, are not public goods. If multiple sellers are allowed to use the same mark on similar goods, the value of the mark to each as a source identifier will decrease.

35 *University of Colorado Fdn v American Cyanamid Co* 105 FS2d 1164 (D Colo 2000) ("fundamental purpose" of the patent system is the "promotion or real innovation in science and technology"); Van Caenegem *Intellectual Property Law* 1 ("The central argument justifying [intellectual property laws] is that the greater social welfare results where the "natural balance" between imitation and innovation is disturbed to favour the latter."); Alikhan and Mashelkar *Intellectual Property* 4 ("The main objective of intellectual property rights protection is to encourage creative activity, thereby providing for the largest number of people, economically and speedily, the benefit of such activity."). For an extensive discussion of the theory from the European perspective, see Hilty 2009 *IIC* 888-890.

36 See, eg, European Union Directive 2004/48/EC (Enforcement of Intellectual Property Rights) Recital 2 ("The protection of intellectual property should allow the inventor or creator to derive a legitimate profit from his/her invention or creation."); Curtis *Treatise on the Law of Copyright* 17.

her innovation, she can profit from the sale of that innovation to others. The natural rights theory tends to dominate in continental Europe, and especially in copyright.[37] The incentive theory, by contrast, is more dominant in the Anglo-American nations, and is more frequently invoked in patent law.[38]

For purposes of this paper, it is irrelevant whether the natural rights or incentive theory is the "true" justification for intellectual property rights. Both variants share the same cornerstone. Under both theories, the reward is given to the innovator for the innovator's *creativity*. In other words, the author or innovator is rewarded as a direct result of his efforts in adding to the storehouse of human knowledge.

It is extremely difficult to justify a system of property rights in traditional knowledge under the reward theory. The problem is not lack of creativity. Most traditional knowledge does involve the creation of something "new," at least when measured by the fairly low standard applicable to copyrights, designs, and other non-patent forms of protection. The problem is instead that the grant of exclusive rights does not provide the right sort of reward for that creativity. Much traditional knowledge has been in existence for centuries. The actual person or people responsible for originating that knowledge are often dead, and in most cases have been long forgotten.[39] Even if the knowledge is of recent origin and the originator can be identified, most proposals for intellectual property in traditional knowledge would vest the rights not in the person but instead in that person's culture — or in the case of the Bill, sometimes in a national agency that simply owes fiduciary duties to the culture.[40] In other words, property-based traditional knowledge laws give the reward *to the wrong party*. Regardless of whether the purpose of the property right is to

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37 See Petrusson "Patents as Structural Capital" 363, 371 (discussing how only France historically viewed the patent as a true natural law right; other nations looked more to theories based on the inventor's labors and Lockean property theory).

38 Van Caenegem *Intellectual Property Law* 1; Alikhan and Mashelkar *Intellectual Property* 4. See also WIPO 2007 www.wipo.int (comments of Japan).

39 Hilty 2009 *IIC* 892-893; Gervais 2005 *Mich St L Rev* 141-42; Kuruk 2007 *Pepp L Rev* 629, 650-51; Downes 2000 *Colum J Envtl L* 253, 258.

40 In some cases a culture itself could be considered the author or inventor of the traditional knowledge, especially when the knowledge is developed to address a particular cultural, rather than individual, concern.

reward past acts or to provide incentive for future acts, a system that grants rights to someone other than the originator would violate the basic policies of the prevailing reward theory. The grant of rights would be little more than a windfall to the recipient.[41]

In one form or another, this argument has often been asserted against proposals to grant property rights in traditional knowledge. Instead, the argument continues, the only right the *culture* should have is the right to prevent wrongs directed at the culture itself, such as situations where someone acquires the knowledge by deceiving current members of the culture. However, the culture should not have a broad property right to "lock up" knowledge and thereby exclude all other potential users.

[41] The nature of the underlying creativity may also differ in the case of traditional knowledge, in a way that poses problems for the reward theory. The reward theory envisions an intended, discrete act of creation. Under this paradigm, there is a clear “creative step” that distinguishes the creation from the prior state of knowledge; between the old and the new. Traditional knowledge, by contrast, usually does not involve a systematic act of creation. Rather, it evolves in bits and pieces as a reaction to the society’s cultural environment. Instead of the staircase paradigm underlying the reward theory, the evolution of traditional knowledge is often more of a ramp.

4 Rethinking intellectual property policy

On their face, the policy arguments raised in opposition to property rights in traditional knowledge seem compelling — and have certainly proven compelling to many lawmakers involved with the question. Upon closer inspection, however, one can find certain flaws in the reward theory argument. First, the reward theory argument, in its most common form, often misstates the true justification for providing a reward. Second, the argument fails to consider that while the reward theory may be the most common justification for intellectual property rights, it is not the *only* justification. Each of these points will be addressed in turn.

4.1 The standard "reward" argument misstates the underlying policy

The reward theory, in its standard form, indicates that intellectual property rights are justified only as a reward for creative activity. In fact, however, even existing intellectual property systems focus on more than creativity. Consider copyright. The copyright system admittedly rewards only those who create. But consider the way in which the system rewards the author. The author's reward — an exclusive right to disseminate the work — generally has value only if the author chooses to sell or otherwise distribute the work to the public.[42] If society was concerned only with creativity, a simple cash prize or grant would work just as well. That society chooses to reward the author by providing the author a "commodity" in the work indicates that something other than mere creativity underlies the system.

Consider also the conditions the existing intellectual property system places on the rightholder. While both patents and copyrights are exclusive rights, they have only a limited term. At the end of that term, the owner must dedicate the invention or work

[42] This observation admittedly does not always apply to patents. First, while a patent in a product will generally have value only if the inventor sells the product to others (or licenses the right to others to produce), a party can reap significant value from a *process* patent simply by using the process in its own operations. Second, the observation does not apply to the "blocking patent." If a party has patents in two competing technologies — Alpha and Beta — but licenses or uses only Alpha, its ability to prevent its competitors from using both Alpha and Beta gives it tremendous value in both, even though it neither uses nor licenses Beta.

to the public. The patent system imposes further conditions on the grant of the right. In order to receive a patent, the inventor must disclose the essence of the invention to the public in the patent application.[43] Again, if the only concern were creativity, the law would not necessarily require the rightholder to educate the public or give up her rights at some fixed date.

These features of the system help illustrate that society is concerned not only with creation, but also with *dissemination*: making sure that knowledge of — and ultimately the benefit of — the invention or work is made available to the public. Consider the following statement from the United States Supreme Court, in a case involving the patent laws:

First, patent law seeks to foster and reward invention; second, it promotes disclosure of inventions, to stimulate further innovation and to permit the public to practice the invention once the patent expires.[44]

A number of other real-world examples illustrate the importance of dissemination. Government invests heavily in the dissemination of knowledge. For example, most developed nations have established a public education system. Government may also encourage dissemination through libraries, publications, and other forms of education, today including the internet.

In fact, from society's perspective, dissemination is just as important as creativity. While new knowledge can be beneficial, it is of little use to society if it remains locked up in the hands of the person who developed it. While the goal of dissemination is often omitted from the reward theory argument, it is in fact a crucial reason why nations opt for an intellectual property system rather than a system of patronage.

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[43] A few nations, including the United States, also require the inventor to disclose the "best mode" of practicing the invention. This requirement provides the public with additional information about the invention.

[44] *Aronson v Quick Point Pencil Co* 440 U.S. 257 (1979) 262. For similar sentiment, see European Union Directive 2004/48/EC (Enforcement of Intellectual Property Rights), recital 4.

Acknowledging the importance of dissemination also helps put the intellectual property system into a new light. Note that society's interest in dissemination is not limited to *new* knowledge. In many cases, such as public education and government publications, the knowledge being disseminated is neither new nor creative. Instead, it is information deemed necessary for a well-educated population. When old but useful ideas are not widely known, providing a means of spreading those still-valid ideas can prove of significant benefit to the public.

Property rights can actually provide an incentive for the dissemination of old, but not widely known, knowledge. At first glance, that premise may seem counterintuitive. How could "locking up" knowledge in one person or group ever help dissemination? The key to the puzzle lies in the economic notion of "transaction costs." The transfer of knowledge is not a cost-free endeavour. Depending on the complexity, it can involve considerable time and expense by the person who seeks to transfer the knowledge. Thus, absent a way to demand payment, the holder of knowledge may not have sufficient incentive to transfer the information to others.

Property rights give the owner the tools to demand payment. As discussed earlier, intellectual property rights serve to commodify the underlying knowledge, allowing the holder to sell or lease it to others. An important feature of the intellectual property system is that the owner can ordinarily realise this profit only if she sells or licenses the protected idea to others. In the case of information that is not widely know — both new and old — a property right could encourage greater spread of the underlying information, resulting in gain to the culture.

Traditional knowledge is a good example of "old"[45] knowledge that is not widely known. Because traditional knowledge originates in a particular culture, it may be known only by the members of that culture. And yet, in many cases that knowledge could prove a boon to many others. Thus, a nation has an interest in encouraging

[45] Again, it should be stressed that traditional knowledge is not necessarily old.

dissemination of traditional knowledge. A system of intellectual property rights could held provide this encouragement.

Of course, granting property rights in traditional knowledge does not guarantee greater dissemination. Many cultures jealously guard their traditional knowledge. Especially when folk or sacred expressions are involved, a culture's first inclination may be to prevent anyone outside the culture from using the protected knowledge.[46] In these cases, not only will property rights not provide enough incentive for dissemination, they may actually provide the culture with the legal means to lock up the knowledge within the culture. Commodification could also lead to internal strife in the culture, as certain members might be inclined to defy the group decision and sell the idea to outsiders.[47]

4.2 Other justifications for property rights

The reward theory, properly construed, certainly provides strong support for a system of intellectual property rights. It is a mistake, however, to assume that it is the *only* justification for such rights. In fact, some intellectual property rights serve goals that are only loosely related to the dissemination of knowledge.

Consider trademarks. Trademark law gives one seller a property right[48] in a word or

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46 Harding 1999 *Ariz St LJ* 291, 313-14, Hilty 2009 *IIC* 909.

47 Professor Yu's recent work, for example, hypothesises a "family feud" within a particular culture, in which different segments of the society disagree on what to do with the traditional knowledge. Yu 2008 *Temp L Rev* 443, 490-91. Given these potential problems, a system of property rights might be more effective in encouraging dissemination of traditional technical knowledge — eg medicines and agricultural methods — than for cultural expressions such as folklore and dance. Although a culture might have deep-seated objections to sharing any type of traditional knowledge, there are likely to be fewer objections in the case of traditional medicines and agricultural methods than when folk music, song, dance, or art are involved. In the case of technical knowledge, it is more likely that the culture's main concern is ensuring that it is compensated when the knowledge is used, something that a property-based system could help ensure. Moreover, because some technical knowledge can be used by a large number of people to solve serious real-life problems, the demand — and accordingly the price — that can be commanded for such knowledge is likely to be higher, resulting in greater dissemination. Conversely, both the demand for, and the culture's willingness to share, its traditional cultural expressions will often be lower, meaning that dissemination may not occur.

48 In the case of a trademark, the right to exclude is not absolute. Historically, trademark law allowed one seller to exclude another only when the other's use led to customer confusion.

symbol used in connection with a good or service. In many cases this property right is quite valuable. Consumers prefer branded goods because they can make use of external knowledge when evaluating those goods in the market. Consumers assume that similar goods sold under the same mark will be of similar quality. Therefore, when they encounter a mark, they can tap into their own prior experiences with, or the recommendations of others concerning, goods sold under the mark. In this fashion, trademark protection allows a seller to reap the benefits of its reputation or goodwill.

Applying the reward theory to this well-established intellectual property right, however, creates problems. Although it is admittedly possible to justify trademark rights as a reward for creative activity,[49] rewarding creativity is not the only, or even the primary, goal of trademark law. Instead, trademark law exists to benefit and protect both consumers and competitors by regulating a certain type of deceit in the market. The grant of a property right to one competitor in a given mark "deputizes" that competitor, giving it both the right and the economic incentive to police the market for misleading uses of the mark by others.

Other forms of intellectual property serve different goals. Moral rights help preserve an author's reputation. The right of publicity functions much like a patent or copyright, but also reflects underlying privacy and personality concerns.[50] Performance and broadcasting rights exist to ensure fair behaviour in the dissemination of ideas. Although those who benefit from these protections typically have come up with something new, legal protection exists not so much as a reward for the creation, but to further other social policies.

However, this limitation on the right to exclude does not mean that a trademark is not a property right for the purposes of this article. As discussed above, this article uses "property" to describe any legal right that limits the use of an identifiable thing to one person or a select group.

[49] In some cases, the mark is a newly-coined word or symbol such as XEROX. Coining a new mark certainly involves a minimal level of creativity. In many other cases, the seller borrows an existing word as its mark. Nevertheless, in one sense even borrowing an existing word involves creativity. In these cases, using a mark in connection with a good or service creates a new *meaning* for the existing word or symbol. Instead of the old dictionary meaning, the word, at least when viewed in connection with the good or service, now connotes the seller's goodwill.

[50] *See* the discussion in *Athans v Canadian Adventure Camps Ltd* (1977) 17 OR (2d) 425 (Ont HCJ), one of Canada's early, and most influential, right of publicity cases.

In short, the reward theory does not stand alone. There are a number of reasons why societies choose to vest one person or a group of people with exclusive control over the use or communication of knowledge. Acknowledging these other goals in no way diminishes the importance of rewarding the creation and dissemination of knowledge. It merely demonstrates that the reward theory is not the only goal that justifies property rights.

Any number of policy arguments could potentially be invoked to justify intellectual property rights in traditional knowledge. However, many of these arguments are fairly weak. For example, one obvious argument for property rights is that such rights could help redistribute wealth to the holders of such knowledge, as those outside the society would now be forced to pay or otherwise provide value to utilise the knowledge. Indeed, there is a strong sense of redistributive justice underlying the South African Bill. However, while redistribution of wealth may be a laudable goal, it does not justify a grant of *property rights* in traditional knowledge. A system of property rights would redistribute wealth in an uneven and somewhat haphazard way to different holders of traditional knowledge, as it would turn on the demand for that particular culture's knowledge. Such a system could also create incentives for inefficient use of resources, including advertising and marketing expenses, by cultures seeking to capitalise on their new commodity. If income redistribution is the goal, a more efficient and equitable means would be a direct cash transfer or a change in tax structure, not a grant of intellectual property rights.

Another possible argument for property rights in traditional knowledge is that such rights would rectify a basic imbalance in the international intellectual property system. This argument is sometimes called "evening the playing field."[51] Existing intellectual property treaties like the Paris and Berne Conventions and TRIPS obligate nations to provide intellectual property rights to certain inventions and expressions, regardless of where they originated.[52] Given that most patented

[51] WIPO/IPTK/MCT/02/INF.4 at 5.

[52] Paris Convention for the Protection of Industrial Property; Berne Convention for the Protection

inventions and copyrighted expressions originate in industrialised nations, the current system tends to benefit those wealthier nations at the expense of the developing and least-developed nations. On the other hand, while these less developed nations may be "intellectual property poor," many are rich in resources that are not protected by current intellectual property law, including biodiversity and traditional knowledge.[53] Commodifying these resources, the argument goes, would help these nations to "participate more effectively in global markets."[54]

However, at its core this argument is merely a variation on the income redistribution argument. Intellectual property rights in traditional knowledge would, of course, increase the wealth of certain nations or cultures, and may (or may not) tend to benefit the lesser developed nations. But so would a grant of property rights in other freely-shared resources, including airspace and shipping lanes. Few would argue that granting property rights in airspace and shipping lanes is a useful way to augment a nation's wealth. Similarly, unless there is another reason to grant rights in traditional knowledge, the underlying goal of income redistribution could be better achieved in other ways.

On the other hand, there *are* more convincing arguments favouring property rights in traditional knowledge. Two are particularly persuasive. First, granting rights to the society that currently uses the knowledge could help prevent mistakes in either the use or teaching of the knowledge. Second, exclusive rights in traditional knowledge could be a means to help preserve the uniqueness — and possibly the very existence — of threatened cultures.

4.2.1 Accuracy in the transmission and use of knowledge

As discussed above, the property right in a trademark helps preserve the accuracy of knowledge conveyed in the marketplace. And in fact, legal systems often employ

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of Literary and Artistic Works; Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS).

53 WIPO/IPTK/MCT/02/INF.4 at 5.

54 WIPO/IPTK/MCT/02/INF.4 at 5 and 10.

exclusive rights as a means to limit errors in the transmission or use of knowledge. For example, the "tarnishment" branch of trademark dilution law allows the owner of a well-known mark to prevent others from using that mark in a way that would decrease the positive features of the goodwill the owner enjoys in that mark.[55] Second, the moral right of integrity allows an author to prevent others from distorting her work in cases where the distortion would harm the author's honour or reputation.[56] Third, moving outside the world of intellectual property, numerous cultures and private organisations have rules that give one person the sole right to use or transmit knowledge, ranging from license requirements for those who dispense legal or medical knowledge to the practice in some cultures to having an exclusive speaker of folk stories or singer of traditional songs.[57] All of these rules help prevent distortion of or mistakes in applying the underlying knowledge by excluding those who might distort the knowledge. Tarnishment-style dilution allows the mark owner to prevent others from introducing extraneous and false information that distorts the goodwill in the mark. The moral right of integrity similarly allows the author to protect her message by preventing changes that would distort her intended meaning.[58] Training and license requirements ensure that only those who understand the knowledge or technology may use it. And social rules limiting recitation to one person ensure — if coupled with adequate training and other controls — that the recitation will be accurate and unaltered.

By similar logic, it might be possible to justify giving a culture property rights in its traditional knowledge to help prevent inaccurate use or transmission of the knowledge.[59] At first glance, the thought of government granting anyone exclusive rights in knowledge in order to prevent others from making what government deems

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55 In cases of dilution by “blurring,” by contrast, the owner of the mark sues to prevent a decrease in the association between the mark and the good, not a *change* in the positive nature of that association.

56 Berne Convention for the Protection of Literary and Artistic Works a 6*bis.*

57 See eg Howard 1983 *Ethnomusicology* 71-82; McAllester *Perspectives of New Music* 433-446.

58 The accuracy goal helps explain why the right is limited to those changes that affect honour or reputation. If a particular alteration is not associated with the original author, the author’s original message, as perceived by the public, remains unchanged.

59 The Azerbaijani law is especially concerned with distortion. See the 8 Compiled Laws of the Republic of Azerbaijan - aa 6.2 and 9.11.

a “mistake” may seem anathema to a free society. Absent a grave threat to safety or morality, civilised government does not police the truth. Limiting the transmission or use of information is the hallmark of a repressive government, not of a government that protects rights.

And yet, the above examples illustrate that even democratic governments frequently grant exclusive rights in knowledge and expression in order to prevent mistakes. This limited government interference in the marketplace of ideas is considered acceptable for the simple reason that not all “mistakes” involving knowledge or expression are of equal concern. Intervention is most likely when mistakes affect the natural environment or parties other than the owner. Trademark and false advertising law help prevent consumers from receiving false information in the market. Licensing and training requirements prevent those with inadequate knowledge from harming others.

Governments may be more reluctant to interfere in situations where the mistake causes harm only to the owner of the information. For example, in many nations there is a perceived tension between allowing recovery for misstatements that harm reputation and the human right of free expression. Nevertheless, in some circumstances most nations will allow the owner to prevent mistakes in the spread of information even if there is no harm to others.

The most difficult situation is where the only harm is to the information itself. Most governments have proven reluctant to give anyone the power to protect the knowledge itself. Instead, government typically opts for a system of Hegelian dialectic, in which all sides have a chance to join the debate, in the hope that the truth will ultimately prevail. Giving one side the exclusive right to transmit or use the information would inhibit this process, and put government in the uncomfortable position of squelching discussion.

These observations are especially germane to the question of property rights in traditional knowledge. In many situations, a culture in possession of traditional

knowledge will best understand that knowledge. Giving that culture exclusive rights to that knowledge would help to prevent the distortions that might occur if the knowledge was used or conveyed by others with a less perfect understanding. In the case of traditional knowledge, however, property rights would be appropriate only when the distortion might cause *external* harm to the environment or some person – either to the culture that owns the knowledge, or a third party. For example, government could justifiably choose to limit the use of a traditional medical plant to those within the culture that developed the treatment. Property rights in this situation would help prevent harm to others. By the same token, government could limit the use of traditional agricultural methods to a culture to minimise environmental harm.

Both of these examples involve traditional technical knowledge. It is more difficult to envision how errors in the use or transmission of traditional cultural expressions, like those protected in the Bill, could cause similar harm. In most situations, the only harm is "internal" — harm to the knowledge itself — in which case government intervention is unjustified.

Nevertheless, external harm is possible even when expression is involved. To illustrate, consider a situation where a person inadequately versed in the nuances of a traditional song performs that song for others. No physical harm results from the performance. Nor is any lasting emotional harm likely. Nevertheless, that performance may result in two related harms. First, the observers are in a sense harmed by being subjected to an erroneous performance. At the very least, their understanding of the song's full message is inaccurate. More significantly, the performance may skew their view of the culture from which the song originated. The second possible harm is to the culture itself. If the distorted performance is associated with the culture, the culture's reputation among outsiders may suffer. While these external harms could justify giving the culture an exclusive right to perform the song, neither presents a particularly compelling case for property rights. The harm to the observers and the culture could also be prevented by a disclosure requirement, in which the performer had to inform the observers that she was not trained in the culture.

In conclusion, then, the policy of preserving accuracy provides a weaker justification for property rights in traditional knowledge than does the policy of encouraging dissemination. Property rights would be justified only when the inaccuracy poses some threat of harm to people or the environment. Giving exclusive rights to protect information itself, by contrast, goes beyond the function of good government. Moreover, in many cases government might be able to prevent the harm by means other than a property right.

4.2.2 Preserving knowledge, preserving culture

Traditional knowledge is disappearing at an alarming rate.[60] In many cases, traditional knowledge has been supplanted by outside knowledge. A culture's youth is enamoured with pop music recordings from other cultures, and forgets the culture's own songs. Modern agricultural methods prove cheaper than the labour-intensive traditional ways, leading to abandonment of centuries-old knowledge. As this traditional knowledge disappears, the world loses information and expression. Therefore, one argument sometimes set forth for legal protection of traditional knowledge is that legal protection would help to slow this steady loss of knowledge.

However, loss of knowledge is not in and of itself an adequate reason to grant property rights. First, granting property rights in traditional knowledge provides no guarantee that people will not continue to abandon and forget that knowledge. Granting property rights in folk music or farming methods will be of little help if people truly prefer the recorded music or modern agricultural technology.

Second, and perhaps more significantly, traditional knowledge and expression is by no means the only knowledge that is threatened with extinction. A high percentage of the world's technical know-how and expression will eventually be lost. Much of that knowledge and expression is not recorded. Even if preserved in tangible form (a

[60] Hilty 2009 *IIC* 901; Downes 2000 *Colum J Envtl L* 255.

luxury admittedly not enjoyed by a great deal of traditional knowledge), much of it will never be referred to again. Given that all sorts of knowledge and expression are fading from our collective memory, there is no *a priori* reason to single out traditional knowledge for preservation. At best, the argument supports only an initiative to record and archive that knowledge.

On the other hand, in some cases there is a crucial difference between traditional knowledge and other forms of knowledge and expression. Some traditional knowledge is crucial to a culture's sense of identity. This phenomenon is perhaps most obvious with expressions such as sacred songs, stories, and art. But technical knowledge may also play a major role in a culture's identity. Scientific knowledge such as agricultural methods can be an important aspect of the culture, establishing patterns and rituals that help define the group as a distinct culture.[61]

Therefore, while preservation is not in and of itself a sufficient reason to provide property rights in all traditional knowledge, it is more compelling for that subset of knowledge which is essential to a culture's sense of identity. In that case, the knowledge is not being preserved for its own sake, but instead because of the role it plays in preserving the culture to which it relates.[62] In short, the justifiable goal is not preserving knowledge, but the broader goal of preserving culture itself.

Preserving threatened cultures is undoubtedly a priority goal of international human rights law. The older policies of assimilating minority cultures have been rejected, replaced by a policy of maintaining the mosaic of different cultures and traditions.[63] One of the greatest threats to cultural diversity is the gradual loss of "non-mainstream" cultures, especially those with relatively few members. International human rights organisations and NGOs have suggested a number of ways to stem

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61 Cross 2009 *Tex Wesleyan L Rev* 257-292.

62 WIPO 2001 www.wipo.int 117 (discusses how knowledge forms part of a "politics of memory"); Daes *Protection of the Cultural and Intellectual Property* 30.

63 The 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which encourages nations to adopt measures "for the protection and promotion of the diversity of cultural expressions on their territory," is in effect in almost one hundred nations. UN Doc CLT-2005/CONVENTION DIVERSITE-CULT REV. art 1(h).

the inexorable loss of cultures in the modern world.

Unlike the extinction of a biological species, the loss of a culture rarely occurs simply because its members die out. A culture, after all, is a dynamic organism, and it is possible for individuals to join or leave. Because of this dynamic nature, loss of a culture more commonly occurs when the members no longer identify with the unique traits that define the culture. For example, international human rights law recognises the importance of allowing all cultures to preserve their languages and religions.[64]

The pressing need to preserve non-mainstream cultures may also provide a policy justification to grant intellectual property rights in traditional knowledge.[65] The effectiveness of a property regime, however, depends on how the culture's self-identifying knowledge is threatened. At the risk of oversimplification, this threat can occur in two ways. First, outside knowledge can supplant traditional knowledge. Second, just the opposite phenomenon can occur: those outside the culture can become so enamoured with traditional knowledge that they begin to use it. If the connection between the knowledge and a particular culture is diluted, that knowledge will cease to help the culture identify itself. In North America, for example, the "New Age" movement, which involved non-Native Americans adopting various Native American practices, served to dissociate those practices from the original cultures.

A grant of property rights most directly addresses the situation of "dilution." Property rights would give a culture the right to prevent others from employing the knowledge or relaying the expression, thereby slowing down the degree to which the traditional knowledge is adopted by members of other cultures. Property rights would be less effective in dealing with the threat of supplanting, which occurs when people in the protected culture are exposed to outside influences. A society's exclusive ownership of a particular song in no way gives it any greater authority to shut out "competing"

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64 Universal Declaration of Human Rights (1948), a 2; International Covenant on Civil and Political Rights (1976), aa 2(1) and 14.

65 Professor Hilty explores a variation on this theme, discussing whether any sort of property rights could provide an impetus for development in lesser-developed nations. Hilty 2009 *IIC* 894-898.

songs from other cultures. At best, a grant of property rights might cause people to perceive of the traditional song as better, because government has elected to protect it, and because it is being sold at a price.

Moreover, using cultural preservation as a justification for intellectual property rights in traditional knowledge also has its share of problems. The problems here are more serious than those accompanying the other two justifications. First, protecting culture requires a broader, more expansive property right than that needed to encourage dissemination or ensure accuracy. The first two goals can be achieved by granting a property right in the particular knowledge or expression. Modifications or variations of the idea need not be part of the intellectual property. Suppose, for example, that a culture knows a method to increase the yield of a particular crop. If government wanted to encourage dissemination of that method, it would only need to grant the culture an exclusive right to that method, not to other similar methods. Preserving culture, however, requires a property right not only in the cultural trait itself, but also in traits that are sufficiently similar to threaten the uniqueness of the trait itself.

Second, a property right designed to preserve culture may directly contradict the policy of dissemination. The key to an intellectual property right designed to preserve culture is that it allows the owner to prevent others from using the traditional knowledge. Of course, government might deem it necessary to grant such a right in the case of a non-mainstream culture facing a significant threat.

Third, there are likely to be cases where more than one culture shares particular knowledge. That same traditional knowledge may help define both cultures. The obvious solution is to grant both cultures a sort of "joint" property right, applicable against the rest of the world. However, if the goal is to preserve culture, a joint property right could present problems. If one of the joint owners decides to allow outsiders to use the knowledge, its act may threaten the continued existence of the other culture, defeating the purpose of the property right. Thus, not only would a property right designed to protect culture need to be fairly broad, it might also need to be inalienable and non-waivable.

Even with these problems, however, the goal of preserving culture can arguably justify a grant of property rights in traditional knowledge. The threat that increased exposure to other cultures poses is difficult to control. Government could opt to rein it in by direct intervention. However, a grant of intellectual property rights to the threatened culture is another option. Giving control to the culture itself allows the culture decide what aspects of its shared knowledge and expression are so crucial that they must be preserved solely for use by the members, and which can be disseminated to the outside world.

5 Conclusion

At present, it is impossible to predict whether international law will ever develop a minimum standard for protecting traditional knowledge. Nevertheless, it seems a safe bet that any minimum standard which may be adopted will not involve property rights. Granting property rights to traditional knowledge raises a whole host of difficulties, ranging from practical concerns to deep-seated policy objections to property rights in a form of knowledge so different from ordinary patentable inventions or copyrightable works.

This article has tackled one subset of the objections to a property system; namely, the argument that property rights in traditional knowledge would not satisfy the policy justifications for a grant of exclusive control in information and expressions. It

demonstrates that sound policy reasons do exist for granting cultures exclusive control over some of their traditional knowledge. Reaching this conclusion requires a close look at all the possible reasons for granting exclusivity, not merely the "reward for creativity" rationale that predominates in discussions of ordinary intellectual property.

Finally, it warrants repeating that the purpose of this article is *not* to advocate for property rights in traditional knowledge. Its only aim is to demonstrate that the policy arguments often offered in opposition to traditional knowledge rights are not as compelling as they may seem at first glance. Even if the policy objections can be overcome, there remain a number of practical and fairness issues that would make it extremely difficult to craft a workable regime of traditional knowledge rights. The author's hope is that by helping remove the policy arguments from the debate, future discourse may focus on whether these many problems can be overcome.

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List of abbreviations

Ariz St LJ	Arizona State Law Journal
Colum J Envtl L	Columbia Journal of Environmental Law
IIC	International Review of Industrial Property and Copyright Law
Mich St L Rev	Michigan State Law Review
Pepp L Rev	Pepperdine Law Review
Temp L Rev	Temple Law Review
Tex Wesleyan L Rev	Texas Wesleyan Law Review
TRIPS	Agreement on Trade-related Aspects of Intellectual Property Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
WIPO	World Intellectual Property Organization