

# IPSP089 - Legal Aspects of Traditional Knowledge and Biodiversity

Assignment 1: 781450

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<sup>1</sup>This is a footnote.



## 1 Question 1 [50]

### 1.1 Compare and contrast the terms “traditional knowledge” and “indigenous knowledge”. In your answer state whether the *maca* plant falls within these definitions. (10)

Traditional knowledge systems, creations, innovations, or cultural expressions refer to *literary, artistic or scientific works, performances, scientific inventions or discoveries, designs, marks or symbols*, that have evolved in response to a changing environment and are inherited from one generation to another within a particular group of people or their territory, [1].


Although there exists no universally accepted formal definition for indigenous peoples, ‘indigenous knowledge’ is synonymous with and in fact a subset to, ‘traditional knowledge’ in terms of its scope, transmission and diversity. Whilst their distinction is indeed subtle, ‘traditional knowledge’ held by indigenous people, denotes ‘indigenous knowledge’, [2], [3].

For example, knowledge disseminated through traditional means amongst the Khoisan peoples of Southern Africa, constitutes ‘indigenous’ or ‘traditional knowledge’. In contrast however, the information passed down through traditional means, by colonial Dutch settlers in the Cape can be described as ‘traditional knowledge’, but **not** ‘indigenous knowledge’.

Given that the maca has long been valued for its ability to enhance fertility in humans and livestock, it does indeed constitute ‘traditional knowledge’. Moreover, given that indigenous peoples have used it the same way for generations, as a potato-like food source, as well as a supplement for livestock, appreciated not only for its rich protein and vitamin content, but for its sexual performance and fertility enhancement, such use also constitutes ‘indigenous knowledge’.

### 1.2 How has knowledge been protected customarily? (10)

Informal regimes relied on mechanisms based on non-systematic and undocumented rules, obligations and rights, that are enforced either by elders or religious leaders. These regimes are ‘self-legitimised’ [4], within and across the community though the accrual of consensus to abide by and adhere to these laws and rules.

Generally speaking customary law is not recognised by legal institutions outside of the relevant communities where  were originally established. The culture and history of a people are preserved by the community elders and leaders, who are also responsible for determining eligibility and allocation of various arts to be practised amongst the community’s artisans, as well as dispute resolution.

The shortcomings of such protections are clearly evident. Further protection of ethno-botanical knowledge of the indigenous peoples of Peru will be required, and in particular will involve the following two aspects:

- the indigenous peoples of Peru will require protections ‘*against*’ the intellectual property rights acquired by ‘outsider companies’ through their patents for the maca’s chemical secrets, which were granted in the United States, resulting in an appropriation of transitional knowledge, and
- implementation of the mechanisms of intellectual property legislation to provide protection of the indigenous peoples of Peru of their traditional knowledge.

### 1.3 What are the problems confronting rights holders (in our case the people in Junin Peru)? (10)

Many existing legal frameworks are inadequate at resolving or determining a common denominator between the economic interests of commercialisation, and the traditional interests of the people of Junin, Peru. Indigenous knowledge is both vulnerable to misappropriation under existing industrial property systems and subsequent financial exploitation by global drug industries, [2]. All without either consent from, or acknowledgement of the indigenous peoples, who *arguably* could be considered the original inventors.

Generally speaking, the lack of representation in litigation, coupled with inadequate protection has resulted in the dismissal and disrespect of the indigenous people of Peru, who *arguably should* have enjoyed the conferral of intellectual property rights in relation to the ‘indigenous knowledge’ regarding the uses of the maca, and again *arguably should* have control over its exploitation by others, [4].

Globalisation has given rise to a reluctance of younger generations to learn the traditional and cultural practices, favouring instead the economic interests of industrial endeavours. Coupled with the absence of willing heirs and participants, means that there is significant risk of loss of the traditional and indigenous knowledge regarding the maca, should it be inadequately documented and ill-preserved. This problem also manifests itself through the forced displacement of indigenous traditional communities based on Eurocentric conservation and biodiversity management strategies, [5]

Generally speaking modern society holds a prejudiced view, denigrating traditional knowledge as ‘primitive’. This lack of appreciation for such knowledge, stems from the indigenous people traditionally exploiting the effects of the maca plant, without describing them in terms of the molecular and chemical reactions of modern biochemical interactions, [4]. This has seen two United States patents granted for the chemical components, specifically the methods of extraction from the active ingredients of the maca plant, and not the plant itself.

### 1.4 What is WIPO’s role in protecting traditional knowledge? (20)

The WIPO General Assembly established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore focusing primarily on three issues of discussion, and perhaps involving amendments to [6], [7] :

- access to genetic resources and benefit-sharing,
- the protection of traditional knowledge, innovations and creativity, and
- the protection of expressions of folklore, including handicrafts.

Where the scope of the current work programme of WIPO includes:

- development of resources detailing methods to implement existing mechanisms of intellectual property frameworks for the protection of traditional knowledge,
- complimentary to the above, hands-on national training workshop on existing intellectual property systems and their use in the protection of traditional knowledge,
- with respect to documentation and preservation of traditional knowledge, establishing mechanisms of their standardisation and recognition as instruments of intellectual property,
- fact finding missions, to providing evidence of practical implementations for the protection of traditional knowledge under existing intellectual property mechanisms,

- fact finding missions and feasibility studies into the applicability of customary laws to traditional knowledge and their integration with existing statutory regulations,
- pilot project on the collective acquisition, management, enforcement of intellectual property rights within traditional knowledge.

Unfortunately however, a number of inter-governmental organisational negotiations with respect to amendments to the TRIPS [6] Agreement on Traditional Knowledge have collapsed, [8], and the current protection afforded is through [article 27(3)(b)][6], where member states are empowered to consider protection of traditional knowledge through intellectual property systems.

With respect to protection against exploitation of intellectual property, at the third session of the Standing Committee on the Law of Patents of WIPO, it was unsuccessfully proposed that a notification requirement be established. In that where the subject matter of a patent application is based on the genetic resources forming part of the ethno-botanical heritage of an indigenous peoples, then a copy of the contract affording access to the genetic resources in their country of origin should be filed, requiring possible amendments to [9], [10] .

Alternatively, were the indigenous peoples of Peru to have their traditional knowledge regarding the maca documented and published as identifiable and searchable prior art, then this would bring into dispute the novelty requirement of any inventions based on said knowledge. Moreover, this would provide a mechanism with which the indigenous peoples of Peru could pursue revocations of the United States patents granted to the companies, albeit at substantial legal costs. Or perhaps, where such patents are granted, provide co-ownership to original inventors / indigenous peoples [4].

Alternatively, rely on the provisions of competition law, where *arguably* [2], the maca and any of its derivative chemical constituent components could be considered a trademark, then the indigenous peoples of Peru could rely on the protection of trade secrets, where the patent holders could have said '*trade secrets*' as pertaining to the maca, disclosed to them in lieu of a license, confidentiality, limited disclosure, remuneration and royalties, amongst others. Again, said information will need to be identifiable and searchable, meaning that WIPO will need to establish mechanisms (such electronic databases<sup>2</sup> [4]) in order to strengthen the protection of ethno-botanical knowledge internationally.

WIPO's most important role however, together with a number of international, intergovernmental organisations, will probably be in defining and establishing a framework for the protection and conservation of indigenous traditional communities and their biodiversity, [5].

## References

- [1] S. Geyer, "Towards a clearer definition and understanding of "indigenous community" for the purposes of Intellectual Property Laws Amendment Bill 2010: An exploration of the concepts "indigenous" and "traditional"," *PER / PELJ*, vol. 13, no. 4, 127–143, 2010, ISSN: 1727-3781.
- [2] C. A. Masango, "Indigenous traditional knowledge protection: Prospects in south africa's intellectual property framework?" *SA Jnl Libs & Info Sci*, vol. 76, no. 1, 74–80, 2010.
- [3] E. P. Amechi, "Traditional knowledge relating to medical uses of plants and the patent regime in south africa: Whiter the traditional healers?" *SA MERC LJ*, vol. 27, 58–91, 2015.

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<sup>2</sup>for example the National Recordal System (NRS) within the republic, and the Traditional Knowledge Digital Library (TKDL) in India

- [4] ———, “Leveraging traditional knowledge on the medicinal uses of plants within the patent system: The digitisation and disclosure of knowledge in south africa,” *PER / PERJ*, vol. 18, no. 1, 2015.
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- [6] Agreement on Trade-Related Aspects of Intellectual Property Rights, 1994.
- [7] Paris Convention for the Protection of Industrial Property, 1883.
- [8] A. Saurombe, “The protection of indigenous traditional knowledge through the intellectual property system and the 2008 south african intellectual property law amendment bill,” *Journal of International Commercial Law and Technology*, vol. 4, no. 3, 196–202, 2009.
- [9] Administrative Instructions under the Patent Cooperation Treaty, 2017.
- [10] Patent Cooperation Treaty, 1970.



