

The Problematic Relationship between Traditional Knowledge and the Commons

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Abstract This chapter investigates two propositions that have become premises of the international debate around the question of the protection of traditional knowledge: first, that the protection of traditional knowledge is primarily a question of the rights of Indigenous Peoples; and, secondly, that the form of the protection of TK is primarily a question of intellectual property law.

Summary 1 Introduction: TK in International law. – 2 TK as a question of the rights of indigenous peoples? – 3 TK as intellectual property?. – 4 TK in the cultural commons?. – 5 TK as cultural property?. – 5.1 Stewardship Model. – 5.2 *Res universitatis*. – 6 TK as a geographical indication?. – 7 Conclusions: recognizing the TK community?

Keywords Knowledge. Property. Commons.

1 Introduction: TK in International Law

At the level of international law, the concept of TK as an object of protection of some type has a long, if not always illustrious, history. Amongst the most important of the international instruments that contribute to this history is the 1989 UNESCO Recommendation. In fact, the expression *traditional knowledge* does not appear in this instrument. Rather, the Recommendation refers interchangeably to ‘folklore’ and ‘traditional and popular culture’, which it defines as:

the totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognised as reflecting the expectations of a community in so far as they reflect its cultural and social identity.¹

Specifically, for the purposes of the Recommendation, ‘traditional and popular culture’ includes, in a widely drafted list, “language, literature,

1 http://portal.unesco.org/en/ev.php-URL_ID=13141&URL_DO=DO_TOPIC&URL_SECTION=201.html (2017-12-15).

music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts". So far as the protection of this 'folklore' or 'traditional and popular culture' is concerned, the Recommendation makes a somewhat ambiguous reference to the possibility, amongst others, of its protection through IP devices and to the 'important work' on this question being undertaken under the joint auspices of UNESCO and WIPO. This reference to the possible role of IPL in the protection of so-called TK is a central concern of this paper.

The 1989 UNESCO Recommendation is, in some senses, a precursor to the 2003 UNESCO Convention. The Convention clearly reflects a number of important themes in the Recommendation and, in fact, makes its debt in this respect quite clear by way of a preambular reference. As in the Recommendation, the expression TK is not to be found in the Convention. Instead, as its name suggests it focuses on ICH, which it defines in art. 2(1) as

the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases individuals, recognize as part of their cultural heritage.

In a similar way to the Recommendation, it also draws attention to the role of ICH in creating and reflecting community identity. There are, however, a number of significant differences between the two instruments. For the purposes of this paper, one of them is that the Convention seems less interested in the possible role of IP as a mode of protecting ICH. Its only mention of IP is in art. 3(b), which makes it clear that the Convention does not affect rights "deriving from any international instrument relating to intellectual property". At least implicitly, this provision might be said to draw a distinction between the forms of protection with which it is concerned, and the concept of private property protection through IP devices. At the same time, it confirms the possibility of an overlap in the objects of protection of these two legal forms.

The first international instrument in which the expression TK appears is the 2005 UNESCO Convention, which makes reference in its preambles to

the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion.

The reference to the TK of indigenous peoples is not without significance in this context. In fact, much of the international debate around this question has been focussed on the TK of indigenous peoples. This aspect of the debate has also found expression in the UN DRIP of 2007. According

to the DRIP, art. 31, the rights of indigenous peoples in their CH, TK, and TCEs include the right to protect it in the form of IP.

Putting these various introductory comments together, it can be seen that the debate around the treatment of TK in international law has coalesced around two premises, which are investigated in this paper: first, that the protection of TK is primarily a question of the rights of indigenous peoples; and, secondly, that the form of the protection of TK is primarily a question of IPL.

2 TK as a Question of the Rights of Indigenous Peoples?

In relation to the first of these two underlying premises, that the protection of TK primarily relates to the rights of indigenous peoples, the chapter unequivocally accepts that the question of the just treatment of indigenous peoples is one of great importance. Indigenous peoples have suffered, and continue to suffer, grave injustices in the post-colonial period. In international law, indigenous peoples are communities with a common cultural and political identity, but without having legal identity as a state. Without the legal identity that comes from the privilege of statehood indigenous peoples are not part of the community of international law makers. For indigenous groups, therefore, the question of the right to control CH, including TK, is linked to questions of identity, survival and the political project of self-determination, in a world that is dominated by the Westphalian state-based system of sovereignty and law-making (Macmillan 2013). This, of course, suggests that a just response to the claims of indigenous peoples requires something more than simply the protection of their CH. In fact, the focus of the debate on questions such as the TK of indigenous peoples seems calculated to distract attention from much more pressing political claims.

At the same time, this focus also distracts from the undoubted fact that it is not only indigenous peoples that have TK. This fact has not entirely escaped attention at the international legal level. The definition of ICH in the 2003 UNESCO Convention makes this reasonably clear by its reference to the

knowledge ... that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. (art. 2(1))

And, this is confirmed by the representative list of the ICH of humanity established under the 2003 UNESCO Convention, which contains examples of TK of communities other than those regarded as indigenous peoples under international law. However, the effectiveness of this Convention in protecting the ICH of communities is questionable. There are two reasons

for this: one is connected with the statist nature of international law, and the other is a consequence of the fact that the Convention does not unambiguously constitute protection per se for its listed ICH.

So far as the statist nature of international law is concerned, inclusion in this list is a form of recognition of TK in relation to which a state is making some sort of claim. Such a claim does not necessarily entail the recognition of communities not forming a state in international law. Further, the Convention has no mechanism to allow communities forming less than a State to list ICH to which they wish to make a claim. Although states are obliged to include “communities, groups and relevant non-governmental organizations” (art. 11(b)) in the process of identifying their ICH, all entries to the Convention’s lists of ICH are made through State channels. In formal terms, this is as much as an issue for indigenous communities as it is for other communities forming less than the State as a whole. In reality, however, it particularly affects communities that have an adverse relationship with the states in which they live – a description that often applies with particular force to indigenous peoples.

States are obliged to put in place “necessary measures to ensure the safeguarding” of the ICH in their territory (art. 11(a)). According to art. 2(3), safeguarding in this context

means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage.

It is arguable that the protection that ICH most needs is protection from improper appropriation and use. While the concept of safeguarding is wide enough to encompass such measures, it might be something of an optimistic overstatement to read the Convention as mandating such measures. It is interesting to note that art. 13(d)(ii) requires States parties to

adopt appropriate legal, technical, administrative and financial measures aimed at ... ensuring access to the intangible cultural heritage while respecting customary practices governing access to specific aspects of such heritage.

This suggests that States might be obliged to limit some types of access, perhaps including appropriation and use, although there is obvious ambiguity in the expression “customary practices”. Would this concept be wide enough, for example, to limit the type of appropriation by those outside the relevant CH community that occurs through devices, unknown to at least some customary practices, of appropriation in the form of private IP? This

seems to be an important question. Besides anything else, a concomitant of ensuring access as part of the rights attaching to CH must also be to limit privatization. So what, then, of claims by the holders of TK to limit access through (private) IPL devices?

3 TK as Intellectual Property?

This takes us to the second underlying premise of the debate, which suggests that protection of TK falls within the remit of IPL. The question of the relationship between CH and IP is a particularly fraught one (Macmillan 2013; 2014a; 2014b; 2015). The tendency to elide IP rights and CH rights, including rights to TK, has been remarkably persistent (Macmillan 2008; 2015). It appears to owe at least something to the confusion provoked by their competing invocations of intangibility. IP rights, unlike CH rights, are never claims to tangible property but rather claims to intangible rights (albeit claims that often implicate tangible objects). CH, on the other hand has awkward relationship to the distinction between the tangible and the intangible. While it applies to both, it is possible to exaggerate the significance of the distinction precisely because what makes a tangible thing into CH is its intangible or symbolic association (Blake 2000; Macmillan 2013). Even though these ideas of intangibility are different, the disorientation of the intangible realm seems to augment the dangers of confusing, eliding and overlapping CH and IP. The reason, however, that it is so important to avoid this confusion is because there is a fundamental difference between the two that rests on the fact that while CH is something that 'belongs' to a community (Macmillan 2015; 2016), IP is a rivalrous form of private property. IP's character as a fully alienable and transferable private right means, furthermore, that it is designed to enable investment in liquid assets, with the ultimate effect of promoting the accumulation of capital to the benefit of those best able to reap profits from that accumulation. And, in the context of forms of cultural property, those best able to harvest profits off these liquid assets are the multinational corporations engaged in the production and distribution of cultural and other knowledge products (Bettig 1996; Macmillan 2006; 2008). Such a conception of IP seems to take it a long way from any idea that it is well adapted to protecting the CH, including the TK, of a community.

Even for indigenous peoples, for whom in reality the demand to protect their CH through the use of IP rights is part of a wider agenda concerned with political self-determination, the transformation of community CH into a form of private property is problematic. A central reason for recognising community rights to CH is to defend that property from privatisation. While it is clear that indigenous peoples and other communities in the global south have been victims of the unauthorised appropriation of their

intangible cultural property by private interests through the use of IP rights (Slaughter 2011; Macmillan 2013; Carpenter, Katyal, Riley 2009), it is at least worth pausing to consider the consequences of using the sword as a shield. The argument that underlies claims of the sort contained in the DRIPs, art. 31(1), is that the best defence to the cultural threat posed by private IP rights encroaching on those cultural rights is to turn those cultural rights into private rights. This argument has an intrinsic appeal. Moreover, the post-colonial political context of these claims is not easy to ignore. At the same time, it is perhaps this very context that is responsible for the fact that attempts to use IP rights in this way have been problematic precisely because of the *difficulty in using a private right to vindicate a community right*. In addition to which it should be recognised that there is a significant lack of political interest in changing IPL in order to recognise the claims of Indigenous peoples (Blakeney 2006).

While noting the inherent injustice in the failure to recognise the particular position of indigenous peoples, the idea of turning CH into IP may not be optimal. One result of such a process is that the cultural property has to be corralled into the shape of Western IPL (Blakeney 2000). If the item of cultural property is a story, music, or artwork then it has to be fitted into copyright law; designs and symbols must fit into the netherworld of the relationship between copyright, designs and trademarks; knowledge about local flora and fauna must be fitted somewhere into patent law, plants breeder's rights, geographical indications. This will mean that different levels of protection will apply to different types of indigenous cultural property. In short, the end result is that occidental IPL comes to constitute indigenous (and other non-Western) CH (Fitzpatrick, Joyce 2007). In so doing, it may change the shape of that heritage in ways that are not necessarily the consequence of the reflexive cultural practice that constitutes it. This seems to be inimical to the very purpose of protecting CH.

TK holders in occidental communities do not have exactly this problem. The origins of such communities and of IPL, at least in theory, are not different in a cultural sense. It might also be possible to argue that TK holders in occidental communities do not have the particular political-legal problem of indigenous peoples because the consequence of not being indigenous (in an international law sense) is precisely that one is part of a cultural and political community that is also recognised as a state in international law. Consequently, such communities have a place at the international law-making table, giving them the capacity to influence legal outcomes that protect their rights to, in this case, their TK. However, when it comes to the protection of community rights in TK, it is easy to exaggerate the significance of statehood. This is because, in general, even non-indigenous TK tends to belong to communities forming less than the state as a whole – that is, communities within a State rather than communities comprising a State. The political problems for such communities in having their

particular rights recognised and pursued at the international level by the state may have something in common with the political situation in this respect of indigenous peoples. The difference may be that the request for protection of TK does not have the same political significance. However, in the end one common problem that all communities – indigenous and non-indigenous – share when it comes to protecting their TK is the *difficulty of sustaining a community right using an individualistic private property right*.

But if we don't protect TK as a form of private property, that is as a form of IP, what should we do with it? Should we put it in the cultural commons and treat it as a type of common goods?

4 TK in the Cultural Commons?

The idea that we should leave CH, including TK, in the cultural commons derives considerable support from a vast movement, scholarly and political, that lauds free access to culture and tends to be suspicious of any attempts at what it regards as propertisation of cultural artefacts, especially intangible cultural artefacts. The much-debated idea of the cultural commons or public domain is primarily located in a concern to safeguard community interests in cultural stuff (Boyle 2008; Brown 2003; Hemmungs Wirtén 2008; Holder, Flessas 2008; Mezey 2007). The method by which this safeguarding is said to take place is by using the cultural commons or public domain as a defence against private appropriation. One of the limitations of this concept, however, is that it raises more difficult questions about how to protect communities from other forms of inappropriate uses of their cultural property. The problem is that the unregulated commons or public domain provides no legal architecture for the vindication of specific community interests in cultural property (Macmillan 2010). In this sense, the unregulated commons is like a defence without a fence – a space that is defined by absence, that is the absence of IP rights, and so a space created by IP itself. All this makes the unprotected exposure of cultural property in the commons problematic. As a result, the discourse of the commons has been cogently criticised on the ground that it has the capacity to amount to what is effectively a second, post-colonial misappropriation of the culture of indigenous peoples (Bowrey, Anderson 2009; cf. Mezey 2007). While this particular addition of insult to injury requires specific recognition, the likelihood that the issue has a wider application, and might also apply to non-indigenous communities, should be recognised (Macmillan 2014b). In response, it is – at the very least – clear that the concept of CH, residing outside the scope of traditional private property rights, requires legal architecture.

While it might be going too far to describe the protection granted to ICH under the 2003 UNESCO Convention as tantamount to leaving that heritage in the unregulated commons, it also seems that, for reasons that have

already been explored above, *the protection conferred by this Convention cannot do all the things that a real community right to its CH might imply*. Where, then, can we find the legal architecture to protect the rights of a community to its own CH, its own TK, without constructing private property fences and without denying the *collective rights of the community*, even when that community forms less than the community of a state as a whole? This is far from being an easy question to answer. Such architecture must to be more than just a vague notion defined by the absence of positive property rights, whether private or state-owned. It needs to provide safeguards against the unauthorised appropriation and use of CH. It needs to transcend outdated thinking that divides rights between public (as in state) and private rights holders, by recognising community interests. It also needs to recognise that people often have more than one community identity. If all this was not already a tall enough order, it also needs to avoid the type of essentialism that suggests cultural (and political) closure. In the context of cultural stuff, this type of closure provokes anxiety because it appears to fly in the face of traditions of cultural and creative interchange that have made the world (for better or worse) what it is today.

5 TK as Cultural Property?

One possible approach to this conundrum is the development of a concept of cultural property belonging to a community that is capable of providing a type of legal counterweight the notion of private property embedded in the concept of IP. Aside from some civil law regimes that recognise a concept of state-owned cultural property, this is not a concept known to occidental legal systems. On the other hand, it is notable that outside positivist legal scholarship the expression is widely used. Nevertheless, it should be said from the outset that, while the development of such a concept has much to offer, there are a number of good arguments that can be advanced against such a concept and that should, at least, be taken into account in the current context.

A pervasive argument against any concept of community-owned cultural property is that the concept of 'property' will always be problematic precisely because it has a clear legal, political and economic significance that is at odds with its use in conjunction with the qualifier 'cultural' (Prott, O'Keefe 1992; Blake 2000). There are various aspects to this argument that merit further enquiry. First, there is the problem that the legal concept of property is not sufficiently broad to cover everything that is intended to be encompassed in the concept of cultural property (Blake 2000; Flessas 2003; Prott, O'Keefe 1992). For instance, the property concept does not extend to a wide range of intangibles, such as spiritual beliefs (Blakeney 2013) or values that bind together and regulate the relationship between

persons, communities and tangibles (Coombe 1997; Prott, O'Keefe 1992; Strathern 1999). This is, of course, also a consequence of the fact that when we talk about property in a legal sense we, here at the self-declared centre or the world, are generally talking about a Western concept that embodies Western values. Apart from its scope, perhaps the Western value that is most bothersome in the context of cultural property is the concept of rivalrous ownership and possession that is Western property's special bedfellow (Mezey 2004). It is not clear that ownership and possession are always appropriate concepts in this context. This is partly because they may not reflect that way that all cultures think about their cultural property (Brown 2003; Coombe 1997; Macmillan 2015; Prott, O'Keefe 1992; Strathern 1999). But also because, even in the Western context, they trail in their wake other values and practices that might be thought to be undesirable. Rivalrous property rights are at the centre of a market-based thinking that has shown itself to be capable in the neo-liberal period of eclipsing any notion of public (as in non-private) good (Christodoulidis 2013). In the specific context of tangible cultural property, the results of this are evident in the thriving private international market for the sale of cultural artefacts (Prott, O'Keefe 1992; Carpenter, Katyal, Riley 2009). It also seems to be implicated in the practices of museums that claim possessive property rights in their exhibits, which have limited or even prevented return of sensitive cultural objects (Flessas 2013).

In the face of these arguments, it is clear that if we want to employ a concept of cultural property then it has to be one that is somehow divorced, or at least separated, from these traditional Western property notions. One way of doing this might be to conceive property in this context, not as a relation of ownership but rather one of membership (Keenan 2014). This conception of property reinforces the idea of cultural stuff as being intrinsically connected to identity. In fact, referring to property rather than heritage may avoid 'the privileging of preservation' (Flessas 2003, 1091), which has been at the heart of Western concepts of heritage (Flessas 2003; Flessas 2013; Macmillan 2013; Simpson 2001; Yu 2008), at the expense of a dynamic relationship with identity. This type of re-conception also moves us away from a strict division in ownership between public (as in state) and private property, which both operate to exclude community interests in ways which vary depending upon the community in question (Keenan 2014; Prott, O'Keefe 1992). At the same time, the use of the word has an important political significance retaining the ideas of 'embattled space' (Flessas 2003, 1085) and that property itself is productive of community (Keenan 2014; Gibson 2006). Using the concept of property here, instead of heritage, does not only make the conflict between cultural property and other types of property evident and unavoidable, both politically and legally. It also allows us to think about whether property concepts themselves, so well-known to the law, can be used to produce a liberatory tool that can be fitted into or recognised by the law.

The idea that property, or property concepts, might have liberatory or even subversive (Keenan 2014) potential has seductive power, even if (like all subversive ideas in their early stages) it requires careful articulation and constant defence. And certainly, as has already been noted, the concept of cultural property, residing outside the scope of traditional private property rights, requires legal architecture. The discussion below examines three possible models for such a form of cultural property. These are the stewardship model proposed by Carpenter, Katyal and Riley (2009), the idea of cultural property as *res universitatis*, and the potential uses of the existing legal concept of geographical indications.

5.1 Stewardship Model

The proposal of Carpenter, Katyal and Riley for a stewardship model of property, which specifically aims to vindicate the cultural property claims of indigenous peoples, seeks to find a liberatory use of the property paradigm that transcends its current narrow legal focus on private rights, and on the distinction between private property and some form of publicly held property. Effectively, this stewardship model uses the property paradigm without replicating those aspects of traditional property law that have already been identified as problematic in the context of cultural stuff. Theoretically, the model is located in Radin's work (1982; 1996) on the constitutive relationship between property and personhood, in which she argues that some forms of property are constitutive of identity in ways that take them out of the normal processes of the market place. To use Radin's work in this way, however, requires a transition from her emphasis on the relationship between individual personhood and property to a concern with the relationship between peoplehood and property that is implicated in the idea of a group claim. Carpenter, Katyal and Riley are fully aware that arguments about community rights often appear to be teetering on the edge of the type of essentialism that suggests cultural (and political) closure. For this reason, their model builds in a notion of community rights that is capable of resting on more than one level of identity thus moving away from an essentialist position.

Whether the elegant and persuasive use of the property concept embedded in the stewardship model, which is intended to address the situation of indigenous peoples, can function as well outside the context of indigenous cultural property claims is open to question. The fact, as they note, that the identity and claims of indigenous peoples as a community are recognisable within the legal environment of many states in which indigenous communities live is, ironically, a reaction to the dispossession and loss of political autonomy visited upon them in the colonial and post-colonial periods. However, it is this very environment of legally recognised identity, in the

context of multi-layered identities, that may make the stewardship model functional. Further, their suggestion that the use of the property paradigm may be a specific response to the massive land dispossession suffered by indigenous peoples everywhere may be interpreted as providing limited support for a paradigm of cultural property outside the context of the cultural property of indigenous peoples. Finally, the particular treatment of indigenous peoples in the post-colonial period, especially the denial of political autonomy, may be a ground for arguing that models designed to protect their cultural property are not, in any case, necessarily appropriate for all communities or groups.

5.2 *Res universitatis*

If the proposal for a new legal form does not convincingly resolve a perceived problem then perhaps it makes some sense to consider what forms already exist, or existed. Given that, in this case, the perceived problem arises from the unacceptable closure of intellectual (or other private) property as a form of protection for CH and the problematic openness of the commons, then perhaps it is worth having a closer look at the origins of the commons in intellectual space. The idea of the commons, at least so far as it has made its presence felt in IP scholarship, is heavily dependent on principles of Roman law governing physical space (Rose 2003; Macmillan 2010). Some of the conceptual problems that arose with respect to physical space in Roman law have also emerged in the modern notion of intellectual space. At the same time, the metaphorical existence of modern intellectual space seems to lack some of the complexity of its forbear in physical space.

The relevant Roman law principles recognised various dimensions of nonexclusive – but not necessarily public – property (Rose 2003). The most well-used of these so far as IP/commons debate are concerned are *res communes* and *res publicae*. The former referring to things incapable by their nature of being exclusively owned, while the latter referring to things open to the public by operation of law. These seem to have translated into the modern-day debate about property in intellectual space in the specific form of the concepts of the commons and the public domain. The fact that these expressions are often used interchangeably is probably not much of a surprise given that the Romans had a similar problem with *res communes* and *res publicae*, which reflected the modern-day tendency

to mix up normative arguments for ‘publicness’ with naturalistic arguments about the impossibility of owning certain resources. (Rose 2003, 96)

This confusion between the commons and the public domain, *res communes* and *res publicae*, has done nothing to simplify the epistemological basis of the dichotomy between IP and intellectual public space. It has also tended to conceal the fact that, traced back to their Roman law origins, neither of these concepts seems to provide a particularly strong basis for a vibrant public or non-exclusive intellectual space in today's world (Macmillan 2010). More than this, in the present context, it has been responsible for a tendency to simplify the notion of the commons so that we are left with a sharp division between closure and openness that seems to admit no shades of meaning or complications of form. Besides impoverishing the debate, this also fails to recognise the complexities of the Roman law governing property in physical space. In particular, as Rose (2003) points out, it ignores Roman law concepts that might be of particular use in resolving current dilemmas, such as the one with which this chapter is concerned.

Res universitatis, which was one of the categories of non-exclusive property under Roman law, appears to have particular potential in the current context. Translated into modern terms, it refers to a type of property that surrounds the productive activities of a group. From the outside those activities are protected by a shell or shield of property rights, but inside activities are not constrained by property relations. The result is that inside the shell there is freedom from property restraints: freedom of speech, freedom to innovate and create, freedom to produce knowledge, freedom of use, freedom of to exchange ideas, freedom to develop the ideas of others. In intellectual space, this form preserves productive synergies within the relevant group or community while maintaining the incentive to produce such synergies through the exercise of rights against outsiders. As the name suggests, this type of bounded community is commonly reflected in the activities of academic and scholarly groupings (Rose 2003). It may also describe the way in which members of traditional and indigenous communities produce innovations, knowledge and other types of creative expressions.

One of the implicit premises of this chapter is that IPL has difficulty in recognising these types of *creative or innovative communities*. The primary reason for this is that IPL is always anxious to identify the owner of the relevant right, be it copyright's author or patent law's inventor. In doing this, it is likely to disregard many contributions from the relevant community and to muddle up concepts of origination, ownership and use. IP does enjoy a very limited ability to recognise the concept of the bounded creative or innovative community through the devices of joint authorship and joint invention, which it transforms into joint ownership. However, these concepts are so limited in law that they can rarely do justice to the dynamic relations of a creative or innovative community (Chon 1996; Rose 1998). And it might also be the case, as Rose (2003) argues, that the successful use of these existing IP concepts to nourish a vibrant creative or innovative community depends upon an unrealistic degree of goodwill, if not goodness, on the part of all the members of the relevant community.

How many of these problems in recognising and governing the relevant community might also affect other property devices, such as that comprised in the concept of *res universitatis*? Certainly, any concept of community falling short of legal recognition as a state in international law is, I think it must be taken as read, likely to pose a challenge to identification by law. Communities, despite being recognised in political theory as constituting the common political identity that forms the basis of the nation (Anderson 2006), and perhaps also the common cultural identity that precedes a common political identity, have traditionally received little formal attention in international law precisely because their identity has been submerged into that of the nation-State. Nevertheless, as was noted in relation to the 2003 UNESCO Convention, the word “community” has started to creep into international legal instruments. The Convention does not seek to define the concept of community. Nor does it attempt to indicate expressly how a community might be recognised by the law, although the reflexive relationship between community and CH in the definition of ICH in art. 2(1) gives some indication of a possible approach to this issue.

Legal accounts of community, of course, exist. Despite the paucity (both quantitative and qualitative) of references to the concept of community in international law instruments, it is clear there is a substantial engagement with this concept in national legal systems. Given the reflexive relationship between community and CH, which is acknowledged in the 2003 UNESCO Convention, it is not surprising to discover that this engagement sometimes takes place in the CH context. National law recognition of the CH of indigenous peoples or of ethnic or linguistic minorities are examples of this. To some extent, these types of rights reflect obligations (actual or hortatory) in international law even though their origins might not be directly attributable to such obligations. However, there are also other well-known examples in national law of the recognition of community and associated community rights, where community is less than the public at large. It is common, for example, for legal systems to recognise community rights in property based on customary use (Clarke 2015). An interesting variation on this is the recognition, nationally and internationally, of certain rights associated with the marking of products made in a certain geographical location (Aylwin, Coombe 2014). With this in mind, this paper now turns to examine whether the concept of geographical indications might offer a useful form of protection for TK.

6 TK as a Geographical Indication?

The concept of protected geographical indications, which already exists at the levels of both national and international law thanks to the TRIPS Agreement, could provide – strangely – a model for the protection of TK and other forms of ICH. This is because, exceptionally, it grants a collec-

tive right rather than a private individual right. Specifically, a recognised geographical indication gives a right to every person that sells products coming from a certain geographical region and having particular qualities on account of that provenance to apply the indication to their products.

It seems to be the case that TK often has a geographical dimension in the sense that it is formed around communities in a particular place who have developed TK and uses as part of the dynamic that holds the community together. Perhaps, then, it would be possible to adjust the already existing concept of geographical indications to protect at least TK, if not also other CH of a specific community. Perhaps this seems a bit too strange: this paper has posed the problem of TK protection as lying somewhere in the conflict zone between IP rights and cultural property rights. If there is something anomalous in the idea of returning, in the end, to a form of protection that is recognised as an IP then that might suggest that the chapter posed the question wrongly. However, it is more likely that *the real anomaly is the concept of geographical indications*, located in the IP camp, but in reality, a community right. In the end, the important thing is that such a right would seem to be capable of responding to many of the needs identified in this paper. It could control the unauthorised appropriation and use of a community's CH, including its TK; by recognising communities that form less than the state as a whole, it is capable of transcending the problematic and antiquated idea that property must be either public (in the sense of belonging to the state) or private; and it could provide safeguards against the dangers of a type of exclusivity that is oppressive and limits cultural interchange and development.

7 Conclusions: Recognizing the TK Community?

The problem of recognising a community that forms less than the State as a whole will always be with us as we seek to find a way to *protect the TK community*. However, that problem is not an insuperable one. In confronting this issue, it is necessary to recognise that community comes before the law, which is to say that it cannot be regarded as constituted by law. Nor can community be contained in legal accounts of its existence or life (Christodoulidis 1998). That community interacts with such accounts does not change the fundamental proposition that, as Christodoulidis argues, community can converge

around a political/ethical understanding both capable of upholding a commitment, and dynamic, always potentially disruptable internally; and with no measure of authority, force, persuasion and violence capable of upholding it externally. (1998, 237)

Since law is not constitutive of community the pivotal question here is not whether we can find a basis in law for delineating a community, which might then lay claim to certain community rights. Rather what we may need to find are *indicia* in existing legal accounts around which to build a concept of community that might then be the carrier of certain CH rights and obligations in law.

The types of (overlapping) *indicia* that seem to be important in national systems as they relate to communities that form less than population of the State as a whole are: common political identity; common ethnic identity; common language; common religious identity; common geographical location; common sustenance practices; common history. As will be evident, with the possible exception of common language (Anderson 2006; Hobsbawm 2013) and common religion (2013), these are all also *indicia* of the type of communities that constitute nation states in international law. All these rather specific 'legal' *indicia* of community in fact draw on certain foundational concepts that are generally identified as being essential to the formation of community in any context, whether directly mediated by law or not. It is, arguably, these foundational concepts to which we should return in a quest to identify communities that should be regarded as enjoying CH rights or claims.

It seems that the central foundational concepts around which all these more specific *indicia* of community rotate are identification and memory, which are reflexively linked to one another. For Anderson, communities (with the possible exception of 'primordial villages of face-to-face contact', Anderson 2006, 6) are always imagined. By this he means not that they are fake or false, but rather that they are created by the imagination, that is by being imagined. Accordingly, he observes that

[c]ommunities are to be distinguished not by their falsity/genuineness, but by the style in which they are imagined. (2006, 6)

Anderson's classic account of community is focussed on the way in which community produces nation, and with its nationalism. Nevertheless, his observations on the formation of community also seem pertinent in the context of communities forming less than the nation-State as a whole. These observations do much to enrich the foundational relation of identification and memory. There are three, in particular, that go to the heart of how community is imagined. First, Anderson notes the 'deep horizontal comradeship' (2006, 7) that characterizes the imagined community - something that might also be referred to as solidarity. Secondly, he places emphasis on the temporal aspect of community, 'this sense of parallelism or simultaneity' (2006, 188). The temporal dimensions here are both horizontal and vertical. Horizontal because comradeship and solidarity carry with them some notion of a shared temporal space. Vertical because if memory is

critical to the imagined community then this implies a shared concept of the community's history and its temporal progression. Following on from this, the third aspect of Anderson's study that has particular resonance in the present context is exactly this question of *how a community imagines its relationship with its own past* (Macmillan 2016). The urgent task now is to find meaningful legal mechanisms that can recognise these communities and give them the capacity to protect their CH in ways that are appropriate to their community and that, with any luck, can enrich us all.

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