Layering Property, Disseminating Knowledge

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Date : July 19, 2019

Ruth L. Okediji, A Tiered Approach to Traditional Knowledge, 58 **Washburn L. J.** 271 (2019).

Presented as the Foulsten Siefken Lecture at Washburn Law School, Professor Okediji's article, *A Tiered Approach to Traditional Knowledge*, has implications beyond its focus on traditional knowledge. That's why it is an article I like lots, as we say in these pages. Its publication in the Washburn Law Journal was accompanied by several thoughtful commentaries, which along with the principal article form a valuable symposium. I like the commentaries a lot too. But I will focus on the main course rather than the tempting side dishes.

Traditional knowledge consists of know-how passed on within local communities carrying forth understandings about healing, cooking, and other fruitful uses of the natural environment. Traditional knowledge is different from traditional cultural heritage, which consists of folklore and artifacts that convey communal interpretations about the world. A common issue raised by both traditional knowledge and traditional cultural heritage is whether their content should in some sense be owned either for the purposes of commercial exploitation or for preservation. Since the legal and political issues are different for the two categories, authors tend to narrow their attention to one or the other. Here, Professor Okediji focuses on traditional knowledge.

Arguments over protection of traditional knowledge are cast in property terms. Consequently, acceptance or rejection of legal protection often rests upon assessments of the desirability of property, especially intellectual property. Professor Okediji presents these well-known arguments in a systematic and original way. She also offers a fresh previously ignored solution based on an analogy to trade secret law. Carefully and thoughtfully, Professor Okediji borrows from fundamentals and critiques of intellectual property to proffer a solution to the problem of how to protect traditional knowledge.

The Intergovernmental Council (IGC) of the World Intellectual Property Organization (WIPO) has been debating protection for traditional knowledge for nearly a decade. The discussions among the member states rehearse many of the well-worn debates played out in decades of scholarship. Best, some advocates against intellectual property maintain, that traditional knowledge remain in the public domain. Intellectual property is not suitable for traditional knowledge because the former privileges individual, rather than communal, creation for the benefit of progress and the modern as opposed to the needs of preservation and tradition. Furthermore, intellectual property laws have served to exploit traditional knowledge, turning know-how gleaned from nature into industrial commodities reassembled in factories. Therefore, to treat traditional knowledge as intellectual property would insult the efforts of activists who have spoken out against pharmaceutical companies that have pursued patents on turmeric, on neem, on the Gumbi Gumbi plant of Australia, and on varieties of Hawaiian taro.

Other members of the IGC, often representing the interest of developing countries, urge protection for traditional knowledge, even if not with the full regalia of intellectual property. Communities which foster and sustain traditional knowledge should be able to benefit and govern its commercial exploitation. Such communities should also make ultimate decisions of whether the knowledge should be exploited at all. In order to protect these community interests, some type of legal rights must be attributed to traditional knowledge. Among these advocates for property rights, the debate is over the details. Who will be the owner? What will be the score and duration of the rights? Proponents move beyond conceiving of property rights as an all or nothing. Instead, they turn the debate into a quest for a balance middle ground.

In many ways, however, the Traditional Knowledge agenda, even as it plays out in WIPO, is consistent with that of the World Trade Organization (WTO) and flows from the philosophy of the Agreement on Trade-Related aspects of International Property Rights (TRIPS). The goal of the TRIPS Agreement is to require member states to reform their intellectual property regimes to meet substantive minimal standards set forth in the treaty. Requirements on subject matter, scope and duration, and limitations and exceptions serve to harmonize intellectual property law and assure predictability as member states trade with and invest in other states. Recognizing intellectual property protection in Traditional Knowledge is a logical extension of these principles. As the World Bank stated in the title to its study on Traditional Knowledge, intellectual property can serve to unlock the economic value of Poor People's Knowledge. Presumably, this economic value is realized through international trade and the economic transactions across nations envisioned within the WTO and TRIPS. When understood this way, the Traditional Knowledge agenda is an extension of, not a reaction to, our new world trade order.

The contradiction, however, is that Traditional Knowledge is often highly local and specialized. Intellectual property covers a range of divergent subject matters, including software, pharmaceuticals, processes for producing chemicals, video games, films and television programs, and educational materials, and intellectual property laws are written in broad enough terms, such as creation and invention, to encompass a wide range of activities and industries. Nevertheless, Traditional Knowledge does not find a comfortable fit within the broad category of intellectual property. Traditional know-how is often more mental than technological, engaging with culturally defined ways of thinking, rather than complex machines or technologies. While the products of intellectual property are designed to promote change, the fruits of traditional know-how are meant to ensure a stable set of knowledge rather than to invite innovation and change. However, subjects of Traditional Knowledge, such as the benefits of plants for medicinal or nutritional purposes, are often *innovative for* those in the developed world who may not be familiar with the exotic fauna or their uses. Fitting Traditional Knowledge within intellectual property requires a balance between the values of stability and devotion to innovation (sometimes for its own sake).

Not only is the idea of Traditional Knowledge somewhat disconnected from intellectual property, it may also be inherently incoherent. First of all, Traditional Knowledge subsumes the knowledge of indigenous groups as well as groups that have a more recent history. This problem in definition raises issues [with identifying?] the relevant beneficiaries. Furthermore, Traditional Knowledge covers a wide range of fields from medicine to music. In its deliberations, WIPO has separated Traditional Knowledge from Traditional Cultural Expressions (TCE), with the latter being the subject of a separate agreement. But even with this bifurcation, Traditional Knowledge encompasses specialized knowledge that is often geographically local and culturally specific. This knowledge as a subject of global trade is very different from the freely mobile capital and technology of intellectual property law in the contemporary trade system.

These notable differences explain the need for a separate agreement on Traditional Knowledge and the set of large scale and specific issues that are the subject of negotiation. They help to identify the fault lines in the negotiations and the sources of continuing debate and tensions.

Talks continue within the IGC, and in my opinion they appear to be stalled. Perhaps Professor Okediji's proposal can promote progress on a new international treaty. Her proposal would divide traditional knowledge into four categories with legal protection tailored to the four tiers. *Sacred traditional knowledge* is fully protected from commercial exploitation. *Secret traditional knowledge*, know-how that has commercial value, would be treated under principles of trade secret law. *Closely held traditional knowledge* is created and maintained through the collective efforts of the community but is used in the open. Finally, *widely used traditional knowledge* is knowledge that has disseminated beyond the group. The first three types of traditional knowledge would be legally protected through a system of proprietary rights that would include the right to compensation and right of attribution. Widely used traditional knowledge, however, would be subject to the right of attribution, or perhaps relegated to the public domain. Professor Okediji advocates for this tiered approach as both politically acceptable and a balance of the community and commercial interests arising from traditional knowledge.

This tiered proposal should provide guidance for the IGC to move towards a conclusion. Reformulating traditional knowledge based on degrees of sacredness, secrecy, and openness restructures the economic rights of traditional knowledge communities. But much of the debate is a reflection of uncertain political rights both within the communities and within the nation-state. The difficult question is how legal rights can address these political issues through a multi-lateral trade agreement. Treaties protecting human rights and cultural rights should play some role in defining rights in traditional knowledge. The problem is that framing traditional knowledge within intellectual property frameworks ignores political rights. Perhaps the best one can do is for the IGC to leave the matter of political rights to national legislatures and courts. Nonetheless, proposals like tiered rights need to *keep in mind* (or account for) political, cultural, and economic implications.

Engaging, provocative, and thoughtful, Professor Okediji's article in one that many will like lots, and its ideas should be taken seriously in understanding the traditional knowledge debate and the possibilities of intellectual property law.

Cite as: Shubha Ghosh, *Layering Property, Disseminating Knowledge*, JOTWELL (July 19, 2019) (reviewing Ruth L. Okediji, *A Tiered Approach to Traditional Knowledge*, 58 **Washburn L. J.** 271 (2019)), https://intl.jotwell.com/layering-property-disseminating-knowledge/.