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The Underlying Matrices that Frame Divergent Views in the Debate on Intellectual Property and Indigenous Knowledge Protection

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I. Introduction

The concern for protecting indigenous knowledge is one that has become top subject on a myriad of platforms — national, international, regional, and academic, amongst others. Scholarly writings are replete on the subject and they mostly take turn in viewing various aspects of the whole as one viewing a specific side of a huge elephant. Scholarly views range from themes on bioprospecting,[1] folklore,[2] agricultural products,[3] tangible and intangible cultural heritage,[4] to general issues pertaining to indigenous or traditional knowledge[5] and a combination of two or more of these aspects.[6] The common

1. See Rimmer, Malcolm. "Legal Protection of Indigenous Traditional Knowledge and Cultural Expression. Blame it on Rio: Biodiscovery, Native Title, and Traditional Knowledge." *Southern Cross University Law Review*, vol. 7, no. 1, 2003, pp. 1–49.
2. See Garon, Jon. "Localism as a Production Imperative: An Alternative Framework to Promoting Intangible Cultural Heritage and Expressions of Folklore." *Bits Without Borders: Law, Communications & Transnational Culture Flow in the Digital Age*, Michigan State University College of Law Intellectual Property & Communications Law Program Conference, 24–25 Sept. 2010, East Lansing, Michigan, pp.1–39. www.law.msu.edu/bits/papers/GaronLocalism.pdf.
3. See Dagne, Teshager. "Place-Based Intellectual Property Strategies for Traditional and Local Agricultural Products: Acting Locally to Participate Globally in a Rights-Based Approach." *Drake Journal of Agricultural Law*, vol. 17, no. 3, 2013, pp. 565–95.
4. See Riley, Angela. "Straight Stealing: Towards an Indigenous System of Cultural Property Protection." *Washington Law Review*, vol. 80, no. 1, 2005, pp. 69–164.
5. See Hansen, David. "Protection of Traditional Knowledge: Trade Barriers and the Public Domain." *Journal of the Copyright Society of the U.S.A.*, vol. 58, no. 4, 2012, pp. 401–38; Gibson, Johanna. "Intellectual Property Systems, Traditional Knowledge and the Legal Authority of Community." *European Intellectual Property Review*, vol. 26, no.

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thread that usually runs through all is the need to engraft the "novel concept" of indigenous knowledge into a systemic world of preservation which most often takes the form of or mirrors intellectual property protection. The common thread that usually runs through all is the need to engraft the "novel concept" of indigenous knowledge into a systemic world of preservation, which most often takes the form of or mirrors intellectual property protection.

Fitting indigenous knowledge into the context of intellectual property, to say the least, has been problematic, as the literature shows. Ranging from difficulties such as catering for the spiritual elements associated with most aspects of indigenous knowledge, originality requirement, group versus individual interests, orality versus idea/expression dichotomy, time limit problem, and public domain concerns, among others (Weatherall 219–20); the list appears to be open ended and emerging. Hence, attempts at proffering a lasting solution have left us with "[y]ears of efforts [with] few tangible results" (Erstling 295). Yet, it is cruel to deny any measure of progress made on the subject especially putting into consideration past and recent deliberations made on the floor of the Inter-Governmental Committee (IGC) of the World Intellectual Property Organization (WIPO) since its inception in 2000, and the Convention on Biological Diversity (CBD), among others. Clamour on these platforms has tilted more in support of a *sui generis* form of protection,[7] amidst two others,[8] although its precise scope and general application are still debatable.

However, a closer observation reveals a conflict of perspectives, which always proves decisive in reaching any kind of conclusion. Like a matrix and

1, 2004, pp. 281–89.

6. See Ahmad, Tabrez. "Intellectual Property Protection of Bio-Cultural Property and Expression of Folklore in International Legal Regime." *Social Science Research Network*, 2010, pp. 1–19. *Social Science Research Network*, ssrn.com/abstract=1589689.
7. A *sui generis* protection is one of its kind that is different from any known existing model. See Garner, Bryan, editor. *Black Law's Dictionary*. 8th ed., Thomas Reuters, 2009, p. 1572.
8. A stringent intellectual property model and a customary law model. See generally, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999)*. World Intellectual Property Organization, 2001. (Based on the findings gathered from the missions carried out by WIPO IGC between 1998–1999, much of the debate hung on the tripartite possibility of protecting indigenous knowledge—through an intellectual property model, through customary law, and through a *sui generis* system.)

founding philosophy of thoughts, these perspectives directly and inadvertently shape various articulations, propositions, and deliberations on the subject. The trio options usually canvassed for protecting indigenous knowledge find their underpinnings from any of these schools of thought. This paper is dedicated to looking into these decisive perspectives with a view to expounding on how each of them often leads a line or more of thought. After the introduction, the paper outlines reasons why an intellectual property regime or its ilk has always been proffered as a major solution for protecting indigenous knowledge. Yet, it will be revealed that the application of intellectual property paradigms in protecting indigenous knowledge is subjective and depends on which perspective one adopts. In the next part, the key and determinant perspectives in the debate will be considered. By way of a conclusion, the paper gives a reflection why the end of the continuum towards reaching a largely unanimous solution for protecting indigenous knowledge is not in sight.

Ⅱ. Why Intellectual Property?

Some scholars have argued on exploring other possible means outside intellectual property in protecting indigenous knowledge (Sunder "Intellectual" 22–30; Torsen 196–98). Usually, the arguments on protection have taken one of three options — an intellectual property model, a customary law model, and a *sui generis* model. Yet, these arguments inadvertently either employ elements or fragments of intellectual property models or make out possible solutions that are derivable or akin to an intellectual property regime. Proponents of a customary law model and a *sui generis* model hinge their arguments around prototypes of an intellectual property regime found within the indigenous people's culture and a special new kind of protection akin to a typical intellectual property model respectively. Admittedly, these approaches can be interwoven and may also inculcate other elements known to law somewhat different from intellectual property.[9] However, the common thread found within them is that, more often than not, there exist colourations of intellectual property principles.

Intellectual property has to do with proprietary rights attached to knowledge or its products with a touch of novelty and originality. "Intellectual

9. See Torsen.

property" has been defined as "intangible personal property in creations of the mind" (Dratler 1–2). Intellectual property rights are legal rights to precisely defined kinds of knowledge. In general, intellectual property laws "protect a creator's expression in artistic and literary works, the proprietary technology in inventions, the words and symbols used to identify products and services and the aesthetic aspects of product designs" (Cassidy and Langford 1). Hence, we can safely say that for any item, symbol, idea, or object to enjoy protection as intellectual property, it must have an element of "ownership" (property) traceable to a certain level of ingenuity, novelty, or originality of the mind (intellectual).

Indigenous knowledge generally has to do with cultural ways of life that can be associated with indigenous people sharing a common culture. Often referred to as traditional knowledge, indigenous knowledge "refers to a wide range of knowledge, and is not limited to a particular field — it covers knowledge about medical treatments, agricultural methods, the threading of beads in a particular way" (IIPI 1). It is further seen as "knowledge mostly developed in the past and may still be developing. [It is] used by generations and is passed on to future generations as part of the community's property" (Wekesa 4). Also, in a 2001 report on its fact-finding missions, WIPO gives a working definition of the concept — "knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and are constantly evolving in response to a changing environment" (WIPO 25). Similarly, it has been defined as "knowledge that people of an indigenous community, in one or more society, based on experience and adaptation to a local culture and environment, have developed over time, and constantly shaped by innovations and practices of each generation" (Bala 2). Among other salient points from these definitions, it is clear that indigenous knowledge is a body of knowledge belonging to specific indigenous communities or people.

This having been said, one can easily see why models of intellectual property canons are mostly suggested for protecting indigenous knowledge. The latter has to do with "belongings," "possessions," "knowledge systems," "cultural expressions" of indigenous people (which may also be referred to as their "property") and they stem from the creative systems and cultural innovations as well as the systemic generational transfer of such body of knowledge (this may constitute part of the intellectual aspect of their knowledge).

However, one major problem always lingers when we consider the issue of affording indigenous knowledge protection under an intellectual property model. Does indigenous knowledge, for what it is, fit into the canons and expectations of intellectual property to afford the former protection under the latter? The literature is divided. Some scholars believe that indigenous knowledge does not and cannot possess the requisites such as originality, authorship, and the like.[10] Others like Farhana Yamin and Darrell Posey doubt the effectiveness of propertizing and commercializing aspects of indigenous knowledge to afford it protection under intellectual property principles (142).[11] In contrast, there are scholars who believe that indigenous knowledge is unique and should qualify as protectable knowledge. In the latter category, some are of the view that a typical intellectual property model, though challenging, will suffice to afford protection for indigenous knowledge.[12] Others believe that protection lies either outside the walls of intellectual property or in a tweak of intellectual property principles with customary law to evolve a *sui generis* (a special kind of) protection.[13]

This paper is not concerned with the substance of these arguments but rather with the underlying or root perspectives which generally, frame or determine them. Indeed, the subjectivity of these arguments finds expression against the backdrop of the underlying schools of thought to be considered here. At the risk of being hastily generalistic, this author is of the view that the plethora of opinions in the lingering debate on indigenous knowledge protection and intellectual property all grow as branches from the stem of these perspectives. It is to these we now turn.

10. See Brown.
11. According to the authors, "it is difficult to classify indigenous knowledge innovations and practices into categories of intellectual property developed for use by commercial firms in an industrial and secular context because the lines between indigenous religious, cultural, business, intellectual and physical property are not as distinct or mutually exclusive. For example, indigenous 'sacred sites' are frequently both ecological reserves developed through human knowledge of management and conservation and cultural centres that have both physical as well as spiritual significance. Concepts such as business reputation and goodwill are also difficult to apply" (142).
12. See Erstling; Varadarajan, Deepa. "A Trade Secret Approach to Protecting Traditional Knowledge." *The Yale Journal of International Law*, vol. 36, no. 1, 2011, pp. 371–420; Graham, Lorie, and Stephen McJohn. "Indigenous Peoples and Intellectual Property." *Journal of Law and Policy*, vol. 19, no. 1, 2005, pp. 313–37.
13. See Ragavan 66–69.

Ⅲ. Decisive Perspectives

1. Subjective Definitions of Property

What is property? The way in which one views this question ultimately determines or frames the side of the argument one will stick to. Classical property theorists, who originally only referred to tangible forms of property, held that property was not associated exclusively with possession (Ostergard et al. 311). "Rather, property is a relationship between the owner and other individuals relative to some physical item. This relationship is a right against others that can be exercised to protect the owner's property" (311).

The key factor here is that property is an "individual" creation which must be protected against other "individuals." The Proponents of individual authorship in intellectual property discourse find their bearing in this view. Thus, with the principle of individuality, they face a challenge, if not an impossibility, in fitting the concept of group or community rights of indigenous people into the authorship requirement of intellectual property.[14] At best for them, a separate notion of protection may be proffered but certainly not under an intellectual property right. This is because indigenous knowledge is not attributable to any individual but to a group of persons, hence, does not agree with the notion of individuality that intellectual property envisages. Consequently, some scholars in this group argue that indigenous knowledge should be treated as "common property" which can be accessible to all. Sunder captures this aptly in these words:

> Traditional commodification scholars would bemoan the propertization of indigenous culture, arguing that culture should be common property accessible to all. More significantly, early commodification theory warns that because of current inequalities, the commodification of indigenous culture is more likely to lead to alienation, rather than preservation, of indigenous culture. ("Property" 6)

One flaw with the perspective of the classical property theory that supports individuality is that they fall into the trap of subjectivity. Realistically, ownership can be anything ranging from individual rights to group rights. For

14. See Brown.

instance, we speak of government ownership of property that is not traceable to any one individual. Yet even such government properties can be subject of intellectual property rights. If community ownership of knowledge is gleaned in this light, it becomes easy to see how group interests can be akin to individual rights, hence, should enjoy intellectual property protection. Indeed, some international instruments share a similar idea as group, cultural, and communal interests are enshrined in them (UN General Assembly, Art. 25, 26). This is the underlying philosophy behind the modern theory of property law rights.

The modern conception of property has been said to be expansive enough to include new claims such as the dynamics of culture and indigenous knowledge that erstwhile were strange. "Modern property is conceived as a complex and dynamic set of legal rights and responsibilities among various social actors" (Sunder, "Property" 10). Hence, Sunder further posits, based on the existing literature, that with a modern lens, property right laws attempt to negotiate relations among neighbours, the competing interests of present owners and future owners of same property, individual rights versus those of a community, and private interests in incentives and rewards versus rights of access for the public ("Property" 12). Within such a framework as this, many, including some on international platforms, have supported and canvassed the need to protect indigenous knowledge as property.[15]

However, a flaw with the modern theory is that the expansive contours it attributes to what amounts to intangible property might run risk of verbosity or uncertainty. For instance, certain aspects of indigenous knowledge lack a real sense of ingenuity from the community claiming ownership of them as they mainly are free gifts of nature. Such examples as traditional plants used for treating illness or biological make-up of individuals within the community come to mind (Ostergard et al. 317). There are possibilities that such medicinal plants exist in other indigenous communities for which reason it might be difficult to give such community the sole right to enjoy protection over them. Simply put, to refer to such as "property" of intellect would be difficult. Yet the modern theorists sometimes fail to consider these details as they attempt to regard various aspects of indigenous knowledge as the same and seek protection for them.

15. The unresolved issue however which has always been the bone of contention is how to protect such knowledge.

2. Views on Authorship

Deconstructing the concept of authorship has also facilitated the emergence of divergent views on the practicability of protecting indigenous knowledge with the paradigms of intellectual property. Like the case with property discussed above, the concept of authorship in intellectual property also has to do with individuality, and it emanated from the concept of the "romantic author" (Riley 179). The modern copyright as well as intellectual property regime derives its basic principles from the Romantic idea of authorship, which emerged around the mid-18th century.[16] As the concept became closely related with the Romantic Movement in literature and art, the worth of the individual experience was brought to the fore, as notions of self and ownership began pervading cultures.[17]

During this period, there was the pervading idea of the individual as one who is not only unconstrained by social order and values, but also sovereign in terms of an individualistic ability to make free choices (Dougherty 357). "It was within this context that the modern author was born — one genius, independent inventor, creative rebel — and became the cornerstone for Western copyright law, establishing its structure and defining the parameters of the entitlements it extends to copyrightable [as well as intellectual property] works" (Riley 179). Hence, scholars like Michael F. Brown use terms such as "his" or "her" pointing to the individuality of authorship in copyright laws. For Brown:

> Copyright law was designed to ensure that the author and his or her immediate descendants [enjoy the work]. The identification of inventiveness with a solitary human life, however, cannot be easily reconciled with the political economy of modern industrial creativity or, for that matter, with the collective productions of indigenous peoples. (196)

On the flipside, there is an emerging expansion of the term, "authorship." Stakeholders are gradually embracing a construction of the term that is a departure from the romantic concept of authorship that sprung up in the

16. See Woodmansee.
17. See Jaszi.

mid-18th century. Thus, group interests are now being accommodated either under extant copyright/intellectual property laws or under a special kind of law or system that provides protection akin to an intellectual property model. Some international covenants have been couched in these terms. UNESCO's Universal Declaration on Cultural Diversity, 2001, recognizes cultural heritage as the wellspring of creativity and canvasses in support of indigenous community or group ownership of cultural property and knowledge. Also, Article 31(1) of the UN Declaration on the Rights of Indigenous Peoples provides thus:

> 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.

Still, on the basis of the broader conception of authorship that promotes the interests of indigenous people, Dan Leskien and Michael Flitner note:

> Suggestions that the "intellectual integrity" of indigenous communities be recognized also resulted from the debate about the protection of "expressions of folklore" [in UNESCO and WIPO forums in 1985 and 1989]. The Model Provisions for National Laws on the Protection of Expressions of Folklore, set up jointly by UNESCO and WIPO in 1985, are directed against any "illicit exploitation and other prejudicial actions" and aim at the control of cultural 'folklore' expression through people still using these expressions in their customary context." (42)

A word or two will suffice on these views. The romantic conception of authorship can be advantageous, taking into consideration the problems fraught with community or group interests. Group interests can result in trio rivalry—inter-ethnic rivalry, inter-state rivalry, and intra-state rivalry (Ostergard et al. 325). Inter-ethnic rivalry arises where more than one ethnic

group can claim ownership of a traditional knowledge in the event that both seem to have knowledge of a source. For instance, there are certain cultural stories that have appeared in multi-ethnic groups with about same style of narration. Take for instance, the popular story of the lion and the tortoise and how both went into contest with the lion trying to prove its superiority because of its obvious strength and the tortoise eventually out-smarting the lion. Some ethnicities in Nigeria have their versions of the same story, which are usually very similar. In this case, which group claims ownership or authorship?

Inter-state rivalry on the other hand, plays out when a particular ethnic/indigenous group is spread among multiple state boundaries. This is the case with most African territories with disjointed cultural inclinations due to the destructive effect of imperialism and the divide and rule system. Many African ethnicities were split into multiple territories that now form modern states. For example, the Yorubas were previously united under the Oyo Empire but they were divided into the colonies of Dahomey, Nigeria, and the Protectorate of Lagos. The Eweres were divided between Gold coast and Togo; Efiks, and Ibibios between Nigeria and Cameroon and the Somali among Ethiopia, Somailia, Kenya, and Djibouti. The Asante of the Asante Empire found themselves in the Ivory Coast and Ghana. The Mossi were divided into Ghana and Burkina Faso, while the Kanuri of Kanem-Bornu Empire became colonial subjects in Nigeria, Cameroun, and Chad (Udombana 120). The San people are divided into Botswana, Namibia, Angola, South Africa, Zambia, and Zimbabwe.

The effect this has on indigenous knowledge is obvious. In the event that an indigenous knowledge of a particular tribe spanning into multiple states, is exploited, which state takes benefit or action on behalf of the tribe? This may result in uneven compensation among the indigenous nation spread across multiple states. In the case of the San people and the South African government with whom a benefit-sharing agreement was entered for compensation due to the exploitation of P57 contained in the hoodia plant, the agreement excluded direct benefits to states of Botswana and Namibia both of which reportedly have substantial San populations and access to the hoodia plant (Ostergard et al. 326).

The last of the trio-rivalry is the intra-state rivalry. There could be intra-state rivalry where questions of authorship in indigenous knowledge arise, especially where the Intellectual Protection Law does not expressly provide for it. Should the state or tribe at issue stand as author, and that aside, would

there not be a clash of interest between the tribe and the state? Consequent upon the foregoing, doing away with the concept of group authorship and sticking to the romantic concept of authorship, which supports individuality may suffice. More so, considering the fact that sustaining intellectual property protection for community interests may eternally exclude aspects of indigenous knowledge from the public domain since a community or group scarcely dies like an individual.

However, the romantic view on authorship is problematic as well. To say the least, disregarding indigenous ownership of properties and knowledge is an outright blow to age-old cultural values and long-standing possessions of indigenous peoples. In view of this, international bodies around the 20th Century began seeking ways to ascribe a sense of authorship or ownership to indigenous groups (Barclay 44–45; Weatherall 219–20). Thus, this facilitated the gathering of a global momentum towards a broader conception of authorship beyond the strictures of the individuality concept of romantic authorship. Yet it is still not resolved if some aspects of indigenous knowledge will pass the test of ingenuity and innovation for which authorship or intellectual ownership should be conferred on the custodians of such knowledge.

3. Views of Cultural Orthodoxy versus Cultural Pluralism

Cultural orthodoxists are firmly of the view that culture needs to be protected from various forms of appropriation. Alternatively, they are referred to as cultural protectionists (Sunder, "Intellectual" 86–90). They believe that culture can die, or be appropriated or distorted, hence the need to shield it from any means of appropriation whatsoever even if this means using the Western model of intellectual property. Cultural pluralists, by contrast, are those who believe in the dynamism and progressiveness of culture: hence, they support cultural appropriation,[18] knowing that it is one means to sustain cultural survival (Sunder, "Intellectual" 94).

Cultural protectionists or orthodoxists are easily inclined towards supporting a western intellectual property model for protecting indigenous knowledge so as to save the long-standing cultural heritage rather than allow

18. The concept of cultural appropriation is one that allows for the changing values of cultural heritage.

room for appropriation of any sort.[19] To them, culture is that which has always been and nothing more. We rather protect it from appropriation or lose it for something else.

For cultural pluralists, however, it is better to allow for divergent views or autonomy and various forms of appropriation in the "cultural survival" debate in order to maintain, reinforce, or redefine the status quo. This will in turn strengthen culture and bring it in tune with modern realities. Hence, to allow intellectual property rights control over culture will be injurious to such autonomy, thereby hampering the free flowing course and revolution of culture (Sunder, "Property" 9).

Consequently, scholars and stakeholders in the orthodox group canvass for the protection of indigenous knowledge either through a customary law model, a *sui generis* system, or an intellectual property model. Any known means of protection for culture will suffice. Of course, within this underlying perspective, there are variants in terms of what should be the appropriate mode of protection. However, there seems to be a consensus as to the fact that indigenous knowledge needs some kind of preservation to save its age-long and generational value.

Also, the orthodox view often frowns at the fair use exception. Fair use is a defence to copyright infringement that permits the unauthorized use of works upon which copyright subsists. Due to the high level of psychological and cultural attachment to indigenous knowledge, those whose perceptions are shaped by the orthodox view may prefer a high degree of protection for their knowledge especially those held sacredly and in secrecy like rituals. Discussing the issue of parodying sacred images and rituals, Christine Farley notes instructively:

> But what of the harder cases where sacred images are used for the purposes of critiquing or even parodying the religion or the clan rituals? In these cases where the purpose is legitimate criticism, the presumption may be different. For example, if an artist of Native American descent, but not a member of the traditional community, makes use of her tribe's designs

19. See Hall, Stuart. "Cultural Identity and Diaspora." *Identity: Community, Culture, Difference*, edited by J. Rutherford Jonathan, Lawrence & Wishart, 1990, pp. 222–37; Sarat, Austin, and Thomas Kearns, editors. *Law in the Domains of Culture*. 3rd ed., U of Michigan P, 1998; Sunder. "Intellectual Property." pp. 80–86.

> to comment on how her identity as a Native American makes her feel, the use looks more fair [*sic*]. It will, however, be just as troublesome to the traditional community if the designs she incorporates are sacred and she reveals them to an outside audience. This use may not be found to be fair. (37)

Those in the pluralist camp usually either opt for a more liberal and unique approach different from intellectual property or canvass for a no-protection system so as to enable free utilization of cultural knowledge. Capturing this notion from a public domain angle, Stephen Munzer and Kal Raustiala defined public domain as a "normative status that confers a presumptive liberty-right and power to appropriate information that relates to existing inventions, works of art and literature, and all forms of TK [traditional knowledge]" (53). As for the fair use exception discussed above, those in support of it appear to share the liberalism of the pluralist camp. The fair-use exception in copyright law is akin to a form of misappropriation that the pluralists support. Opinions such as those of Brown can be gleaned in this light. While faulting the need to protect indigenous knowledge based on the fair use exception, Brown noted, "I am free to quote limited sections of copyrighted works because of the fair-use doctrine, which holds that copyright is not absolute—nor can it be in a society that values creativity" (196).

Truth be told, both perspectives have their strengths and challenges and the perspective one takes depends on the side of the divide that one chooses to align oneself with. The native fathers of a typical African society will most likely hold on to the rather orthodox view and canvass reasons why we need to stick to long-standing heritage rather than allow it to pass through the subtle lens of Westernization. Besides, who decides the standards of dynamism or appropriation that the cultural pluralists support if not the pervasive influence of Westernization? Yet in a feat of contrast, some cultural protectionists opt for a Western model of intellectual property, which is largely a product of Western influence, just to protect his/her cultural values.

The pluralists, on the other hand, often argue in favour of the need to give culture full rein to express itself and emerge with a touch of modernity. Besides, more people in the long-run tend to benefit from such cultural heritage and body of knowledge, especially through the fair use exception. Hence, they either canvass for pluralistic and liberal approaches somewhat different from the Western notion of intellectual property as appropriate

protection mechanisms, or they canvass for a no-protection system.[20] However, the negative side to this is that the liberality of cultural misappropriation may result in more confusion and a greater degree of destabilization of and uncertainty in cultural values or knowledge than it can redefine or re-establish.

4. Vermeylen's Legalistic and Anthropological Approaches

Vermeylen has presented the discourse on indigenous knowledge and intellectual property along two views—legalistic and anthropological (Vermeylen 7). The legalistic approach is one "which takes the existing intellectual property rights framework as a starting point and examines to what extent the current system can be used to protect traditional knowledge" (7). It further considers the legal status of traditional knowledge (6). Should traditional knowledge be termed protectable in the light of what kind(s) of knowledge is (are) suitable for protection? Hence, in treating with first importance the suitability of existing intellectual property rights as a protective scheme for indigenous knowledge, the legalistic approach probes further into the epistemological discourse of knowledge in order to properly contextualize the knowledge systems of indigenous people.

Knowledge has been referred to as:

> [T]he sum of what has been perceived, either through a theoretical data base or through practical experience, which leads to an in-depth understanding of the issue at hand. [It] has always been a coveted possession, beginning in the Old Stone Age when mankind evolved. However, the impact of technology and its importance was highlighted during and after World War II. This resulted in the realization that certain types of knowledge require protection for the benefit of the greater good, thus leading to rights over such knowledge. (Ragavan 1)

But if such knowledge must benefit from protection, it must have a sense of novelty and originality. In other words, it must not have been domesticated in the public domain. This is the undertone for the requirements of originality, novelty, and innovation in most intellectual property regimes around the world. Hence, critics of traditional knowledge, from the legalistic perspective,

20. See Brown.

have questioned if it can fit into the features of protectable knowledge given above.

Furthermore, views that find a problem with granting property rights to indigenous knowledge can be said to be moulded by the legalistic perspective. With respect to intangible property connected to indigenous knowledge, James Boyle stated that, "originality [is] the watchword of artistry and the warrant for property rights" (54), whereas indigenous knowledge is basically not about originality but about handing down of cultural values in the same unfettered pattern across generations (Conway 207). However, some scholars who do not necessarily fault the legal approach in its entirety also posit that a variation of the term, "property" can include indigenous knowledge especially when other factors, such as market forces and commercialization, are considered in determining what "property" is.[21]

The anthropological approach probes the traditional knowledge debate from a cultural context so as to formulate a possible solution. It is founded on the notion that knowledge and culture are inseparable. In the words of Chidi Oguamanam, they are "two elusive but fused phenomena" (32). In fact, "knowledge thrives in the agency of culture and vice versa" (32). This means the definitions and meanings ascribable to aspects of knowledge are undeniably influenced by the cultural views of those who frame them. Hence, for the anthropological approach, it is believed that demystifying the debate around traditional knowledge protection will only suffice when field research into indigenous communities is conducted (Vermeylen 7). Silke Von Lewinski (2004) opines that a purely legal approach that does not cover the topic from an indigenous point of view can hardly do justice to the complexities at stake.[22] Consequently, views on the debate over indigenous knowledge protection, which are shaped by anthropological perspectives, are usually in support of protecting such knowledge even if it has to make do with the Western canons of intellectual property.

What of the public domain dimension to the indigenous knowledge debate? It would appear that varying constructions on this issue have their root in either of these perspectives. For the legalistic approach, which prioritizes an intellectual property paradigm as a probing lens, "something is regarded as in the public

21. See Singer's *The Edges of the Field Lessons* and *Entitlement.*
22. See Von Lewinski, Silke. *Indigenous Heritage and Intellectual Property Genetic Resources, Traditional Knowledge and Folklore*. Kluwer Law International, 2004.

domain if it is not protected by intellectual property, either because it does not meet the criteria for protection or, in the case of rights of finite duration, those rights have expired" (Frankel 35), whereas for the anthropological perspective, which embraces culture, the public domain is a "normative status that confers a presumptive liberty-right and power to appropriate information that relates to existing inventions, works of art and literature, and all forms of TK [traditional knowledge]" (Munzer and Raustiala 53).

The twofold classification of legal and anthropological approaches is commendable. Nevertheless, it is my view that the dichotomy does not necessarily reflect all of the opinions based on the literature, and Vermelyn, in a sense, admits this in her work. Of course, anthropological quests and analyses do have a lot to do with cultural inclinations, but so do the legal inquests into the subject. While most legal scholars working from within the legal literature do approach the discourse with much of their thinking drawn from legal conceptions, they also go beyond the bounds of law and the intellectual property models for protection in seeking a solution to the long-standing debate.[23] Hence, to consider the twofold perspectives as being exhaustive and independent of each other may yield unsatisfactory consequences. After all, scholars and several view holders on the subject employ a wide range of means in their wherewithal—ranging from politics, social and economic philosophy, and jurisprudence; to culture, law, human rights, "practical triggers" (Oguamanam 31), and other schools of thoughts—in seeking the most appropriate pathway to a sustainable solution.[24]

23. For instance, Vermeylen notes that Von Lewinski, a legal scholar, admitted that a pure legal perspective would do not much good without considering the issue from an indigenous point of view (7).

24. Paterson and Karjala discuss some non-IPR approaches to protecting traditional knowledge which includes principles of contract and tort laws, civil law, cultural heritage rights in domestic law, and other legal cum socio-economic theories. See Paterson, Robert, and Dennis Karjala. "Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples." *Cardozo Journal of International and Comparative Law*, vol. 11, 2003, pp. 633–70; Molley Torsen opines that "a workable model law for TCEs [Traditional Cultural Expressions] should be flexible enough to accommodate different value systems, but specific enough to offer genuine protection" (195).

5. Optimism of the Modern Era

The pervading influence of globalization in modern times has played out in the debate on protecting indigenous knowledge through intellectual property paradigms. Up until the earliest 20th century, the concern and worth given to indigenous knowledge was not so much of an appreciable story to write about. There were various accounts of exploitation, misuse and outright disregard for indigenous culture especially by the imperial lords (Ostergard et al. 312–16). Even the international community was slow towards acting in the interest of indigenous peoples.

However, the impact of globalization and international institutions led the emergence of a more concerned world where the interests of indigenous people became a front burner issue. It is not that solutions towards protecting their body of knowledge have hit a considerable level of unanimity; rather, more voices shaped by a triumphant modern world that tries to accommodate the yearnings and aspirations of various interest groups, including indigenous people, have emerged in favour of indigenous interests. The plethora of international instruments and paradigms that canvass indigenous interests, some of which have been pointed out here, is testimony to this fact. For one, the emergence of a core human rights movement towards the second half of the 20th century is quintessential. Scholars have written extensively in support or critique of indigenous interests from a human right perspective.[25] Stakeholders in indigenous interests have sought to protect their knowledge and heritage on the basis of such rights as the right to self-determination, the right to land, the right to intellectual and cultural property, the right to benefit from the use of indigenous knowledge, and the right to participate in national matters concerning indigenous people, to mention but a few (Leskien and Flitner 40).

In addition, opinions have emerged towards evolving a plural and unique system of protection for indigenous interests where existing intellectual property laws are insufficient (Torsen 196). These are the yielded fruits of the modern age in which we find ourselves. Paradigms to accommodate legitimate interests are often sought, even if existing frames were not originally intended

25. See Yu, Peter. "Ten Common Questions about Intellectual Property and Human Rights." *Georgia State University Law Review*, vol. 23, no. 4, 2007, pp. 709–54; Haugen, Morten. "Traditional Knowledge and Human Rights." *The Journal of World Intellectual Property*, vol. 8, no. 5, 2006, pp. 663–77; Riley. "Recovering Collectivity."

for them. Borrowing a leaf from Huff, this globalized era presents "major and unavoidable consequences for all nations around the world" (440). Yet, there are still voices that do not share the optimistic views shaped by the modern era, although, in the long-run, they would appear to inadvertently publicize the cause of indigenous people even in criticism.

Ⅳ. Conclusion

This paper has attempted to consider the underlying frameworks upon which various views in the debate on intellectual property and indigenous knowledge protection have been canvassed. These frameworks are inter-related and have an ineluctable presence in major discussions on protecting indigenous knowledge. The "individual" notion ascribed to the concept of property is not far-fetched from the romantic idea of authorship. However, this may not favour the quest of indigenous people who would rather support the notion of communal ownership and control. Speaking of indigenous people and their interests, international discourse on the subject reveals that cultural orthodoxy will suffice rather than the liberal approach of cultural pluralists. Vermeylen's twofold approaches afford possible options for indigenous people albeit scholars whose views are largely shaped by legal paradigms would easily opt for the legalistic approach whilst those who appreciate the deep cultural systems of indigenous people can make a strong case from the anthropological stance.

Instructively, it does appear that the optimism of the modern era which we have found ourselves has a sweeping effect on scholars and various stakeholders. On the international front, support towards providing succor for indigenous peoples has been vociferous. In 2014, WIPO came up with draft documents for the protection of "Traditional Knowledge" and "Traditional Cultural Expressions." Also, in the same year, there was an indigenous knowledge forum which was mainly geared towards addressing indigenous concerns in Australia and India. A year earlier in 2013, South Africa amended their laws to reflect indigenous people's interests. Specifically, the law granted them a wider sense of ownership of aspects of their knowledge and innovations. There are also several other countries that have special legislations for protecting indigenous knowledge. Panama and Peru enacted *sui generis* legislations in 2000 and 2002 respectively, affording respite for their indigenous populations. Other

countries like Venezuela, India, China, Brazil, and Costa Rica, to mention a few also have specific and revised provisions in their laws intended to give their indigenous populations the benefit of enjoying a sense of ownership of their body of knowledge (De Obaldia 349). More countries are likely to follow this trend.

However, the challenge remains that not much has been recorded on the benefits derived from these laws by the indigenous peoples. For example, with regards to patenting traditional plants, Nihaya Khalaf records that in "the last few years, there has been a dramatic increase in the number of plant patents, inclusive of conventional breeding processes and conventionally bred plants" (222). Notably, among stakeholders in support of protecting indigenous knowledge, there are variants on whether an intellectual property regime would suffice. The possibility of overcoming this challenge, to a large extent, depends on how various stakeholders, especially those involved in implementing or influencing the implementation of intellectual property laws, can adjust their perspectives towards favouring indigenous interests. For instance, extreme cultural pluralists would prefer to criticize or remain passive when it comes to protecting or favouring indigenous knowledge with intellectual property canons. So would anyone whose perception is founded on the individual concept of authorship. Obviously, the cultural orthodoxists would differ in favour of indigenous interests. We may therefore not be far-fetched from being caged in a continuum of rhetorical puzzles framed by these divergent views.

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Abstract

Protecting the age-old culture and body of knowledge of indigenous people has become a topical issue. Three options are usually canvassed for such—a typical western intellectual model, a typical customary law model and a *sui generis* model. More often than not, these options still mirror intellectual property paradigms and the reason is not far-fetched. Intellectual property generally has to do with property rights, innovation and ownership. Hence, indigenous people's claim to ownership of their knowledge and innovations are usually associated with the canons of intellectual property. However, several views and arguments abound on the practicability of protecting indigenous knowledge with intellectual property principles. The literature addresses themes such as catering for the spiritual elements of indigenous knowledge, originality requirement, public domain concerns, among others. Instructively, little or nothing has been done on analyzing the philosophical undertone behind these arguments. By way of contributing to knowledge, this paper presents five underlying perspectives that frame divergent views in the debate on protecting indigenous knowledge—subjective descriptions of property, views on authorship, views of cultural orthodoxy versus cultural pluralism, Vermeylen's legalistic and anthropological approaches and optimism of the modern era. Like a matrix, set of theoretical principles and founding philosophies of thoughts, these inter-related perspectives directly and inadvertently shape various articulations, propositions and deliberations on the subject. This paper engages this discourse outlining precisely what these underlying perspectives are, whilst also noting their relative strength and flaws. It is expected that this will present future researchers with a clear philosophical categorization of arguments in the debate on indigenous knowledge protection.

Keywords: culture, traditional knowledge, perspectives, property rights, ownership and authorship

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