

PANEL II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources

Facilitator: Hugh C. Hansen *

Panelists: Michael Blakeney **
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MS. FEINSILVER: Good afternoon. My name is Amy Feinsilver, External Affairs Editor of the *Fordham Intellectual Property, Media & Entertainment Law Journal*. On behalf of the entire *Journal*, welcome to our second panel discussion. I would like to extend my gratitude to the guests and panelists for coming to our Symposium today. We are delighted to have such a distinguished group, and I look forward to an interesting discussion. Professor Hugh Hansen is the Facilitator for the second panel. He is a Professor of Law at Fordham University School of Law, where he has been teaching since 1978. For the past nine years, Professor Hansen has hosted an annual conference on the state of international intellectual property law and policy here at Fordham in the spring. The *Journal* is grateful for Professor Hansen's guidance.

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PROFESSOR HANSEN: Thank you very much.

By the way, I was only six when I started teaching in 1978.

I am happy to be asked to be part of this. I think the *IPLJ* has done a wonderful job, especially Margaret and Amy. I am very pleased to be here. So far it has, I think, been a smashing success. The morning session certainly was very interesting, very lively.

We are going to discuss two issues: a cultural one, which is loosely referred to as “folklore;”¹ and a scientific one, which is referred to as “traditional knowledge and genetic resources,”² traditional knowledge being those remedies which indigenous people usually have developed over time. We will discuss whether these remedies are then exploited, genetic resources; just that community’s resources that are used by others and are not necessarily tied to any known cures within that particular community.

Conversely, in the morning session, we suggested that the people in the governments of developing countries and least-developed countries probably agree in their view of what should be done in this area. Perhaps the governments and the indigenous people might actually be at odds about what should be done, both as to where the money should go and also as to particular remedies. I expect that some governments will be alarmed if they view the fight for

¹ “Folklore” has been defined as traditional and popular culture and is “the totality of tradition-based creations of a community, expressed by a group or individuals and recognized as reflecting the experiences of a community in so far as they reflect its cultural and social identity; its standards and values are transmitted orally, by imitation or by other means. Its forms are, among others, language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts.” Recommendation on Safeguarding of Traditional Culture and Folklore adopted by the United Nations Educational, Scientific and Cultural Organization General Conference at its Twenty-Fifth Session (Paris, 15 Nov. 1989), available at http://www.unesco.org/culture/laws/paris/html_eng/page1.shtml.

² “Traditional knowledge” is one of several terms to describe the same subject matter. The term refers to “tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields.” Intellectual Property Needs and Expectations of Traditional Knowledge Holders (Apr. 2001) (WIPO Report on Fact-Finding Missions) [hereinafter *WIPO Report on Fact-Finding Missions*], available at <http://www.wipo.int/globalissues/tk/report/final/pdf/part1.pdf#>.

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traditional knowledge protection as kindling views of self-determination, human rights, or other types of empowerment.

With regard to these areas, there are always possibilities that traditional intellectual property (hereinafter “IP”) may afford some sort of protection, whether through copyright, trade secrets, trademarks, or patents.³ We do not have time to discuss this possibility, although Coenraad Visser in his paper does explore it to some degree.⁴ We are going to assume, for the purposes of this discussion, that traditional IP will not work, and even if theoretically it could, there is probably not a legal infrastructure that would allow vindication of those rights. But that is another issue. We will assume no available IP protection.

Therefore, the question is this: What should you protect and how should you protect it? There are various forms of providing protection: *sui generis* legislation,⁵ for instance; broadening traditional IP; certainly, in the area of genetic resources and traditional knowledge, developing well-constructed contracts that would grant access to tribal areas and knowledge on condition of sharing in the revenue resulting from that access. Maybe human rights law is an alternative. While human rights are normally viewed as protecting individuals, maybe a collective form of rights could be developed.

So there are various alternatives that can be addressed. By the end of this session, maybe we can assess the pros and cons for at least some of these.

We have a very good group of speakers. The biographies are in your papers. We will start off with Michael Blakeney from Queen Mary College, University of London, who is the head of the intellectual property unit in that college. He will be discussing the cultural side and folklore.

³ See generally Frank J. Penna & Coenraad J. Visser, *Cultural Industries and Intellectual Property Rights* (2001) (chapter in the Trade Handbook published by the World Bank for LDC representatives to the World Trade Organization).

⁴ See *id.*

⁵ *Sui generis* is defined as “of its own kind,” or legislation outside the scope of traditional legal protections. BARRON’S LAW DICTIONARY 495 (4th ed. 1996).

PROFESSOR BLAKENEY: Thanks very much, Hugh, and I thank Fordham for inviting me to be here to speak to you this afternoon.

My presentation is on the subject of folklore. Actually, a paper that I am recycling, one that I presented at the World Intellectual Property Organization, deals with the evolution of the definition of the phrase “traditional knowledge” and the relationship between folklore and traditional knowledge.⁶ I will make one or two comments about that before referring to some examples.

The first time folklore was discussed internationally was at a joint conference organized by WIPO and UNESCO to promulgate a model law on folklore.⁷ Representatives at that meeting objected to the use of the word “folklore,” saying that folklore was an archaism with the negative connotation of being associated with the creations of lower or superseded civilizations, so some developing country people do not like the word “folklore.” Nevertheless, that word was used by WIPO and today by Fordham.

⁶ See Michael Blakeney, *Intellectual Property in the Dreamtime—Protecting the Cultural Creativity of Indigenous Peoples*, Oxford Intellectual Property Research Centre, Research Seminar, Nov. 9, 1999, available at <http://www.oiprc.ox.ac.uk/EJWP1199.html>.

⁷ See Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (Second Session, Geneva, Dec. 10-14, 2001) (WIPO Preliminary Report on National Experiences with the Legal Protection of Expressions of Folklore), available at http://www.wipo.org/news/en/index.html?wipo_content_frame=/news/en/conferences.html. General listings of international UNESCO/WIPO forums and symposia on protecting traditional knowledge and folklore are accessible online at <http://www.unesco.org/culture/copyright/index.shtml>.

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In 1996 there was another meeting organized by WIPO where the term “folklore” was again criticized by a number of the representatives.⁸ The African representative, for example, was critical of the way in which the Western conception of folklore focused on the copyright cultural side of things, noting that, under the Ghanaian Copyright Law of 1985, folklore included scientific knowledge.⁹ So some countries conceive of folklore as embracing what we now call “traditional knowledge.”¹⁰

The Australian representatives at that meeting, the Aboriginal representatives, criticized folklore as being too narrowly defined and implying an inferiority of the cultural and intellectual property of indigenous peoples to the dominant culture.¹¹ So in Australia we do not use the word “folklore.”

Moving on to the conception of intellectual property as it applies in this area, developing country people, particularly indigenous peoples, say that—

PROFESSOR HANSEN: Michael, what word do you use?

PROFESSOR BLAKENEY: “Traditional knowledge.”

PROFESSOR HANSEN: For everything?

PROFESSOR BLAKENEY: Yes, or “cultural expression of indigenous peoples,” as a phrase.

⁸ See Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (Geneva, Dec. 2-20, 1996), available at http://wipo.int/news/en/index.html?wipo_content_frame=/news/en/conferences.html.

⁹ See generally *id.*; Ghanaian legislation defines folklore as “all literary, artistic and scientific work belonging to the cultural heritage of Ghana which were created, preserved and developed by ethnic communities of Ghana or by unidentified Ghanaian authors, and any such works designated under this Law to be works of Ghanaian folklore.” Paul Kuruk, *Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States*, 48 AM. U. L. REV. 769, 778 (1999) (quoting Copyright Law (Ghana) 53 (Mar. 21, 1985)).

¹⁰ See *WIPO Report on Fact-Finding Missions*, *supra* note 2.

¹¹ See generally Diplomatic Conference on Certain Copyright and Neighboring Rights Questions (Geneva, Dec. 2-20, 1996), available at http://wipo.int/news/en/index.html?wipo_content_frame=/news/en/conferences.html.

So there is a criticism of the application of intellectual property to this area as also somewhat Eurocentric.¹² The proprietization of traditional knowledge implies rights such as authorship, ownership, alienation, and exploitation,¹³ and the intellectual property paradigm is based upon incentivization.¹⁴

Now, what I thought I would do with you is go through some examples from Australia, particularly from Western Australia where I am from, illustrating the inadequacies of the intellectual property concepts as they apply to this area of cultural expression. I have some examples here that were generated by some case litigation.

[Slide] A couple of years ago in Western Australia, the aboriginal people of the Kimberley Region complained about the unauthorized reproduction of the so-called "Wandjina image."¹⁵

[Slide] Here is a Wandjina image. It is that head up there.

[Slide] I have another one for you that possibly will come out better than that. There you are. Those are Wandjina images.

Now, those paintings are about 86,000 years old and the paintings were done by the Wandjina themselves, so the Kimberley Aborigines believe.¹⁶

You will note their eyes and their nose and their mouth. According to the Aboriginal beliefs of the Kimberley Region, should the mouth appear, there will be natural cataclysms in their region.¹⁷

A couple of years ago, a surfboard manufacturer in Perth wanted to put the Wandjina image on the fin of the surfboard and improve the image by adding a mouth.¹⁸ This was offensive to the Kimberley Aborigines and they wanted to know what sort of action they could

¹² See generally Michael Blakeney, *Milpurrurru and Ors v. Indofurn Pty. Ltd. and Ors—Protecting Expressions of Aboriginal Folklore under Copyright Law*, 2 E LAW - MURDOCH UNIV. ELECTRONIC J.L. 1 (1995), available at <http://www.murdoch.edu.au/elaw/issues/v2n1/blakeney21.html>.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See Blakeney, *supra* note 6 (discussing Wandjina image).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

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bring to prevent that.¹⁹ There are numerous intellectual property problems with that:

- First, authorship—86,000 years ago, who can identify who the authors were? Maybe the Wandjina. They might have a *locus standi* problem.²⁰
- Second, duration of the intellectual property right—it is out of copyright protection.²¹
- Finally, who can bring the action on behalf of those people?

Now, in the year this was done by the surfboard manufacturer, there were massive cyclones up the West Australian coast, and a town that was actually built by the Americans, called Exmouth, was blown into the sea.²² This provided the solution and an out-of-court settlement followed.²³

Moving on to the next concept—I was just exploring the concept of authorship—we have the concept of ownership.

[Slide] I just want to show you a painting and a carpet. On the left is a carpet and on the right is a painting.

Now, an obvious copyright infringement has occurred there. This painting, which hangs in the National Gallery of Australia, was actually put on carpets by a Vietnamese carpet manufacturer and those carpets were sold in Western Australia.²⁴

Now, for the Aboriginal people this is a demeaning use of their cultural creation. It is placed on a carpet; people walk on carpets. All indigenous artwork, almost without exception, is concerned with

¹⁹ *Id.*

²⁰ *Locus standi* is “the right to bring an action or to be heard in a given forum; standing.” BLACK’S LAW DICTIONARY 391 (pocket ed. 1996).

²¹ The Australian Copyright Act 1968, Part III, Division 1, 33, states that:

[Subject to § 33.2], copyright subsists in a literary, dramatic or musical work, or in an artistic work other than a photograph, that copyright continues to subsist until the expiration of 50 years after the expiration of the calendar year in which the author of the work died.

Id., available at [http://clea.wipo.int/pbin/pext.dll?f=file\[ibrowse-j.htm\]](http://clea.wipo.int/pbin/pext.dll?f=file[ibrowse-j.htm]).

²² See Blakeney, *supra* note 6.

²³ *Id.*

²⁴ See *Milpurruru & Ors v. Indofurn Pty. Ltd. & Ors.* (1994) 54 F.C.R. 240 (Austl.).

the legends of the creation of the indigenous people, so this is semi-sacred for them.²⁵

The action that was brought here was brought by the next of kin of the artists for the cultural harm that had been suffered by the tribe as a consequence of this activity.²⁶ So the next of kin, members of the clan that collectively owned the legend, were bringing the action. The court said they had no action; the action was by the artist and the people inheriting, if you will, directly from the artist, so there was no open intellectual property action.²⁷

A third case that I want to refer you to concerns alienation.²⁸ I do not have an exhibit for this. The case is called *Yumbulul v. Reserve Bank of Australia*, and it concerns some bank notes that were produced in Australia in 1988 to celebrate—and I use that term loosely—the settlement of Australia by the white man.²⁹ To mark that celebration they decided to reproduce some Aboriginal artifacts on the bank note. One of those artifacts was a thing called “Dreaming Star Pole,” which is a depiction of the Aboriginal legend of where one’s soul goes when one dies.³⁰ The soul is carried off to

²⁵ See *id.* ¶¶ 10-21.

²⁶ *Id.*

²⁷ The *Milpururru* court stated that:

The statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of the dreaming stories and the imagery such as that used in the artworks of the present applicants. . . . Whilst the Copyright Act only recognizes the rights of the copyright owner, in a practical way it appears that there may be scope, even in the case of the estates administered by the Public Trustee, for the distribution of the proceeds of the action to those traditional owners who have legitimate entitlements according to Aboriginal law to share compensation paid by someone who has without permission reproduced the artwork of an Aboriginal artist.

Id. at 127-29.

²⁸ Alienation, in this context, refers to “a conveyance or transfer of property to another.” BLACK’S LAW DICTIONARY 26 (pocket ed. 1996).

²⁹ *Yumbulul v. Reserve Bank of Australia*, (1991) 21 I.P.R. 481 (Austl.). Mr. Yumbulul brought an infringement action against the Bank and the Aboriginal Artists Agency contending that he was induced to sign the licensing agreement by misleading or deceptive conduct on the part of the Agency. The action against the Bank was settled. The application against the Agency was dismissed. The court dismissed the application on its determination that the license agreement Mr. Yumbulul signed had with the Agency was valid at the time the sub-license agreement was entered into with the bank. *Id.*

³⁰ For a more detailed description of the Morning Star ceremony’s significance, see *id.* at 4.

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the Dreaming Star.³¹ The Dreaming Star Pole is like what I am holding here, except it has a circlet of lorikeet feathers to indicate the dreaming star.

The Aboriginal artist, a chap called Terry Yumbulul, assigned copyright in the Dreaming Star Pole to an agent, and it found its way to the bank note-issuing department of the Reserve Bank of Australia.³² Terry Yumbulul, to become the artist, had to go through various initiatory rights, and he inherited the right to be an artist through his mother and, as I say, went through initiation.³³ The image of a Dreaming Star Pole is sacred.³⁴

So the tribe brought an action against the Reserve Bank of Australia to prevent the distribution of the bank notes.³⁵ The court said copyright had been successfully alienated, assigned by the artist, and that was the end of the matter.³⁶

The tribe said, "But what about our rights as owners of the legend?"³⁷ The court said, "Well, you have no rights under current intellectual property law."³⁸

Moving on to the issue of incentivization, one of the things that the Aboriginal people are concerned about is the demeaning use of their legends.³⁹ I will just skip over some examples and I will just show you these exhibits here.

[Slide] Although the quality of the image is poor, there is a motorcar with Aboriginal designs on it. Pictured are also an airplane, wine, T-shirt, settee, and wine labels. Now, this is quite common in Australia.⁴⁰ Given the sacred significance of Aboriginal

³¹ *See id.*

³² *See id.* ¶¶ 11-15.

³³ *See id.* ¶ 3.

³⁴ *Id.*

³⁵ *Yumbulul v. Reserve Bank of Australia*, (1991) 21 I.P.R. 481 (Austl.).

³⁶ *See id.*

³⁷ *See id.*

³⁸ *See id.* ¶ 21.

³⁹ *See supra* note 18.

⁴⁰ *See generally* Michael Blakeney, *Milpurrurru & Ors v. Indofurn Pty Ltd & Ors—Protecting Expressions of Aboriginal Folklore Under Copyright Law*, 2 E LAW - MURDOCH UNIV. ELECTRONIC J.L. 2 (Mar. 17, 1995) (noting that a matter of increasing concern to

imagery, all of this is culturally offensive to the Aboriginal people, as well as to their sacred rites.

So the sort of incentive paradigm that we have with intellectual property may not work for indigenous peoples. I do not have time to show all my examples, but I might show some others later. I will just move on to ask: What are indigenous peoples doing about this and how does that fit into the international scene?

One thing that indigenous peoples are doing is taking in hand the promulgation of their own intellectual property rights, or agitation for the protection of their own intellectual property rights.⁴¹

The major initiatives occurred, first of all, in 1992 during the UN International Year for World's Indigenous Peoples.⁴² Various groupings of indigenous peoples had meetings. The most significant of all these meetings was that of the Mataatua. The people in Mataatua are the nine tribes of New Zealand.⁴³ They promulgated the Mataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples.⁴⁴ This Mataatua Declaration has been borrowed by every subsequent group, and there are now about thirty of these indigenous people's promulgation declarations.⁴⁵ Basically, indigenous peoples want to define their own intellectual and cultural

Aboriginal peoples has been the utilization of reproductions of traditional Aboriginal designs as a means "of decorating a host of mundane products" developed primarily for tourists), available at <http://www.murdoch.edu.au/elaw/issues/v2n1/blakeney.txt>.

⁴¹ See, e.g., *Yumbulul*, (1991) 21 I.P.R. 481 (Austl.); *Milpururru v. Indofurn Pty. Ltd.* (1994) 54 F.C.R. 240 (Austl.).

⁴² General Assembly Resolution 45/164 of December 18, 1990, proclaimed 1993 the International Year of the World's Indigenous People. The objective of the Year was to strengthen international cooperation for the solutions of problems faced by indigenous peoples in such areas as human rights, the environment, development, education, and health. See United Nations Development Programme, IPs and UNDP, available at <http://www.undp.org/csopp/CSO/NewFiles/pundp.html>.

⁴³ The Nine Tribes of Mataatua in the Bay of Plenty region of Aotearoa New Zealand convened the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples from June 12-18, 1993. See United Nations Development Programme, The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, available at <http://users.org.ox.ac.uk/~wgtrr/mataatua.htm> (last visited Feb. 1, 2002).

⁴⁴ *Id.*

⁴⁵ See Blakeney, *supra* note 6 (discussing Mataatua Declaration).

property and the way in which that intellectual and cultural property is to be exploited.

One other declaration I thought I would refer to, since I am in North America, was one that was promulgated by the Coordinating Body of the Indigenous Peoples of the Amazon Basin, the so-called COICA meeting, which was held in Bolivia in 1994.⁴⁶ I will just read this to you. The declaration reiterates most of what the Mataatua Declaration contains: "All aspects of the issue of intellectual property, determination of access to natural resources, control of the knowledge or cultural heritage of peoples, control of the use of their resources and regulation of the terms of exploitation are aspects of self-determination."⁴⁷

Therein, as the Chair mentioned, lies a political problem for indigenous peoples in countries other than, say, Australia and the United States, because once you start talking self-determination, then you have a very real political obstacle to the recognition of the intellectual property rights of indigenous peoples. Now, although we are going to hear a bit about the international initiatives represented from WIPO and the United States, one other international perspective that should be mentioned in this context is the World Trade Organization, the TRIPS Agreement.⁴⁸

⁴⁶ The indigenous organization, Coordinadora de las Organizaciones de la Cuenca Amazonica (COICA), organized the first regional consultation with indigenous peoples' organizations in September of 1994 in Santa Cruz de la Sierra, Bolivia. This conference marked the first of a series of consultations with indigenous organizations on Support to the Preservation of Indigenous Peoples' Knowledge and the Protection of Indigenous Intellectual Property. See United Nations Development Programme, IPs and UNDP, available at <http://www.undp.org/csopp/CSO/NewFiles/pundp.html>

⁴⁷ See Intellectual Property Rights and Biodiversity, The COICA Statement (Sept. 30, 1994), available at <http://users.ox.ac.uk/~wgtrr/coica.htm>.

⁴⁸ The World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property rights is also known as TRIPS. The agreement appeared as Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco on April 15, 1994. TRIPS is an attempt to "narrow the gaps in the way these rights are protected around the world, and to bring them under common international rules." The following areas are covered by TRIPS: copyright, trademarks, geographical indications, industrial designs, patents, layout-designs of integrated circuits, and undisclosed information like trade secrets. See Agreement on Trade Related Aspects of Intellectual Property, Apr. 15, 1994, available at http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm6_e.htm [hereinafter *TRIPS*].

Article 27.3(b) of TRIPS deals, among other things, with protection of plant varieties, and possibly with access to genetic resources.⁴⁹ Groupings of indigenous peoples have been suggesting that somehow Article 27.3(b) can be amended or revised to import into the TRIPS Agreement protection of traditional knowledge, which would embrace some of the matters to which I refer.⁵⁰

Now, as I have indicated, traditional intellectual property does not easily work with the concerns of indigenous peoples.

One of the most difficult aspects—and I will conclude with this—for us, coming from a Western intellectual tradition, is the suggestion by indigenous peoples that they have a monopoly in their style.⁵¹ So in the case of Aboriginal art, the Aborigines say that the pointillist style they use is theirs and the use by anybody else of this style is an appropriation of their intellectual property.⁵² Our culture develops from the exploitation of previous cultural myths.

So James Joyce, writing about Bloom's activities in Dublin,⁵³ is borrowing from Homer, and that is permissible borrowing in our culture. Indigenous peoples, particularly the Aboriginal people, are not so comfortable with that sort of borrowing. So these concepts are alien for us, but they have to be fitted within the Western intellectual property tradition.

Thank you.

⁴⁹ See *TRIPS*, art. 27.3(b).

⁵⁰ See, e.g., Intellectual Property Rights and Biodiversity, The COICA Statement (Sept. 30, 1994), available at <http://users.ox.ac.uk/~wgtrr/coica.htm> (recommending as a short term goal the identification, analysis, and evaluation “from the standpoint of the indigenous world view different components of the formal intellectual property systems,” including TRIPS, in order to determine the possibility of using some mechanisms in relation to “protection of biological/genetic resources.”).

⁵¹ See generally Indigenous Peoples' Folklore and Copyright Law (1994) (noting that “the idea that folklore belongs to a living and changing group of people means that Western concepts of individual creation and individual ownership reflected in copyright law through such exclusive rights of reproduction and adaptation, publishing and recording, performing, and broadcasting rights do not necessarily hold up for indigenous peoples”), available at <http://members.ozemail.com.au/~dambiec/indigenous-llm-essay.html>.

⁵² See generally Blakeney, *supra* note 6 (discussing culturally offensive uses of Aboriginal images and themes).

⁵³ See generally JAMES JOYCE, *ULYSSES* (Errol McDonald ed., Vintage Books 1990) (1922).

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PROFESSOR HANSEN: Our next speaker is Coenraad Visser of the University of South Africa.

PROFESSOR VISSER: Thank you, Chair.

I will make a few brief remarks about protection of traditional knowledge in the sense of scientific knowledge, also including here some remarks about access to genetic resources.

I think the illustration that I want to use at the outset is a recent case in the European Patent Office involving the bark of the Neem tree.⁵⁴ The Neem tree is a traditional tree in India. The bark of the tree contains a natural fungicide. A Western pharmaceutical company went to India, obtained samples of the active ingredient in the bark, obtained a patent in the European Patent Office, offered it for sale, and then tried to sell the patented fungicide back to India.⁵⁵

This obviously upset the people of India greatly. They took the registration of the European Patent Office on appeal.⁵⁶ Finally, the Technical Board of Appeal of the European Patent Office ruled that the patent had to be revoked and struck off the Register for the simple reason that the patent was not new; it did not comply with the absolute requirements of novelty because the properties of the bark of the tree was general knowledge in India so it was not a new invention, and for that reason the patent was invalidly granted.⁵⁷

The Indian application for revocation was based on a very interesting second ground: that the patent was granted improperly because the subject matter of the patent was obtained improperly and was “against public morality.”⁵⁸

The European Patent Office did not rule on this. They left the question open.⁵⁹ The feeling was that this ground would not have

⁵⁴ See, e.g., Penna & Visser, *supra* note 3, at 10 (discussing the controversy surrounding the patent of the fungicide derived from the Neem tree).

⁵⁵ See Press Release, Neem Patent Revoked!!!—Major Victory Against Biopiracy, International Federation of Organic Agriculture Movements (May 10, 2000), available at http://www.ifoam.org/press/win_final_neu.html.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See generally *id.*

been accepted by the European Patent Office because of the wording of the European Patent Convention,⁶⁰ which says that only the exploitation of the invention must be against public morality for the invention to be struck down.⁶¹

One traditional view is that whether there was misappropriation of the subject matter is not important and does not render the exploitation of the patent against public morality. But I will revisit this concept later.

So that is an illustration of the kind of situation that often greatly upsets indigenous peoples. When we talk about intellectual property protection in this area, I think we must distinguish two very distinct situations. The first situation is where indigenous peoples need protection against the operation of the intellectual property system, so they are protected against IP. The second situation is one where indigenous peoples try to utilize the IP system to protect their traditional knowledge.

In the first situation, where they seek protection against the operation of the intellectual property system, I think there are two approaches that we usually have seen taken in the past. The first one is, in the case of patent law, to introduce into patent law a requirement of notification.⁶² So, for example, in the case of the Neem tree application, it would be a requirement of European patent law that there be a declaration lodged with the application for the patent indicating that the genetic resources were obtained in India and that they were obtained with the permission of the indigenous peoples involved. So there has to be permission, lawful access to the resources, and that would form part of your application for the patent.

This requirement was proposed as part of the new Patent Law Treaty, which was adopted in 1999.⁶³ Of course, it does not form

⁶⁰ See European Patent Convention, Jan. 2000, art. 53 (“[P]atents shall not be granted in respect of inventions the publication or exploitation of which would be contrary to public order or morality.”), available at <http://www3.european-patent-office.org>.

⁶¹ *Id.*

⁶² See generally Penna & Visser, *supra* note 3, at 11 (discussing notification as method of protecting against exploitation of industrial property).

⁶³ See WIPO Patent Law Treaty, June 1, 2000, available at

part of the treaty, for the simple reason that when this proposal was discussed at the last preparatory meeting of the committee drafting the draft proposal, the United States in particular threatened to boycott the conference if that was part of the draft of the treaty. At the conference itself, when this argument was raised by Colombia, the United States threatened to walk out of the conference if that was even considered at the conference. The United States argument was simply that the requirement was not a matter of substantive patent law, and that the Patent Law Treaty is concerned with formalities only.

A number of developing countries are now arguing that in the next TRIPS negotiating rounds, this requirement should be part of the agenda, and would possibly be included in the next agreement pursuant to TRIPS.⁶⁴

A second possibility would be to rely on a compilation of databases documenting existing prior art, so that this kind of traditional knowledge, if it could be documented in some way, can be searchable by patent offices when they consider applications for patents based on traditional knowledge or on genetic resources from developing countries.⁶⁵

When you talk about protection for the intellectual property of indigenous peoples, there are a number of ways in which the

<http://www.wipo.org/pressroom/en/index.html>. The proposal by the Columbian delegation stated, “[E]very document shall specify the registration number of the contract affording access to genetic resources and a copy thereof where the goods or services for which protection is sought have been manufactured or developed from genetic resources, or products thereof, of which one of the member countries is the country of origin.” See WIPO, Standing Committee on Law of Patents (Sept. 6-14, 1999), *available at* http://www.wipo.int/sep/en/documents/session_3/doc/sep3_10.doc.

⁶⁴ See, e.g., Commission on Intellectual Property Rights, Intellectual Property Regimes in Developing Countries (criticizing TRIPS because it does not cover traditional knowledge or access to indigenous genetic resources, and supporting development of internationally recognized standards), *available at* <http://www.iprcommission.org/textonly/whatis.htm>.

⁶⁵ See Penna & Visser, *supra* note 3, at 11 (discussing documenting and publishing traditional knowledge as searchable prior art. The article also notes the World Bank’s Indigenous Knowledge Program which includes a database on indigenous/traditional knowledge and practices.); *see also* The World Bank Group, Indigenous Knowledge Program, *available at* <http://www.worldbank.org/afr/ik/index.htm>.

intellectual property can be protected—not necessarily protected, but also exploited.

The first one is by means of a so-called transfer technology agreement.⁶⁶ There are good examples of that already, and I think Michael has written about one of them, the Merck agreement in Costa Rica, in which the National Institute for Biodiversity in Costa Rica, as a nonprofit organization, entered into a licensing agreement with Merck, a pharmaceutical company.⁶⁷ It transferred some 10,000 plant samples to Merck, and in return for the exploitation of these samples it would earn a sort of royalty stated in the agreement. The projected income and royalty income from this agreement is about \$100 million every year.⁶⁸

The problem, of course, with the transfer of the technology approach is that you have to have an organized body of knowledge, so you need some sort of database or the like, and also an identifiable entity, like this organization in Costa Rica, to administer the transfer of the technology, to receive the royalties, and to distribute them to the appropriate beneficiaries.

This also raises, of course, related issues of protection of trade secret. For example, what should be the contents of a database compiled by countries to document traditional knowledge or botanical knowledge in this way?

A tension between the protection against IP and protection for IP exists here. In order to protect against IP, if you want to make something part of the searchable prior art, you have to disclose as much as possible. If you want to exploit the traditional knowledge by means of a compilation or a transfer technology agreement, then it is in your interest to disclose as little as possible in the agreement.

I am working on a project in Venezuela. The solution there seems to be to tag only. So you would list in the database only the items that are available for the transfer of technology. Whether that would help with searchable prior art is a different question, but the decision

⁶⁶ See generally Penna & Visser, *supra* note 3, at 12.

⁶⁷ *Id.*

⁶⁸ *Id.*

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taken there was to go for protection of IP for the purposes of exploitation.

Other possibilities are outlined in my paper, but I would like to refer to one or two issues that are crucial when you talk about the protection of botanical knowledge or traditional knowledge of indigenous peoples.

The first one is out of ownership. The question is who owns the traditional knowledge, and that is particularly important when you talk about benefit sharing.⁶⁹ A good example is an agreement entered into by the South African Government recently with a pharmaceutical company, licensing to the pharmaceutical companies certain traditional knowledge of the Khoisan people, the Bushmen people as they used to be known.⁷⁰ Interestingly, the South African Government said they had not yet worked out the mechanism for ensuring that the benefits of this agreement actually reached the Khoisan people. They said it is a question of ownership: who collects the benefits, for example, of a transfer of technology, to ensure it goes back to the people or the tribes.

The problem is often also compounded in developing countries, for example in countries in Africa, where tribes live across national borders, so you would have the same tribe, for example, living in parts of South Africa, parts of Swaziland, parts of Mozambique. If it is a government agency collecting on behalf of these tribes, which agency of which government will be the one collecting?

One solution to that, and this is the solution we are trying in Venezuela, is to set up a not-for-profit corporation.⁷¹ The corporation would administer such transfer of technology and the receipt of the benefits. The problem that we are finding with this is that the tribes themselves have a problem with the establishment of

⁶⁹ *Id.*

⁷⁰ See Peter Hawthorne, *The Hunter-Litigators: Southern Africa's San Tribes are Challenging the Right of Commercial Interests to Profit at Their Expense*, TIME EUROPE, Mar. 3, 2002 (discussing South African Council for Scientific and Industrial Research negotiation of commercial rights in the Hoodia cactus with Britain's Phytopharm, which sold the rights to Pfizer for a reported \$32 million), available at <http://www.time.com/europe/af/magazine/0,9868,169370,00.html>.

⁷¹ See Penna & Visser, *supra* note 3, at 12.

the corporation. The elders in the tribe see the corporation as supplanting the traditional authority structure in the tribes. The members of the tribes have problems with transferring what they see as their knowledge to an outside entity. So it is a question of ownership and benefit sharing, which I think is crucial here.

That brings me to the last problem, which is that you often run into problems of what we can call internal conflict of laws, where you have a conflict between, for example, principles to determine ownership, in terms of, let's call it the Western legal systems, and principles to determine ownership in terms of tribal law. This raises a whole new issue, for example, when you deal with disclosure requirements and things like that; namely, who should grant the disclosure, when is it properly disclosed, and how do you determine whether the person granting the consent to the disclosure has the authority to do so.⁷²

So these are the type of issues that are coming to the fore as we move forward with the protection of traditional knowledge in this area.

Thank you.

PROFESSOR HANSEN: Thank you.

I actually abbreviated too much. I should have said Coenraad Visser is from the head of the University of South Africa's Department of Mercantile Law and Center for Business Law.⁷³ Coenraad came all the way from South Africa just for this conference, and Michael came all the way from the United Kingdom just for this conference, so we are very appreciative of their long travel.

Coenraad has been very influential working in international intellectual property matters on behalf of South Africa and as the chair of the African Caucus in WIPO matters. I thought he was particularly effective during the Diplomatic Conference in December 1996 that resulted in the WIPO Copyright Treaty and the WIPO

⁷² *See id.*

⁷³ For more information on this department, visit the University Web site at <http://www.unisa.ac.za/dept/merc/index.html>.

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Performances and Phonograms Treaty.⁷⁴ My observation at the time was that he did a wonderful job representing African interests and also as an honest broker between the developed and developing countries in constructing or assisting in various compromises.

Our next speaker is Paul Salmon, who is a Senior Counselor in the Coordination Office of WIPO here in New York. Paul works with various constituencies that deal with WIPO here in New York, including NGOs and UN delegations.⁷⁵ Paul?

MR. SALMON: Thank you very much, Hugh.

I came all the way from 45th Street. It is a pleasure to join you. I will be very brief and, unfortunately, will provide no fireworks. What I plan to do is give a brief outline of what WIPO has done to date in this area.

Of course, everyone knows WIPO is the UN agency charged with promoting the protection of intellectual property worldwide, and so it continually looks at where the IP system needs to be updated.⁷⁶ Its 177 Member Countries have unanimously agreed that WIPO should turn its attention now to the area of traditional knowledge,⁷⁷ as defined by Professor Blakeney, in its most inclusive sense.

Traditional knowledge has received increased attention across a

⁷⁴ See World Intellectual Property Organization Copyright Treaty, adopted by Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 65 (1997) [hereinafter *WIPO Copyright Treaty*], available at <http://www.wipo.org/treaties/ip/copyright/index.html>; see also World Intellectual Property Organization Performances and Phonograms Treaty art. 6 adopted by Diplomatic Conference at Geneva, Dec. 20, 1996, 36 I.L.M. 76 (1997) [hereinafter *WIPO Performances and Phonograms Treaty*], available at <http://www.wipo.org/treaties/ip/performances/index.html>.

⁷⁵ WIPO is “an international organization dedicated to helping to ensure that the rights of creators and owners of intellectual property are protected worldwide and that inventors and authors are, thus, recognized and rewarded for their ingenuity.” The number of member states belonging to WIPO currently stands at 177, approximately ninety percent of the world’s countries. See General Information About WIPO, at <http://www.wipo.int/about-wipo/>.

⁷⁶ *Id.*

⁷⁷ See *WIPO Fact-Finding Missions*, *supra* note 2 (defining traditional knowledge). In 1998, WIPO was mandated to “undertake exploratory groundwork in order to provide an informed and realistic analysis of the intellectual property aspects of traditional knowledge and folklore protection. See Information on WIPO Mandate, at <http://www.wipo.int/globalissues/tk/index.html#>.

number of policy areas. These range from food and medicine, the environment, health, human rights, and cultural policy, to trade and economic development.⁷⁸ There is growing recognition of the value of traditional knowledge as an important source of income, food, and health care for large populations in developing countries.⁷⁹

There are conceptual problems with the protection of traditional knowledge. The IP system generally has a date of creation, a limited duration of protection, and an identifiable author, whether it is an individual author or collective authors.⁸⁰ Traditional knowledge, however, is a living body of knowledge that is supplemented and replenished with time. It can lack a precise date of creation and identifiable authors. It is not necessarily ancient in all cases, but often involves incremental creation and innovation as communities respond to challenges.

In 1998 WIPO Member States gave it the mandate to undertake exploratory work to research the implications of developments in the field of traditional knowledge on the intellectual property system.⁸¹

Currently there is no universally recognized definition of traditional knowledge. It has several subsets, often designated by expressions such as “genetic resources,”⁸² “indigenous knowledge,”⁸³ “folklore,”⁸⁴ and “traditional medicinal knowledge.”⁸⁵ WIPO treats all of these together, since they share several characteristics, under the general heading of “TK,” which stands for traditional knowledge.

⁷⁸ See Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (summary on traditional knowledge), WIPO, available at <http://www.wipo.int/globalissues/tk/index.html>.

⁷⁹ See generally Intellectual Property Needs And Expectations of Traditional Knowledge Holders, WIPO, available at <http://wipo.int/globalissues/tk/report/final/pdf/part1.pdf>.

⁸⁰ See, e.g., Penna & Visser, *supra* note 3, at 3 (noting that copyright protection is determined with reference to an author, and as such, the lack of an author in the folklore context is problematic).

⁸¹ See *WIPO Fact-Finding Missions*, *supra* note 2 (defining traditional knowledge).

⁸² See Intellectual Property Needs And Expectations of Traditional Knowledge Holders 25, WIPO, available at <http://www.wipo.int/globalissues/tk/report/final/pdf/part1.pdf>.

⁸³ See *id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

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The 1967 Convention that establishes the WIPO treats intellectual property as a very broad concept and includes all matters that result from intellectual activity in the industrial, scientific, literary, or artistic fields.⁸⁶ It is not confined to well-established categories of patents, trademarks, designs, or copyrights. Indeed, intellectual property protection has proven to be evolutionary through the years, extending to new areas such as semiconductor layout designs,⁸⁷ or in the case of the European Union, non-copyrightable databases.⁸⁸ And so WIPO is looking to whether the IP system can be involved to cover these areas.

Following hundreds of interviews conducted by WIPO during nine fact-finding missions around the world, in 1999, it published its report of traditional knowledge.⁸⁹ I will make a shameless plug for our Web site, which is www.wipo.int, where this report, as well as all of the documents for our meetings, fact-finding missions and so forth, is available.⁹⁰

This report summarizes the main needs and expectations of traditional knowledge holders as expressed to WIPO. In the short term, these include the applicability and use of the existing IP system to protect traditional knowledge.⁹¹ In the longer term, traditional knowledge holders have asked for the development of new IP tools and the elaboration of an international framework for traditional knowledge protection.⁹²

Persons also have expressed the need to provide information and training to traditional knowledge holders and to government officials on IP and traditional knowledge.⁹³ They have also voiced a desire to

⁸⁶ See generally Convention Establishing the World Intellectual Property Organization, (July 14, 1967, as amended Sept. 28, 1979), available at <http://wipo.int/globalissues/tk/report/final/pdf/part1.pdf>.

⁸⁷ *Id.*

⁸⁸ See generally Intellectual Property Needs And Expectations of Traditional Knowledge Holders, WIPO, 1998-99, available at <http://wipo.int/globalissues/tk/report/index.html>.

⁸⁹ *Id.*

⁹⁰ See WIPO Web site, at <http://www.wipo.int>.

⁹¹ See Intellectual Property Needs And Expectations of Traditional Knowledge Holders 223, WIPO, available at <http://wipo.int/globalissues/tk/report/index.html>.

⁹² See *id.*

⁹³ *Id.* at 218.

facilitate dialogue between all stakeholders—the private sector, governments, NGOs—at the community, national, regional, and international levels.⁹⁴

In September of 2000, WIPO's General Assembly established an Intergovernmental Committee on Genetic Resources, Traditional Knowledge, and Folklore.⁹⁵ This was partly a result of the Patent Law Treaty discussions, but it was decided not to treat them there because of the breadth of subject matters covered, which are not limited to patents.⁹⁶ In fact, traditional knowledge does not fit neatly in any of WIPO's standing committees—patents, trademarks, copyrights, or information technologies.⁹⁷ So a new committee was created which held its first meeting in May of this year.⁹⁸ During that meeting, the Members asked the Secretariat to do several things:

First, to identify those areas of TK to be protected under the formal IP system; second, to prepare a survey calling for information and case studies from Members on these aspects; and third, to prepare contractual clauses on the protection of genetic resources and benefit sharing.⁹⁹

The problem with this is that contracts on access and benefit sharing can cover almost a limitless range of combinations of materials, stakeholders, and uses. So WIPO has recently issued a document that proposes a two-phased approach to this area.¹⁰⁰ First,

⁹⁴ *Id.*

⁹⁵ The Intergovernmental Committee constitutes a “forum for members to discuss intellectual property themes with arise in the context of (i) access to genetic resources and benefit sharing; (ii) protection of traditional knowledge, whether or not associated with these resources; and (iii) the protection of expressions of folklore, including handicrafts.” *Id.* at 235.

⁹⁶ See WIPO General Assembly, Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore 3 (Sept. 25 to Oct. 2, 2000), available at http://www.wipo.int/eng/document/govbody/wo_gb/ga/pdf/ga26_6.pdf.

⁹⁷ *Id.* at 4.

⁹⁸ The first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore took place in Geneva from April 30 to May 3, 2001. See WIPO web report, available at <http://www.wipo.int/eng/meetings/2001/igc/index.htm>.

⁹⁹ Press Release, Member States Move Forward with Work on New Global Intellectual Property Issues, WIPO (May 4, 2001), available at <http://wipo.int/pressroom/en/updates/2001/upd130.htm>. (last visited Jan. 24, 2002).

¹⁰⁰ See WIPO Intergovernmental Committee on Intellectual Property and Genetic

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WIPO is seeking Member State guidance on specific scenarios that should be addressed on a priority basis, such as bio-prospecting agreements;¹⁰¹ and second, WIPO is proposing options for operational principles to guide contract practices in this area.¹⁰² The document has extensive information on the existing contractual practices and shows the complexity of this area.

The committee also asked the Secretariat to conduct a survey of national experiences with the protection of folklore, in particular with the implementation of the 1982 UNESCO/WIPO provisions, which are contained in the materials. WIPO has information that these provisions have not been extensively implemented. But, in fact, the survey is still ongoing, and one of its purposes is to try to determine why these provisions have not been implemented and whether other forms of protection might currently exist or be more favorable.¹⁰³

In the course of its work on traditional knowledge, WIPO has focused on practical activities designed to test the current system of IP protection and its applicability to TK. We have organized a series of roundtables and workshops to enable TK holders to learn more about the principles of the IP system and how they can be applied.¹⁰⁴

The WIPO Worldwide Academy,¹⁰⁵ which is one of our training facilities, will soon be offering a distance-learning course over the Internet on the protection of traditional knowledge using the IP system.¹⁰⁶

Resources, Traditional Knowledge and Folklore, Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit Sharing, Second Session, Dec. 10-14, 2001, *available at* http://www.wipo.int/eng/meetings/2001/igc/pdf/grtkfic2_3.pdf.

¹⁰¹ *See id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ The WIPO Worldwide Academy was founded in 1998 in order to assist member states in attaining specialized knowledge and skills to enable them to derive benefits from intellectual property systems. *See* information on WIPO Worldwide Academy, *available at* <http://www.wipo.int/academy/en/intro.htm>.

¹⁰⁶ *See* Press Release, WIPO Worldwide Academy Launches Cyber-Learning Course, WIPO (June 1, 1999), *available at* <http://www.wipo.int/pressroom/en/releases/1999/p172.htm>.

The IP system *can* be used. It involves several IP concepts to protect traditional knowledge, such as collective or certification marks for goods from a certain community or group,¹⁰⁷ geographic indications,¹⁰⁸ patents that can be filed collectively by associations of TK holders on behalf of their members,¹⁰⁹ copyrights,¹¹⁰ and the moral rights of paternity and integrity¹¹¹ and unfair competition laws¹¹² to prevent passing-off,¹¹³ or effective trade secrets.¹¹⁴

WIPO is also developing standards for documenting public domain traditional knowledge for use by intellectual property offices, in particular to prevent the improper granting of IP rights on this TK.¹¹⁵

These documentation projects can also serve to raise awareness of offices, researchers, and the general public, about the value of traditional knowledge. However, many problems must be overcome in this area. WIPO has recently also issued for the second meeting of the committee a progress report on the documentation projects identifying these problems and proposing solutions.¹¹⁶

Nonetheless, widely acclaimed TK registries and databases have already been developed under various initiatives in Peru, India, the

This teaching technique will bring teachers specializing in intellectual property issues closer to students and other parties across the world through virtual means. *Id.*

¹⁰⁷ See, e.g., Penna & Visser, *supra* note 3, at 7 (discussing use of certification in Australia).

¹⁰⁸ *Id.* at 9 (discussing protection of geographic indications).

¹⁰⁹ See Kanaga Raja, *WIPO Meet Next Week on IPRs and Traditional Knowledge*, THIRD WORLD NETWORK, Apr. 25, 2001, available at <http://www.twinside.org.sg/title/wipo.htm>.

¹¹⁰ *Id.*; but see Penna & Visser, *supra* note 4, at 3 (noting the difficulty in fitting folklore into the copyright paradigm).

¹¹¹ See Raja, *supra* note 109.

¹¹² See Penna & Visser, *supra* note 4, at 8 (noting that unfair competition laws are problematic because they are confined to a national level).

¹¹³ See Raja, *supra* note 109.

¹¹⁴ *Id.*

¹¹⁵ See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit Sharing, Second Session, Dec. 10-14, 2001, available at http://www.wipo.int/eng/meetings/2001/igc/pdf/grtkfic2_3.pdf.

¹¹⁶ *Id.*

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Philippines, and Canada, where indigenous communities want their TK to be documented and used as prior art.¹¹⁷

In conclusion, the second session of the Intergovernmental Committee will be held this year from December 10th to the 14th,¹¹⁸ and the Members of WIPO will be asked to take several decisions on how to move these discussions forward. Almost all of the documents for the meeting have been placed on the Web site and are available for review.¹¹⁹

With good will and hard work, WIPO Members should be able to find ways of expanding the benefits of intellectual property protection so that all creators can profit. As stated by our Director General in his opening statement to our assemblies last month: "The purpose of the international intellectual property system is to encourage individual creativity so it can benefit us all economically, socially, and culturally. Intellectual property is foreign to no culture and native to all nations."¹²⁰

Thank you.

PROFESSOR HANSEN: Our final speaker is Linda Lourie. She is an Attorney-Advisor in the Office of Legislative and International Affairs of the United States Patent and Trademark Office.

MS. LOURIE: Thank you very much.

I am very pleased to be here, especially on a panel exchanging views with experts in the field of intellectual property. This is unusual. I have been dealing with this issue for about six years or so, and usually in these kinds of discussions we have people from the environment ministries or cultural ministries who are not as familiar

¹¹⁷ See WIPO Roundtable on Intellectual Property and Traditional Knowledge Report, Nov. 1-2, 1999, available at www.wipo.org/eng/meetings/1999/folklore/pdf/tkrt99_7.pdf.

¹¹⁸ See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Operational Principles for Intellectual Property Clauses of Contractual Agreements Concerning Access to Genetic Resources and Benefit Sharing, Second Session, Dec. 10-14, 2001, available at http://www.wipo.int/eng/meetings/2001/igc/pdf/grtkfic2_3.pdf.

¹¹⁹ See generally <http://www.wipo.int>.

¹²⁰ See Press Release, PAC Endorses WIPO's Vision for Future Development of New Intellectual Property Frontiers, WIPO (Oct. 11, 2001) (quoting Director General).

with traditional and current forms of intellectual property protection. So I am very pleased to be here speaking to you today.

I am particularly pleased to speak after Paul Salmon, a good friend of mine and a former colleague, who spoke about the WIPO process, because we both participated in the first Intergovernmental Committee in May.¹²¹ We were particularly surprised, I have to say, that there was such unanimity among the Member States about what needs to be done.¹²² WIPO submitted to its Member States quite a hefty document, and we were wondering how this group was going to get through this document in three or four days.

Other than diplomatic discussions about who should be the chairman at the beginning, and when the next meeting should be held at the end, we found that in fact most countries really knew what they wanted to do first, and we were very pleased to be able to task WIPO with taking an incremental step at looking at these very important issues.

From the U.S. Government perspective, when we went through the WIPO Report on the fact-finding missions, we seemed to be able to distill one theme from all those discussions, namely, that there were vast differences among indigenous communities across valleys, let alone across continents, in the types of folklore and traditional knowledge that has been developed over the generations. At the same time, there were diverse interests in determining such things as ownership, on the one hand, and exclusion, on the other hand, versus openness to free access.

The local rules concerning rights to use and own traditional knowledge and the differing desires to commercialize versus maintain secrecy of such knowledge were some of the differences we saw from community to community. So we asked ourselves whether it is possible—or, in fact, even desirable—to establish a

¹²¹ The first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore took place in Geneva from April 30 to May 3, 2001. See WIPO Web report, at <http://www.wipo.int/eng/meetings/2001/igc/index.htm>.

¹²² *Id.*

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comprehensive, uniform set of rules at the international level to govern the use of traditional knowledge and folklore.

At the very least, we wondered whether it is advisable to undertake such activity before individual countries have—and this is important—in conjunction with their communities within their borders, established their own regimes for protection within their own territories, and gained experience in the application of that protection, and then examined what effect that had on the communities involved.

We encouraged WIPO to undertake this activity, and I think some of this work has started to occur. The WIPO has issued questionnaires to Member States—and perhaps to other stakeholders—to describe national experiences with respect to traditional knowledge and with respect to folklore protection.¹²³

Of course, as others have pointed out, legal systems that are known collectively as intellectual property are not static. We do not say that what was decided at the end of the 19th century in the Paris¹²⁴ and Berne¹²⁵ Conventions should remain fixed forever. And yes, to a certain extent, intellectual property is evolutionary and adaptive. Care must be taken to avoid their preemption.

All in all, many of the goals of indigenous and local communities in “protecting” their folklore and traditional knowledge stem actually from their concerns for self-determination regarding health, justice, cultural heritage, and land issues. These are serious issues, but they must be examined fully within the appropriate national and intellectual contexts. These are not, however, issues for which WIPO or the national intellectual property offices have competence, and, while inherently important, the answers do not involve intellectual property questions.

¹²³ See generally *WIPO Fact-Finding Missions*, *supra* note 2.

¹²⁴ Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at the Stockholm Revision Conference, July 14, 1967, 21 U.S.T. 1538, 828 U.N.T.S. 305, available at <http://www.wipo.int/treaties/ip/index.html>.

¹²⁵ Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, as last revised at Paris, July 24, 1971, 828 U.N.T.S. 221, available at <http://www.wipo.int/treaties/ip/index.html>.

Preservation, conservation, and protection should be the goals. In the United States, for example, unlike in Australia, preservation of Native American work is achieved through several legislative avenues.¹²⁶ We have the registration of official insignia of Native American tribes, which has been recently implemented at the USPTO, and we have the Indian Arts and Crafts Act, which has been in place for several years now.¹²⁷

And, in addition, for more than seven decades, the United States has been involved in the preservation of folklore. In 1976 Congress created the American Folk Life Center at the Library of Congress to "preserve and present American folk life."¹²⁸ The Center incorporates the Archive of Folk Culture, which was established at the Library in 1928 as a repository for American folk music.¹²⁹ The Center and its collections have grown to encompass all aspects of folklore and folk life from this country and around the world, including over one million photographs, manuscripts, audio recordings, and moving images.¹³⁰ The Center is the United States' first national archive of traditional life and is one of the oldest and largest of such repositories in the world.¹³¹

¹²⁶ See, e.g., Press Release, U.S. PTO Establishes Database of Official Insignia of Native American Tribes, U.S. PTO (Aug. 29, 2001), available at <http://www.uspto.gov/web/offices/com/speeches/01-37.htm>.

¹²⁷ *Id.*; see also Indian Arts and Crafts Act of 1990, Pub. L. 101-644, 104 Stat. 4662 (Nov. 29, 1990).

¹²⁸ The American Folklife Center at the Library of Congress was created by Congress in 1976 "to preserve and present American Folklife." The Center incorporates the Archive of Folk Culture, which was established at the Library in 1928 as a repository for American Folk Music. The Center and its collections have grown to encompass all aspects of folklore and folklife from this country and around the world. The American Folklife Center Web site may be accessed at <http://www.loc.gov/folklife>.

¹²⁹ The American Folklife Center includes the Archive of Folk Culture, which was founded at the Library in 1928 as a repository for American folk music. The Archive of Folk Culture became part of the American Folklife Center in 1978. Today, its multi-format, ethnographic collections are diverse and international, including over one million photographs, manuscripts, audio recordings, and moving images. It is America's first national archive of traditional life, and one of the oldest and largest of such repositories in the world. Information about the Archive of Folk Culture Collections may be accessed at <http://lcweb.loc.gov/folklife/archive.html>.

¹³⁰ *See id.*

¹³¹ *Id.*

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When we discussed this Folk Life Center at the May meeting at WIPO,¹³² I cannot tell you how many delegations came over to me and were very enthusiastic about our approach to encourage countries to establish such centers. I think many countries expected the United States to come to Geneva at this meeting and say, "We do not want to discuss these issues, we do not want to move forward on these issues," but in fact we are very interested in these issues and we are very interested in understanding national experiences better so that we can determine what the next steps should be.

But we do think that one of the next steps should be documentation, which has a critical role in both folklore and traditional knowledge. USPTO, in particular, has been a bit of a lightning rod in the patent area for people claiming that we have granted patents on traditional knowledge.¹³³ We are encouraging WIPO to do more in this area to document traditional knowledge so that the more than 3,000 examiners that we have in Virginia, outside Washington, D.C., can actually know what is out there and can guard against granting patents on knowledge that is not new to the claimed inventor.

I note that part of the difficulty in this documentation program regarding traditional knowledge is that some of this knowledge has sacred or other closely held value for the community. While we are very sensitive to such cultural concerns, we recognize that some of this knowledge is actually leaking out to those who are seeking patents.

I note a famous case not about secret knowledge, but certainly about traditional knowledge, traditional medicine. The case was of turmeric, the kind you can buy at the supermarket.¹³⁴ A patent on the

¹³² International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge, Boyana Government Residence, Sofia, Bulgaria, May 29-31, 2001, organized under the auspices of His Excellency Mr. Petar Stoyanov, President of the Republic of Bulgaria by WIPO, in cooperation with the National Intellectual Property Association of Bulgaria.

¹³³ See, e.g., *U.S. Cancels Patent on Sacred Ayahuasca Plant*, ENVIRONMENT NEWS SERVICE, Nov. 5, 1999, available at <http://ens.lycos.com/ens/nov99/1999L-11-05-03.html> (discussing U.S. PTO cancellation of a patent on a plant from the Amazonian rainforest after criticism from many NGOs and indigenous groups).

¹³⁴ "Turmeric" is an East Asian perennial herb of the ginger family with a large aromatic

healing properties of turmeric was granted. Now, I do not know if any of you have spent time in India, but apparently it is well known in India if you take ground turmeric and apply it on an open wound, it will have healing properties.¹³⁵

So why was this patent granted? Was this some misappropriation by some scientist or anthropologist going out and trying to steal knowledge from India? No. In fact, these were two Indian nationals who were working at a university in, I believe, Mississippi, two Indian nationals who knew that this was their folk knowledge, traditional knowledge, who applied for the patent.¹³⁶ And while the examiner could not discover any documentation of prior art, or that this was in fact a known remedy, the examiner granted and issued the patent.¹³⁷

We, therefore, are very concerned about, not just the public relations side of this situation, but certainly the granting of patents inappropriately and ensuring that folklore is respected. But we have to work with an incremental approach. We cannot jump in and say we need new *sui generis* legislation,¹³⁸ new treaties in this area, because I think a lot of these issues are not well understood, and I think that we certainly have to be concerned about governments who are pushing for such legislation, but are not in fact working within the best interest of their communities. I think Professor Hansen has pointed out that the governments that are pushing for these kinds of protections are often not the governments who are most sympathetic to their indigenous and local communities.

We in this country cannot say anything with respect to tribal knowledge unless we have consulted with all 556 officially recognized tribes.¹³⁹ So the U.S. Government is very careful not to

yellow rhizome. The U.S. PTO initially granted a patent on turmeric in March 1995 to two non-resident Indians associated with the University of Mississippi Medical Center. After a challenge, the PTO ruled that turmeric's medicinal properties could not be patented. Vandana Shiva, *The Turmeric Patent is Just the First Step in Stopping Biopiracy*, THIRD WORLD NETWORK, available at <http://www.twinside.org.sg/title/tur-cn.htm>.

¹³⁵ See *id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ See *supra* note 5 (defining *sui generis*).

¹³⁹ The term "Indian Tribe[s]" or "Federally-Recognized Indian Tribes" means any Indian or

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misrepresent or set forth the position of tribes unless the Government has really consulted with the tribes.

This brings me to my final point, which is that many have characterized this as a North/South issue. This is decidedly not a North/South issue because all countries have folklore, all countries have traditional knowledge, and all countries have genetic resources. We are just as concerned about misappropriation of Native American and Native Alaskan traditional knowledge as we know governments in developing countries are. We are the home of a lot of research, but in the developing world there is also much research, and more research can be done.

And so, as we look forward, each of us government officials and employees have to recognize that we have interests on both sides of the debate and that we must look at this in a balanced fashion.

Thank you.

PROFESSOR HANSEN: We are going to have plenty of time for questions from the audience. I would like to start with the panel to make sure we can figure out where everyone stands on some issues.

I must say, Linda, this approach is not the normal approach the United States takes with regard to international treaties. Certainly when Bruce Lehman and the European Union proposed a database treaty, nobody said, "Do we really need *sui generis* protection? Let's go back to the Member States to see what they think."¹⁴⁰ Also, there were provisions in the WIPO Copyright Treaties that might

Alaska Native tribe, band, nation, pueblo, village or community which is acknowledged by the federal government to constitute a government-to-government relationship with the United States and eligible for the programs and services established by the United States for Indians. See The Federally Recognized Indian Tribe List Act of 1994 (Indian Tribe Act), Pub. L. 103-454, 108 Stat. 4791 (1994) (the Secretary of the Interior is required to publish in the Federal Register an annual list of all Indian Tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians).

¹⁴⁰ See, e.g., *U.S. Backs Off Database Treaty*, CNET NEWS, Dec. 13, 1996, available at <http://news.com.com/2100-1023-254768.html?legacy=cnet> (stating that the U.S., in response to domestic opposition to the database treaty, would concentrate its efforts on other treaties). A *sui generis* database treaty would allow owners of databases to protect the information contained within the database by allowing them to in effect copyright facts by copyrighting the assemblage of facts.

theoretically, at least, change United States law, and no one said, "Let's make sure Senator Hatch is okay with this."¹⁴¹ Your position appears to be similar to sending a proposal back to a committee for further consideration, which is a way to kill it. I am not saying that is what you are doing, but it has that sort of feel to it.

So, leading to a broader question, is this not a perfect opportunity for the United States and the European Union to say, "Okay, as developed countries, we have a certain, well-developed tradition of intellectual property protection. We have been fairly successful in imprinting and implanting the Western regime and model upon the rest of the world through TRIPS, and bilateral and multilateral treaties." Moreover, we have been doing with regard to countries and peoples who, as net IP importing countries, do not see the immediate gain and maybe not even the long-term gain¹⁴² If the U.S. and EU support this new form of *sui generis* protection, wouldn't it give these countries and peoples a view that protection is legitimate and provides important benefits. They will be able to gain financially and otherwise from a type of intellectual property regime. Isn't this helpful to developed countries in their efforts to convince developing countries that they should give more than lip serve to IP protection?

So the question is this: Should we or should we not on a policy basis give *sui generis* types of protection for genetic resources, traditional knowledge, what I will now call "cultural heritage" rather than "folklore?" What do you think about this and what is U.S. Government's position now?

MS. LOURIE: We are not trying to kill this, send it back to a committee. We would like to understand it more.

I must say that I differ from your approach a bit because I think we do not want to jump into treaty-making in any area before we understand our national experiences.

One of the things you point out is database protection. In fact, as you will recall, database protection was up in 1996 for a third treaty, and that treaty was not concluded then, largely because it was not

¹⁴¹ See *WIPO Copyright Treaty*, *supra* note 78.

¹⁴² See, e.g., *TRIPS*, *supra* note 49.

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clear what the national experience in some countries would be. In particular, in the United States, we wanted to see what kind of database legislation we would get before we were able to negotiate a treaty.

I must say that we are still working on legislation on non-copyrightable database protection, and therefore the process at WIPO has slowed down somewhat.

So I think we are using a common approach in trying not to jump into something without understanding what the ramifications would be. And I think that we do not want to talk about new forms that are completely different from the forms we understand. The WIPO Copyright Treaty and Performances and Phonograms Treaty¹⁴³ are along the lines of traditional copyright forms—they are incentive mechanisms. And the kinds of *sui generis* legislation or treaties that people are talking about are really a different animal, and I think we need to study this better.

PROFESSOR HANSEN: So can we take that as a “probably no”?

MS. LOURIE: I think we have to see what the results of the studies are before we can give a “probably no.”

PROFESSOR HANSEN: All right.

I must say, though, that I disagree with you on your database protection analogy. The United States was very strongly behind the proposed WIPO Database Treaty.¹⁴⁴ Changes resulted from the lobbying assault on the White House by MCI, AT&T and others, which basically undercut Bruce Lehman. The original position of the United States was “let’s go ahead with the European Union.” It was trouble back home that changed it.¹⁴⁵ That is the way I saw it.

¹⁴³ See *WIPO Copyright Treaty*, *supra* note 78; see also *WIPO Performances and Phonograms Treaty*, *supra* note 78.

¹⁴⁴ See WIPO Diplomatic Conference on Certain Copyright and Neighboring Rights Questions, Basic Proposal for the Substantive Provisions of the Treaty on Intellectual Property in Respect of Databases to be Considered by the Diplomatic Conference, Aug. 30, 1996 (the proposed Database Treaty was rejected by the U.S.), available at http://www.wipo.org/eng/diplconf/6dc_sta.htm.

¹⁴⁵ See, e.g., *U.S. Backs Off Database Treaty*, CNET NEWS, Dec. 13, 1996 (stating that the

MS. LOURIE: So we do consult with Judiciary Committee Chair Senator Orrin Hatch.

PROFESSOR HANSEN: Too much, perhaps.

MS. LOURIE: And now the new Chair, Senator Patrick Leahy.

PROFESSOR VISSER: Just speaking from a developing country perspective now, I think the impression I gained just listening to the presentation of the USPTO was that it is a stalling mechanism. To say that we need to study national experiences first flies in the face of one of the main problems with the protection of folklore, that we cannot have national protection only. That is not a new issue. It is an issue that has been known for thirty or forty years at least. In the case of Africa and Latin America, you have balkanization, you have tribes living across borders; you cannot have protection of folklore in a national system only. It is not new. So to say that you want to study national experiences means you are again going to study something that has been studied and has proved to be a problem for years already. You have to have an international or at least a regional system of protection.

In other cases—like, for example, the 1999 Patent Law Treaty,¹⁴⁶ I think the United States is being obstructive because it is not in the interest of multinational companies in the United States to have protection of this kind.

PROFESSOR BLAKENEY: If I can just make a contribution to make sure that we are perfectly divided down the middle of this bench, my views are pretty similar to Hugh's. I was working at the WIPO in 1989. In January of 1989 the U.S. Delegation came along and said, "We need integrated circuits protection. We need something to protect the architecture of integrated circuits and there is presently nothing that is good enough for us." By July of that year, there was a Diplomatic Conference in Washington that came up with the Washington Treaty on Integrated Circuits, which is now part

U.S. PTO backed out of the database treaty due to the level of opposition in the U.S.).

¹⁴⁶ See WIPO Patent Law Treaty, June 2, 2000, available at <http://www.wipo.org/pressroom/en/index.html>.

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of the TRIPS Agreement.¹⁴⁷

Nobody said, "Let's be incremental," no one said, "Let's have a fact-finding mission," there were no three worldwide forums, and there were no national conferences, and all the sorts of things that are being done in relation to traditional knowledge.

I must say that the impression I gleaned from the USPTO and the WIPO presentations is that we have a lot of fact-finding missions to go before there will be any action.

Now, one of those fact-finding missions came to Australia.¹⁴⁸ It went to Darwin, which would be the least relevant place to go. The largest Aboriginal population is in Western Australia. They did not visit Western Australia, and then they went to Sydney to take in the Olympics. But that was the fact-finding mission to the continent of Australia. I do not know what they did in other places.

There are thousands of tribes in the small country of New Guinea. Now, maybe there should be a fact-finding mission to each of those before we have some action.

So what is it going to take before something happens?

MR. SALMON: Who said there would not be fireworks on this panel?

From WIPO's perspective, obviously we have 177 Member States, and really what we have heard from most of them is that there is, particularly from developing countries, a desperate need for protection of this sort. And so the approach has been: what can we do immediately?

The process has involved exploring the areas that the existing system can protect. And it certainly can, even for those creations that are ancient in some sense. Where there can be a collective ownership established, you have laws dealing with collective

¹⁴⁷ See *TRIPS*, *supra* note 49, arts. 35-38 (integrated circuits).

¹⁴⁸ See generally WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore Fact-Finding Missions, *available at* <http://www.wipo.int/globalissues/events/index.html>.

rights,¹⁴⁹ collective trademark rights,¹⁵⁰ passing-off¹⁵¹ and so forth, that can be applied immediately.

With regard to the discussions on the Patent Law Treaty¹⁵² and the requirements to determine the location of biological material in a patent application, that was basically an agreement that was struck so that the treaty could go forward, but this would then be moved into a new committee which would discuss the matter more broadly. So I think the Member States generally are moving forward in these discussions on an amicable basis.

PROFESSOR HANSEN: Paul, what is your timetable then?

MR. SALMON: It is up to the Member States, honestly.

PROFESSOR HANSEN: What is your best guess?

MR. SALMON: Well, if we look at how long it took to adopt the Copyright Treaties, those took ten years,¹⁵³ if you include the earlier Copyright negotiations leading up to those treaties that began in WIPO in the mid 1980s. Treaty-making is a very long process.

MS. LOURIE: Can I defend myself outlook a bit?

PROFESSOR HANSEN: Sure.

MS. LOURIE: On three quick points. Coenraad, I recognize that this problem is broader than national, particularly when you have communities on either side of a national border. But I think it first

¹⁴⁹ See, e.g., Dieter Dambiec, *Indigenous Peoples' Folklore and Copyright Law*, University of Queensland (1994) (citing Department of Home Affairs and the Environment, *Report of the Working Party on the Protection of Aboriginal Folklore*, at 8, Canberra (1981)).

¹⁵⁰ Collective trademark rights are owned by a collective body and serve to indicate that the person who uses the collective mark is a member of that collectivity. J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION (4th ed. 1996).

¹⁵¹ The passing off action can be described as a legal remedy for cases in which the goods and services of one person can be described as a legal remedy for cases in which the goods or services of one person are represented as those of somebody else. W.R. CORNISH, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS 619 (4th ed. 1999).

¹⁵² See WIPO Patent Law Treaty, June 2, 2000, available at <http://www.wipo.org/pressroom/en/index.html>.

¹⁵³ See *WIPO Copyright Treaty*, supra note 78; see also *WIPO Performances and Phonograms Treaty*, supra note 78.

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has to be a national problem, and I am not seeing many countries—and we will see the results of the WIPO survey will demonstrate this—I do not think many national governments have actually addressed this at home. I think we have to have local legislation before we can go internationally. I think there is definitely an interest in national governments to sort of shut this off and let the international community resolve their local problems, but I think it has to be resolved locally first, or perhaps regionally in certain regional groups.

And I think in the access and benefits-sharing area they have been doing this regionally, and they have been recognizing that in terms of bio-prospecting they have genetic resources that cross national boundaries and they are thus setting up regional regimes.

I do have to caution that some of these regional regimes are perhaps too onerous, like the OAS¹⁵⁴ for instance, which will scare away researchers and will not encourage them to participate. And if researchers do not come in and have access to genetic resources, they will not make discoveries that lead to benefit sharing. So I think in regional—

PROFESSOR VISSER: Andean also.¹⁵⁵

MS. LOURIE: OAS has also, Andean as well.

In respect to the PLT discussions, I was not there, but the Colombian proposal,¹⁵⁶ is something that the United States and others feel would be inconsistent with the TRIPS Agreement because it would provide an additional requirement for patentability and this would be contrary to TRIPS and national laws.¹⁵⁷ Simply put, if you did not disclose where you received your genetic resources, that

¹⁵⁴ The Organization of American States (“OAS”) Web site may be accessed at <http://www.oas.org>.

¹⁵⁵ See, e.g., Andean Pact: Common System on Access to Genetic Resources, July 2, 1996, at <http://www.lclark.edu/org/ielp/andeaneng.html>.

¹⁵⁶ See Nuno Pires de Carvalho, *Requiring Disclosure of the Origin of Genetic Resources and Prior Informed Consent in Patent Applications Without Infringing The TRIPS Agreement: The Problem and the Solution* (discussing Colombian proposal), available at law.wustl.edu/Journal/2/p371carvalho.pdf.

¹⁵⁷ See *id.*

might be grounds for denying a patent that would otherwise meet the TRIPS standards for patentability.¹⁵⁸

And finally, we are not going to these meetings without discussion with our tribes. When we have talked to the tribes and Alaskan Natives, they say, "Please, please, do not do anything that is going to legislate our knowledge and our folklore. This is ours and we do not at all authorize you, the United States Government, to be making treaties about what is ours. Do not touch it." We are balancing this government-to-government relationship we have with the tribes with the calls internationally.

PROFESSOR HANSEN: Yes, but would those same tribes have said, "Do not do anything with regard to our right to fish, our right to hunt, our right to gamble, our right to do anything"? No, they would not. Maybe it is because they do not understand the rights would be to their benefit.

MS. LOURIE: They do in fact.

PROFESSOR HANSEN: So, they do not want the benefits or they do not see them as benefits?

MS. LOURIE: They do say, "You must respect our traditional knowledge in fishing and in conservation, and where there are conservation issues on our land, you must use our knowledge." They are very interested in use of their knowledge in those areas. But about intellectual property they just say, "do not touch."

PROFESSOR HANSEN: All right. One last point and then I will open it up.

Assume there are many things national governments cannot accomplish through domestic legislation. One of the unstated reasons for treaties is simply to allow national governments to overcome domestic opposition to its policies. Examples of this are environmental and human rights treaties. The treaties allow one set of elites to override another local elite through a different mechanism in order to achieve a public good. Assume I am right on that.

¹⁵⁸ *Id.*

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If that were true and the only way to get forms of protection of traditional knowledge in the broadest sense was through an international treaty, and you knew for sure you could not get them doing it the way you want to do it, where would you come out?

MS. LOURIE: There are a lot of hypotheticals in that question.

PROFESSOR HANSEN: I understand that. And actually, I think you are doing a wonderful job representing a position that is particularly difficult to represent.

MS. LOURIE: I think it is an easy position to represent. I will give you an example, the country of Oman. Oman has traditional knowledge and folklore legislation. The problem is they do not have regulations.¹⁵⁹ They do not know how to draft regulations to figure out how to implement their legislation. Simply put, the Omani legislation says that any folklore in Oman is the property of the Minister of Culture and the Minister of Culture will decide who has access to it.¹⁶⁰

You think that is going to fly in the United States, to say that the Librarian of Congress or the Secretary of Commerce has the rights over all the folklore in the United States? This is—

PROFESSOR HANSEN: Then the question is what should the treaty do, how should we form it? Should it be close to an intellectual property right that bypasses the government and goes to those who create it, or some other type of right? But going back to Oman for fact-finding is not going to help on resolving this. It involves basic policy choices. If you think that government control is problematic, then you make it a private right: bypass governments and go directly to the people. In any case, these are the types of issues that will be resolved in the treaty-making; it should not necessarily determine whether you will have a treaty or not.

MR. SALMON: The USPTO has set up a registry of tribal insignia. Morocco and some other countries have set up basically a list of “this is our folklore, and if you want access to it within our

¹⁵⁹ See, e.g., Sultan Decree No. 37/2000, The Law for the Protection of Copyright and Neighboring Rights, available at <http://www.law.cornell.edu/world/mideast.html#oman>.

country, you have to pay into a fund that goes to the Ministry of Culture and then goes to help preserve culture and so forth.”

So WIPO does not rule out any possibility. But I think there are models out there. The one thing we are surveying is why so few countries have implemented those 1982 provisions and if there are better models out there.¹⁶¹

PROFESSOR HANSEN: Well, Paul, let me ask this question, since we have been a little bit easy on WIPO up until now: Does the inherent nature of WIPO in which the Director General is elected by the WIPO Member States, many of which are developing countries, make it particularly difficult to create *sui generis* rights that bypass the governments and give rights or funds directly to individual tribes or creators?

MR. SALMON: It does, in the sense that it is basically a government-driven organization with 177 governments. We do allow NGO representation, but the governments ultimately make the decisions. And so if you have countries in which the governments do not listen to their indigenous peoples, WIPO cannot crack that. I think the same would be true with the WTO.

It is probably more difficult in WIPO because you do not have the possibility of cross-sectoral trading, where developed countries who might not be interested—I am not saying they are less interested, but who *might* be less interested—do not have concessions to make across different sectors, or non-IP sectors.

PROFESSOR BLAKENEY: If I can make a small WIPO comment, this is a touchstone of the difficulties that WIPO had with this issue. This traditional knowledge issue is in the Global Issues Division,¹⁶² and WIPO has not been able to appoint a Director to the Global Issues Division for some years, since the American Director

¹⁶⁰ See *id.*

¹⁶¹ UNESCO/WIPO Model Provisions for National Laws on the Protection of Expression of Folklore Against Illicit Exploitation and Other Prejudicial Actions (1982), available at <http://www.unesco.org>.

¹⁶² See WIPO Global Intellectual Property Issues Division on Traditional Knowledge, available at <http://www.wipo.int/globalissues/tk/index.html>.

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Richard Wilder vacated it.¹⁶³ So solving that problem is the first step along the road.

PROFESSOR HANSEN: All right. Let's open the floor to comments and questions.

QUESTION: My name is Marie Samuel. I am with the NGO Yachay Wasi, based in Peru and in New York.¹⁶⁴ I am not indigenous, but our constituency is. The President is also indigenous in Cuzco, Peru.

I am glad to see WIPO is there, but at the same time I do have a question. As you know, the Permanent Forum on Indigenous Issues has been adopted.¹⁶⁵ I assume that one of the questions they will deal with is traditional knowledge. Now, I see there is a panel of scholars, but you do not have an indigenous representative speaking from their point of view. For example, when you spoke about the Alaskan indigenous people, someone should have been there to have their say.

Now, I agree that there should be an international treaty even though some countries and Peru have done some of that—this was in the report from the May session that you attended and that you were reporting on.¹⁶⁶ But, at the same time, as Professor Visser stated, indigenous people are really an international, independent body from national jurisdiction—in other words, an international treaty should apply to them. Thank you.

¹⁶³ Richard Wilder served as the American Director of the WIPO Global Intellectual Property Issues Division for three years before joining the Washington D.C. law firm, Powell Goldstein Frazer & Murphy LLP, where he is currently a partner specializing in Intellectual Property and International Trade Policy. See Powell Goldstein Frazer & Murphy Web site at <http://www.pgfm.com>.

¹⁶⁴ Marie-Danielle Samuel is vice-president of Yachay Wasi is a Non-Governmental Organization ("NGO"), available at <http://www.geocities.com/RainForest/6658>.

¹⁶⁵ See The United Nations Permanent Forum on Indigenous Issues, available at <http://www.unhchr.ch/indigenous/forum.htm>.

¹⁶⁶ The first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore took place in Geneva from April 30 to May 3, 2001. See WIPO Web report, at <http://www.wipo.int/eng/meetings/2001/igc/index.htm>.

PROFESSOR HANSEN: May I ask you a question? For which indigenous group should we have had a representative?

QUESTIONER: It could have been any indigenous group.

PROFESSOR HANSEN: What would they have said that was not said today or that you did not say?

QUESTIONER: Well, it is like speaking about a dead body or something. The person is not there to speak. Apparently none of you are indigenous. It would have been good to have an indigenous point of view. That is my point.

PROFESSOR HANSEN: Okay. I might say we did put out a word to invite some NGOs to speak and, for whatever reason, it never happened. But there was an invitation.

QUESTIONER: In the UN, I know that you know that since 1993, the International Year—now we are in the International Decade. And I repeat that the permanent forum on indigenous issues has been adopted by ECOSAR (Ecological Structure Activity Relationships) last year.¹⁶⁷ Their first session will be next year in July at the United Nations. I am sure in the future they will have more importance. And since the treaty, as you say, may take ten years, I am sure you will consult with them at that moment.

QUESTIONER: I am Jesse Feder of the U.S. Copyright Office.¹⁶⁸ It just happens that a group came through our office a couple of days ago, and one of the representatives was from Ghana, and posed a question about folklore protection. We had a similar dialogue to what I have seen going on here, and I was emphasizing that there are a lot of goals of folklore protection that do not match the goals of IP protection. Rather bluntly, he sort of put his hand up and said, “No, no, no. This is about money. You have intellectual property and you get money from that. This is what we have and we want money for this.”

¹⁶⁷ See ECOSAR Web site, at <http://www.epa.gov/oppt/newchems/21ecosar.htm>.

¹⁶⁸ The opinions of Jesse Feder, Acting Associate Register for Policy and International Affairs, U.S. Copyright Office, are individual observations and not necessarily those of the U.S. Copyright Office.

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Now, to what extent are we really just talking about dividing up the pie? To what extent are we just talking about money? And if this is really a central part of this whole issue, I think the practical problems of who administers it—does it go through the government; does it go through collectives; how are these collectives administered; who keeps them honest; who makes sure the money gets where it is supposed to go—become very, very important. I would be interested to hear any comment anybody has on that point.

PROFESSOR VISSER: Just one question. Was it a government official or not?

MR. FEDER: He was a government official from Ghana.

PROFESSOR VISSER: I think I would like to respond to both of the previous questions.

The first one was what would have been different if there was someone from an indigenous community here. My experience is that, especially in the case of expressions of folklore, for the indigenous community it is often not so much about money. For that community it is about protecting a way of life. As Michael has said often, it is about the religious significance, the sacred significance of many of these expressions, art works, musical works and things like that, and that is what is important if you go to the community. It is also in some of the WIPO Reports. I mean, some of the communities say that money is not an issue for the community. It is a question of trust. It is a breach of trust for someone to come into the community, appropriate something there, and use it in a way that offends the community. So for the community often it is not a question of money.

I am not sure that the right questions have been asked—whether the community would know, for example, what they can achieve for the community, especially if it is a community really far from the cities or something like that, who do not know what can be done with money.

But a government, of course, is interested in money. And then, the question is—this is my sort of natural skepticism; this is why I would not like to generally see a government or a government body as the

recipient of the economic benefit of the exploitation of traditional knowledge or folklore. It goes into the general government funds. It does not reach the community where the activity takes place or where the knowledge originates. So that is why I asked whether it was a government official or not.

QUESTIONER: I am Cynthia Sturkenberg from Columbia University and also the Medical Research Council in South Africa.¹⁶⁹ What I am interested in is how are you distributing the benefits? What has been the experience of distributing the benefits throughout these tribal systems? They do not have the same Western idea, perhaps, of each member getting the same amount of money. They have a hierarchical internal structure that may even be counter to what Western people would believe as equitable. So what has been the experience for groups that have received benefits in terms of how moneys or other benefits have been distributed?

PROFESSOR BLAKENEY: If I can just give you the Australian example, and we can analogize here also with land rights, in Australia we have the concept of native title, that is Aboriginal land rights, which overlay the rights of, say, companies that are engaging in mining, and so when mining is to be engaged in, a royalty is paid to the Aboriginal people. It is up to the Aboriginal people themselves to set up the structures that will represent those people.

I was talking about the Kimberly Aborigine. Now, the area of the Kimberly is about as big as Europe, and there are thirty-eight language groups there, and the Kimberly Aborigines have set up an arts and cultural organization that negotiates on behalf of the Kimberly people.¹⁷⁰ They then receive moneys from the government for whatever it happens to be, and distribute that amongst their people. So it is left to the indigenous peoples in Australia to organize these things for themselves.

MS. LOURIE: Can I chime in on that one? I think that is really a very appropriate question, considering that next week there will be a

¹⁶⁹ The Medical Research Council in South Africa Web site may be accessed at <http://www.mrc.ac.za>.

¹⁷⁰ The Kimberly Aboriginal Law and Cultural Center Web site may be accessed at <http://www.green.net.au/kalacc>.

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meeting. I am heading off to Bonn this weekend for a meeting of a working group on access and benefit sharing as part of the Convention on Biological Diversity.¹⁷¹ We are going to be dealing with these kinds of issues.

Part of the United States Government's contribution is going to be sharing our experiences at the National Cancer Institute (hereinafter "NCI"), which has a very long-term program of letters of collection and memoranda of understanding with a number of communities around the world where they have been collecting genetic resources for, obviously, cancer research.¹⁷² The NCI experience has shown that rather than having international rules in this area, we really need to have tailored solutions that address the particular concerns of the hierarchy of the community, perhaps the access of the community to scientists that might be brought to the United States to have fellowships in laboratories in the United States, or other kinds of capacity-building.

And so, we feel strongly that this should not be an international, particularly mandatory regime on access and benefit sharing, that these are the kinds of things that have to be narrowly tailored to the individual situations.

MR. SALMON: Even WIPO treaties, you will notice, do not generally impose a "one size fits all" solution, and therefore they leave room for tailored solutions depending on the individual circumstances.

PROFESSOR BLAKENEY: One comment about this "one size fits all," where we have patents, you get twenty-year protection.¹⁷³ That is irrespective of whether the patent is in the area of biotechnology, mechanical engineering, or electrical engineering. So it is estimated that it will take twenty years for you to be able to recoup the research and development cost in relation to any invention from any field of technology—"one size fits all."

¹⁷¹ The International Convention on Biological Diversity Web site may be accessed at <http://www.biodiv.org>.

¹⁷² The National Cancer Institute Web site may be accessed at <http://www.nci.nih.gov/>.

¹⁷³ See 35 U.S.C. § 154 (granting patent protection for a period of twenty years from the date of the original application).

QUESTIONER: I am Bruce Lehman, President of the International Intellectual Property Institute.¹⁷⁴

PROFESSOR HANSEN: And former head of the PTO. During much of the period that we were discussing, including the WIPO Diplomatic Conference in 1996.

MR. LEHMAN: This subject, just in the last month, I have been deeply involved in, because I was in South Africa on a US-AID mission talking to the South African Government, and then, just last week, I was in Geneva at a meeting of the Policy Advisory Commission to the Director General of WIPO, and that was a very high-powered group.¹⁷⁵ There were three sitting presidents of countries; there were several ex-presidents, several foreign ministers, cultural ministers, and people of that rank.

The only observations I would make are first, this is an issue that is not going to go away, and second, there are really two issues here. You are focusing on the folklore issue, but I really think that the folklore issue and the issue of what I would call genetic starting material are one and the same thing. Biological resources involve taking some indigenous resource from a country and then using it.

I have been traveling around the world for the last three years to a lot of these countries, and there is not one of them where this issue does not come up. There is a strong feeling of unfairness, that somehow or other these people have been forced into the TRIPS regime;¹⁷⁶ we are patenting things, they are forced to recognize our patents, but somehow or other what they have is not being recognized. I think this is a very strong feeling around the world.

Jim Rogan,¹⁷⁷ when he takes over at the PTO, is going to have to face up to that fact, that it is not going to go away. It is probably also

¹⁷⁴ The International Intellectual Property Institute's Web site may be accessed at <http://www.iipi.org>.

¹⁷⁵ See Policy Advisory Commission to the Director General of WIPO, Geneva, June 15, 2000, available at <http://www.wipo.int/eng/pressrel/2000/p227.htm>.

¹⁷⁶ See generally *TRIPS*, *supra* note 49.

¹⁷⁷ James E. Rogan was nominated by President George W. Bush in June 2001 as his choice for Under Secretary of Commerce for Intellectual Property and director of the United States Patent and Trademark Office. See generally Information About James E. Rogan, available

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going to come up in the trade negotiations, which are going to start again in Singapore.

And so I think that to just say that we can do other things, we really do not need to worry about it, so on and so forth, is really just overlooking reality. I think it is here to stay and the United States has to be prepared to respond to this in some responsible way.

With regard to the issue of what individual countries do, I think I heard Linda Lourie talk about the indigenous tribes in the United States and how they do not want the federal government speaking for them. Well, there are clearly two sides to this problem: one is, what are the relationships among states going to be; and then, what is the situation within a state going to be?

I think it is quite clear that there is going to be a lot of room, and probably in this area there ought to be a lot of room, for individual states to make a decision about how these matters are going to be dealt with individually. In some cases, countries that have very strong recognition of Aboriginal people, like Canada, for example, I would imagine would have these moneys flowing directly to or have a very strong involvement with the Aboriginal people, where they have institutions set up to do that. For other countries, that might not be the case. I think we just have to respect their sovereignty in that regard, as we do in many other cases of treaty application.

PROFESSOR HANSEN: Bruce, do we respect the sovereignty in traditional intellectual property of the nations? If they wanted to, rather than have authors' rights, have government rights, for all the money to go into a central fund and then distribute it. Would this be a proper form of respecting their sovereignty?

MR. LEHMAN: No, and I think that goes to what—as I see it, these are not classic intellectual property rights treaties.

PROFESSOR HANSEN: Right, they are not. I agree with that.

MR. LEHMAN: All intellectual property—the Berne Convention, the Paris Convention, and so on—deal with creations of individuals. These are not inherently creations of individuals.

Also, they deal with new creations. Novelty is the essence of a patent.¹⁷⁸ In copyright, it has to be an original work of authorship.¹⁷⁹ Here we are dealing with works that have existed, in many cases, for millennia. So these are not really intellectual property rights treaties, and therefore I do not think you can apply the same principles that we have applied elsewhere. And I do not think countries are going to agree with that. Even in our country, I would think we would want some flexibility.

And by the way, we are not the first people. Another issue that I have been involved in is, for example, the performers' rights issue, the actors' rights issue, in the WIPO Audio-Visual Performers Treaty.¹⁸⁰ Well, there the United States is the one saying, "We have to have our own internal system, we have to have exceptions for our system; we have the guild system, the residual system." So certainly, we are no strangers to some wiggle room in these treaties for national systems.

QUESTIONER: I am Jenny McGill.

I have a couple of narrow questions. One of my questions relates to the Neem example that Ms. Lourie mentioned. It seems to me that is a perfect example of why some sort of consent requirement. At least in terms of an economic analysis of information available in the market and who is in the best position to know the status of a patent application and what its sources of information are, some consent requirement would be appropriate. In that case, these were Indian researchers who were in a far better position than the Patent Office to know what their source of information was, and even if the consent requirement were phrased in negative terms, that they are just not aware of any other sources of information, it seems to me it would be not so burdensome on patent applicants to make some sort of affirmative statement in a patent application. So I would be interested in general views of that.

¹⁷⁸ See 35 U.S.C. § 101 (providing for the grant of patents for "new" inventions).

¹⁷⁹ See 17 U.S.C. § 102(a) (stating that copyright protection "subsists . . . in original works of authorship").

¹⁸⁰ See *WIPO Performances and Phonograms Treaty*, *supra* note 78.

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And in terms of changes in patent law, considering that TRIPS has forced a number of countries to make drastic changes in their intellectual property regimes in a very short period of time, I cannot imagine that that kind of a change in TRIPS or some flexibility within TRIPS to allow countries to adopt that legislative change would be such a burden.

The second question relates to plant varieties. Most of the discussion has been about folklore. But again on the issue of universal approaches versus *sui generis*, there is the *sui generis* carve-out in TRIPS for plant variety protection.¹⁸¹ But my understanding is that the U.S. Government has been pressuring countries to adopt the UPOV approach,¹⁸² commercial plant breeder protection, and that there has been some difficulty in coming up with flexible, feasible, *sui generis*, other approaches. I wonder in that case if Mr. Salmon could tell us what WIPO is doing to help countries develop something other than the UPOV approach to protect small farmers?

MR. SALMON: On the Neem question, I would just like to say that the United States does actually have something known as a duty of disclosure, which basically requires the applicant, under penalty of losing the patent, to disclose the prior art of which he is aware. And so to that extent, I am not sure that similar requirements by other countries would be violative of TRIPS.

On the plant variety question, WIPO has in place basically a well-developed system for protection of plant varieties, and so that is the system that WIPO basically makes available to countries if they ask, but countries under the WTO are free to implement any *sui generis* system that is equivalent and that effectively protects plant varieties.¹⁸³

MS. LOURIE: You cannot forget that TRIPS is a negotiated document. It is not a document drafted in Washington and Brussels and then handed to developing countries. The TRIPS Agreement

¹⁸¹ TRIPS, *supra* note 49, art. 27.3(b).

¹⁸² See International Union for the Protection of New Varieties of Plants ("UPOV"), available at <http://www.upov.int/eng/index.htm>.

¹⁸³ See TRIPS, *supra* note 49, art. 27.3(b).

was the result of years of negotiations among countries, and so the contents were agreed to by all.

I think it is unfair to say this was demanded of them without any kind of—obviously, we gave up things in order to get certain provisions. And I think that, in terms of plant variety protection, as Paul was mentioning, Section 27.3(b)¹⁸⁴ says it provides for protection under patent or *sui generis* protection. When we negotiated that, it was understood that the *sui generis* protection we were referring to was UPOV, and so it is not—UPOV does not require that you be a commercial breeder.¹⁸⁵ Anybody who meets the standards of a variety can have access to UPOV protection.¹⁸⁶ It is unfair to say that this was just delivered on their doorstep.

PROFESSOR HANSEN: We have time for one more question.

QUESTION: My name is Mark Cohen from the USPTO.¹⁸⁷ This is more of a general comment than a question. This is not my principal focus at the PTO, but something that very much concerns me is how much culture gets nationalized, either taken away from minority groups or belonging to a state when it is trans-border, and that countries will assert rights not over new acts of creation, but over traditional art. We protect new creations with patents, trademarks, and copyrights. We do not go back 86,000 years to what was created then.

In one field with which I am familiar, just by way of an example, in China herbal medicine is probably one of the most secretly treated aspects of medicine. Patent applications are frequently filed under seal.¹⁸⁸ The export of herbal medicines is highly protected. I think this deprives other people, researchers throughout the world as well

¹⁸⁴ *Id.*

¹⁸⁵ See International Union for the Protection of New Varieties of Plants (“UPOV”), available at <http://www.upov.int/eng/index.htm>.

¹⁸⁶ *Id.*

¹⁸⁷ Opinions expressed by Mark Cohen, Attorney-Advisor, Office of Legislative and International Affairs, U.S. Patent and Trademark Office, are individual opinions and not necessarily those of the U.S. Patent and Trademark Office.

¹⁸⁸ See, e.g., Jiang Zhipei, Deputy Chief Judge of the Intellectual Property Trial Chamber of the Supreme Court of China, Judicial Protection of IPR in China, available at <http://www.chinaiprlaw.com/english/forum/forum2.htm>.

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as sick people, the opportunity to cure themselves in advance. I think some of these things deprive humanity of its common heritage, of access to information.

And another question: how does oral literature fit into this, oral literature which can be found throughout many different cultures, that can have archetypal aspects and such, and how can a nation state, or even a tribe, claim it as unique to its own?

PROFESSOR HANSEN: You have the difficult idea/expression dichotomy, you have difficult law with regard to conceptual separability, you have all sorts of issues that are difficult to deal with, but somehow we do not say you should have no rights at all. Maybe these are legitimate—I think very legitimate—concerns, but I do not know that they logically lead to having no protection at all. These concerns go rather, I think, to how you properly and carefully create that protection.

Thank you very much, to both the panel and the audience.