The McGill Journal of International Law & Legal Pluralism

Recruitment Material for the
Editorial Team

*Applications due by midnight on **15 January 2017***
via email to intergentes@mcgill.ca

Prepared by IG for the 2016-2017 Recruitment Cycle
www.intergentes.com

Job Descriptions

Executive Editor

Expected time commitment: 10-15 hours per week

- Follow individual submission through all steps of the review process (for articles: Internal Review - Substantive Edit - Language / Grammar Review; for all other submissions: from initial review to final publication).
- Oversee team of Senior Editor and Associate Editors at each step of the editorial process.
- Report to the Editorial Chair on a weekly basis.
- Desirable skills include:
    - Experience managing a team (managing an editorial team in various settings will be considered an asset but is not necessary);
    - Experience on a law journal will be considered an asset;
    - Bilingual in two of the three official languages of the Journal (French, English and Spanish).

Senior Editor

Expected time commitment: 5-10 hours per week

- Oversee given steps of editorial process (either Internal Review, Substantive Edit, or Language / Grammar Review) and coordinate with Associate Editors on tasks and deadlines.
- For all other submissions, Senior Editor will work directly with Associate Editors to reach a decision.
- Report to Executive Editor on progress of individual submission.
- Desirable skills include:
    - Experience on a law journal will be considered an asset;
    - Bilingual in two of the three official languages of the Journal (French, English and Spanish).

Associate Editor

Expected time commitment: 5-7 hours per week

- Participate in editorial process of all submissions by either: completing an Internal Review, Substantive Edit, or Language Review.
- Report regularly to Senior Editor.
- Desirable skills include:
    - Bilingual in two of the three official languages of the Journal (French, English and Spanish).

Application Procedure

1. Please submit a short cover letter that answers the following questions: (1) Why are you interested in this position? (2) What can you offer to the Editorial Team and to *Inter Gentes*? (3) How have your past academic and professional experiences prepared you for this type of role?
2. Please submit your curriculum vitae.
3. Please download the English academic article and answer all the questions below.

Extract of " Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I"
By Caroline Joan S. Picart and Marlowe Fox
***This article has been extracted for *Inter Gentes'* recruitment purposes only.**

PART A - *Please answer the questions below and limit your answers to 2,000 words maximum for all five questions:*

1) Summarize the extract. What is the thesis the author is attempting to advance? Is the argument logical and plausible?

2) Which area of international law does this article fall under? To the best of your knowledge, is this article an original, interesting or relevant addition to the field?

3) Does the author write clearly and concisely? Is the paper well organized?

4) Does the article appear to reference sources adequately? Do you anticipate any issues of plagiarism?

5) What changes would you recommend to the author? Would you recommend this article for publishing? Please justify your answer.

PART B - *Source Check*

Please identify the correct format for the following sources using the Canadian Guide to Uniform Legal Citation (8^{th} edition). Please insert the footnote you create into a two-column table, identifying in the second column where you located the format in the Cite Guide. Note: some sources may be strictly located online.

1) The International Covenant on Economic, Social and Cultural Rights (ICESCR)
2) Bill C-31
3) The Convention on the Rights of the Child
4) Japan — Agricultural Products II, WT/DS76/AB/R
5) Kofi Annan's Final Speech (December 11, 2006)
6) Third Geneva Convention (Prisoners of War)
7) "To Perpetual Peace: A Philosophical Sketch," in Immanuel Kant's book entitled: Perpetual Peace and Other Essays

Beyond Unbridled Optimism and Fear: Indigenous Peoples, Intellectual Property, Human Rights and the Globalisation of Traditional Knowledge and Expressions of Folklore: Part I

Caroline Joan S. Picart[1] and Marlowe Fox[2]
'University of Florida Levin College of Law; Tybel Spivak Teaching Fellow at the Center for Women's Studies, University of Florida, Gainesville, FL, USA
hAtrorney, Jacksonville, FL, USA

Abstract
This article is the first part of a two-part piece, which considers the intellectual property rights of indigenous peoples. After establishing pragmatic working definitions of who "indigenous peoples" are and what folklore (or "traditional cultural expression") is, as compared with, but dialectically related to, "traditional knowledge," this article does the following: 1) explains why western assumptions built into intellectual property law make this area of law a problematic tool for protecting traditional knowledge (TK) and expressions of folklore (EoF) or traditional cultural expressions (TCE) of indigenous peoples; and 2) creates a general sketch of human rights related legal instruments that could be and have been harnessed, with varying degrees of success, in the protection of the intellectual property of indigenous peoples.

Keywords
international law; intellectual property law; indigenous peoples; traditional knowledge (TK); expressions of folklore; human rights; globalization; trade

---

1 Caroline Joan S. Picart, Ph.D., is ajoint *Juris* Doctor (cum laude) and M.A. (Women's Studies) graduate (May 2013) at the University of Florida Levin College of Law, and was the Tybel Spivak Teaching Fellow at the Center for Women's Studies, University of Florida. Prior to law school, Picart was an Associate Professor of English and Humanities at Florida State University with a Courtesy Appointment at Florida State University Law School. The author thanks Professors Berea Hernandez-Truyol, Stephen Powell, Wentong Zheng, and Ulrich Loewenheim for their encouragement and suggestions on earlier drafts. Sheowesadebt of gratitude to Professors Raymond Fleming, Kenneth Nunn, Katheryn Russell-Brown, and Berta Hernandez-Truyol for their mentorship on critical race theory; and Professors Danaya Wright, Jeffrey Lloyd, Elizabeth Rowe, Paul Gugliuzza and Jeffrey Harrison for their having taught her the essentials of Property and Intellectual Property Law. Finally, she is grateful to Judge Richard Posner and Professors John Stuhr and Richard Behling for their constant support of her pursuit of her interests. She thanks Marlowe Fox, J.D., the co-author of this article, for his help with this project, and Sarah Singer, *JCLR* Managing Editor, and several anonymous reviewers, for their constructive suggestions. She dedicates this article to her two families, the Picart and Terrell families; and most especially her wonderfully supportive husband, Jerry Rivera.

2 >....!Marlowe Fox, Esq. holds a Juris Doctorate and a Master's of Science in Urban and Regional Planning from Florida State University. He thanks Or. Caroline Joan S. Picart for the opportunity to work on this critical issue.

1. Introduction

This article attempts to tackle a set of significant issues that present a myriad of descriptive and normative difficulties. Our multi-layered examination results in a substantial analysis, which has been divided into two parts for the convenience of the reader.

The first section of this article attempts to set up the theoretical context behind the oft-employed rhetorical narratives of "Optimism and Fear" in the context of the intellectual property rights of indigenous peoples. Our goal is to help promote change in the current paradigm by analysing contemporary empirical evidence and inducting core principles therefrom (as opposed to deducing from general principles in abstraction).

The second section endeavours to describe, without detracting from, the concept of indigenous peoples. We defend the necessity of establishing a working description of indigenous peoples as a pragmatic starting point for understanding their intellectual property rights. This section also attempts to characterize traditional knowledge (TK), while demarcating it from expressions of folklore (EoF) and traditional cultural expressions (TCE).

To close, the third section examines why TK and EoF lack substantial protection under current intellectual property legal strategies, setting out examples of biopiracy and existing means of legal redress. Specifically, we argue that current Intellectual Property (IP) law is a crude instrument that lacks the flexibility and nuance needed to appropriately address the needs of indigenous communities. This is followed by a descriptive analysis ofIP law's protection of EoF and its inherent limitations. Lastly, we analyse different strategies for defining TCE and EoF.

…

3. Why Traditional Knowledge and Expressions of Folklore Are Difficult to Protect Using Standard Intellectual Property Legal Strategies

In this section, we begin by employing examples of developed countries exploiting the TK ofless developed countries under the rhetorical justifications of entrepreneurship and utilitarianism; however, they fail to account for the detrimental effects of their activities on indigenous populations. We then describe some of the legal means of redress that may curb continued profiting from the unlawful appropriation of TK. And though a particular instance of misappropriation may be thwarted, economic incentives to exploit still persist. In addition, Western assumptions inherent in the Agreement on Trade-RelatedAspectsoflntellectual Property Rights (TRIPS) further complicate legal redress by failing to recognize

Table 1. Ways of Framing Seed as Property and Possible Strategies of Legal Protection[3]

Ways of Seeing/Framing	Conceptions of Property/Possible Strategies of Legal Protection
The seed as physical object	ownership as personality (a distinct chattel) associated with land ownership or real property covered by conceptual constraints on use after access afforded (e.g., a material transfer agreement) access constrained by controls on entry to land access conditioned on a permit or regulation governing prospecting of genetic resources national resource sovereignty more broadly national sovereignty in determining the conditions of entry and exit to the country concerned regulations on bioprospecting, biosafety, endangered species protection or quarantine (restricting or conditioning access to the seed and the right to remove it)
Botanical variety (phenotype)	– Plant variety right (if variety meets substantive criteria) Plant patent (if variety meets substantive criteria)
Genetic makeup (genotype)	Patent (e.g., if seed is of inventively transformed plant)
Embodiment of traditional knowledge or heritage of plantbreeding (TK)	raditional knowledge protection (where accorded) Custodial responsibilities under customary law Farmers' rights
Element of cultural heritage (TCE/EoF)	Links to customary land use or other rights based on customary law and practice - Association with local agricultural products and associated branding and regional identity

[3] *Supra.*

property rights in TK. Similar problems arise when attempting to protect EoF because these expressions of folklore are marked by two consistent features: anonymity and oral tradition. The solution may be to establish a working description; however, it raises the question of whether to employ strict definitions, which, though objective, may lead to unfair or absurd results, or broad standards, whose subjectivity may undermine the very cornerstones of the rule of law: certainty, uniformity, and predictability.

3.1. *Examples of Biopiracy and Examining Current Means of Legal Redress*

Numerous examples of biopiracy, which involve the misappropriation of TK by multinational corporations (MNCs) devoid of any benefit to, or recognition of, the tribes that initially generated the source of the TK, exist. Instances include: US pharmaceutical Eli Lilly's patenting of the cancer-fighting drugs vinblastine and vincristine from the rosy periwinkle plant in Madagascar;[4] American timber exporter's Robert Larson's receipt of a patent for importing India's neem tree (India's "curer of all ailments") into the US and commercialization of a pesticide derived from the neem extract called Margosan-0; [5] and American agricultural executive Larry Proctor's patenting of the "Enola" bean, derived from the traditional Mexican bean, the mayacoba.[6] In each of these instances, thousands of dollars of profit were involved, sometimes leading to a severe negative impact on the livelihoods of the local communities that were the original source of the TK from which the MNC developed the patented drug. For example, Proctor's appropriation of the Enola bean led to export sales of the Mexican traditional bean dropping over ninety per cent, "causing severe economic damage to more than 22,000 farmers in Northern Mexico who depended on sales from this bean."[7]

On a slightly more positive note, such patents can be revoked, usually through a challenge raised by an NGO. For example, in 2008 the United States Patent and Trademark Office (USPTO) revoked Proctor's patent of the Enola bean based on Columbia-based International Center for Tropical Agriculture (CIAT)'s formidable seven-year challenge to Proctor's patent. [8] Despite the NGO's victory, Proctor and his company managed to exploit the patent for seven years – about a third of the twenty-year patent term.[9] Similarly, the ayahuasca case resulted in ambiguous and temporary gains. Ayahuasca is a South American vine with hallucinogenic properties; as TK, it is used to treat sickness, contact spirits and foresee

---

[4] Lorna Dwyer, "Biopiracy, Trade and Sustainable Development", 19 *Coloradojournal of International Environmental Law and Policy* (2008), p. 226.
[5] *Ibid.,* pp. 216-17.
[6] *Ibid.,* pp. 228-29.
[7] *Ibid.*
[8] *Ibid.,* PP· 229-30.
9 *Ibid.*

the future. Local customary law, usually engaging the assistance of a shaman,[10] typically guides the preparation and administration of the drink, which has significance both as an embodiment of TK and as an instance of TCE because it is associated with religious rituals.[11] Following the typical pattern, the patent holder brought a particular variety of the vine back to the US in the 1970's and claimed a patent on it that was approved in l986.12 The Coordinating Body of lndigenous Organizations of the Amazon Basin (COICA) opposed the patent based on non-novelty and non-utility.[13] Initially, the USPTO revoked the patent; however, the USPTO later reinstated it because the variety was not identical to specimens in the US herbarium.[14] This is because US patent law excludes unpublished foreign sources when determining what constitutes "novelty" or "prior art".[15]

4.2. *Current IP Law as a Blunt Instrument*

At an initial level, there are clear analytic reasons why current Intellectual Property (IP) law is a blunt instrument in protecting TK and EoF as property of the tribe, rather than the MNCs. First, as Hernandez and Powell point out, TK is the "product of *collective* experimentation, which makes impossible associating a resource use with *one individuaf."* Intellectual Property law requires an identifi- able inventor or author (who could be an employee or agent of an MNC, for example); in contrast, TK and EoF draw from the collective therapeutic and pragmatic knowledge of the tribe, as well as the collective cultural and artistic heritage of the group.

A second factor is associated with the difference between the emphasis on the individual and the focus on the collective. Furthermore, as required by TRIPS Article 27(1),[16] patent protection can be granted only if inventions and ideas are "new", "nonobvious," and "useful". In addition, patent protection has a requirement called "enablement"[17] – which simply means that the application for a patent must describe the new idea by a physical manifestation or display a newly discovered type through a sample, and in written form, especially if it is a method

---

[10] Leanne M. Fecteau, "The Ayahuasca Patent Revocation: Raising Questions about Current U.S. Patent Policy", 31 *Boston College Third World Law journal* (200I) pp. 70-71.

11 Daniel Wiiger, "Prevention of Misappropriation oflntangible Cultural Heritage through Intellectual Property Laws", in *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (2004) [55]p. 193.

[12] *Ibid.*

[13] *Ibid.,* p. 194.

[14] *Ibid.*

[15] 35 USC § l02(a) and (b) (2002).

[16] Agreement on Trade-Related Aspects of lntellectual Property Rights, arc. 27(1), Annex IC, 1995, in Daniel C.K. Chow and Thomas J. Schoenbaum (eds.), *International Trade Law: Documents Supplement* (2010) pp. 297-298.

[17] The Enablement Requirement, 35 USC 112, in US Patent and Trademark Office's [USPTO] Manual Patent Examining Procedure [MPEP], sec. 2164 (8th ed., August 2011).

patent. For instance, one must be able to describe the invention so clearly that potentially, anyone wishing to replicate or exploit that knowledge once patent protection has lapsed, can do so. This is very much in keeping with patent protection's policy of balancing the desire to incentivise innovation by granting temporary monopoly rights over inventions with the attempt to make such knowledge eventually generally available to promote public welfare. This unbridled optimism assumes the utilitarian calculus that granting a monopoly *(m),* minus its initial social welfare costs (i), is greater than the increase in social welfare from distribution *(d),* of a new invention or methodology: $m - y > d$. However, while this utilitarian calculus may be true in Western cultures, which have well developed traditions in cultivating individual rights, it may not be easily transferrable to indigenous communities and their collective value systems.

Unfortunately, again, patent protection's emphasis on "novelty," "nonobviousness" and "usefulness" are radically opposed to TK's valuation of what is collectively familiar, intuitively obvious and "useful" (though not in a Western sense) to the tribe. And TK, much like EoF, as exemplified in traditional crafts, music or dances, rely more on an oral mode of transmission, rather than a written method. As such, TK is usually regarded as not patentable, and as such belonging in the public domain. More disturbingly, as Hernandez and Powell point out, even if TK were to meet patent law's "originality" requirement, most instances of TK do not fit patent law's requirements of being "profitable" and "capable of 'industrial application"'.[18] Again, the "optimistic" viewpoint's requirements of being "profitable" and "capable of industrial application", though applicable in a Capitalist market-driven society, may constrain the IP rights of indigenous peoples.

4.3. *Using IP law to Protect the EoF of Indigenous Peoples*

Convergent problems attend the attempts to use intellectual property law to protect the EoF of indigenous peoples, which are compounded by stereotypes of primitivism and racism.[19] Once again, unbridled optimism has created a myopic conception of folklore based upon Western societies' consequential ethos and empirical epistemology. Specifically, the West fails to see value where consequences of act or invention are not readily quantifiable. The oral tradition of folklore may afford benefits to indigenous communities that are not readily quantifiable; thus, it is accepted as an end in and of itself rather than a means of generating an economic profit. Hence, its collective nature or its "nonobviousness" should not preclude IP protection, as the exploitation of this folklore would result in social costs to an indigenous community whose losses must be compensated.

---

[18] Hernandez and Powell, *supra* note 35, p. 219.

[19] *See, e.g.,* Rosemary J. Coombe, *The Cultural Life of Intelkctual Properties: Authorship, Appropriation, and the Law* (I998) pp. 199-204 (analysis of che controversy over a male whiskey company's appropriation of Lakota statesman Crazy Horse's name as the trademark for its product).

As an instance of the clash in viewpoints regarding what deserves protection versus what does not, the Western notion of "folklore" often implies cliches of the (merely) "collected" and (already) "dead" or "dying".[20] In sharp contrast, for the communities whose identities are bound up with TCEs, folklore is nothing short of a living heritage, which is inextricably intertwined with daily realities and as such, necessarily evolves.[66] Nevertheless, two principal characteristics of EoF make it immediately evident why IP law makes it difficult to use copyright, for example, to protect EoF as tribal property. Two consistent features are: anonymity and traditional character (oral transmission).[21] In consonance with this general description, the WIPO characterisation ofEoF or TEC includes the following features:

i) being handed down from one generation to another, either orally or by imitation;
ii) reflecting a community's cultural and social identity;
iii) consisting of characteristic elements of a community's heritage;
iv) being made by "authors unknown" and/or by communities and/or by individuals communally recognized as having rights, responsibility or permission to do so;
v) being constantly evolving, developing and being created within the community.[22]

However, these precise features make it difficult to demarcate EoF as "property" separate from the public domain. Copyright law, akin to patent law in some ways, creates a binary between private property (usually individually owned and exploited) and the notion of the "commons" (usually not owned by any individual and free for use by all in the community). "Copyright law matured in the classical era of liberalism, which formally enshrined the ideal of the abstract individual freely exercising his or her creative capacity protected by a neutral system of natural rights, the most important of which was the right of property."[23] The converse to these clearly delineated individual rights is the amorphous "public domain," which is "usually equated with the non[-]propertied general welfare of

---

[65] Janice G. Weiner, "Protection of Folklore: A Political and Legal Challenge", 18 *International Review of Industrial Property and Copyright Law* (1987) p. 58.
[66] Terri Janke, "UNESCO-WIPO World Forum on the Protection of Folklore: Lessons for Protecting Indigenous Australian Cultural and Intellectual Property", 15 *Copyright Rep* (1997) p. 109.
[67] Agnes Lucas-Schloetter, "Folklore", in Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge and Folklore* (2nd ed., 2008) p. 346.
[68] WIPO, *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore* no. 50, WIPO/GRTFK/IC/6/3 (1 December 2003) p. 17.
[69] Thomas Streeter, "Broadcast Copyright and the Bureaucratization of Property", in Manha Woodmansee and Peter Jaszi (eds.), *1he Comtruction ofAuthorship: TextualAppropriation in Law and Literature* (1994) p. 306.

the common people of a particular nation-state or, more generously, with the larger welfare of the undifferentiated global community as a whole."[24]

Yet what that binary hides are precisely the assumptions behind copyright law and its historical origins. Much as patent law requires an inventor, copyright law requires an author; in addition, both invention and the creation of liter- ary texts (as copyright's origins lie in the attempt to protect the production of books) became regarded as testaments to the creativity and "genius" of a par- ticular individual. Within the context of 18th Century England, a book rose to becoming "the intellection of a unique individual",[25] rather than a product of mastering the rules of craftsmanship. Because a book is a particular embodied or "fixed" expression of the author's unique mind, originally expressed, it is private intellectual property; thus, the right to exploit chis identifiable piece of property belongs purely to this unique individual. Yet, as James Boyle points out, such an idealised view of authorship "blinds us to the importance of the commons – to the importance of the raw material from which information products are to be constructed."[26] Hardly surprisingly given chis binary, EoF, like TK, becomes discredited as "not original" – to borrow a monstrous metaphor, they become as the anonymous and interchangeable – "unfixed" – body parts that the genius, Dr. Frankenstein, stitches together to breathe life into his creature. Within chis context, "[i]ndigenous knowledge and generations of indigenous labour – mental and physical – are discredited. All that is credited is the 'chop-shop' labour of individual corporate and academic scientists who interject 'novelty' into what they have taken."[27] Hardly unexpectedly, the justificatory rhetoric for rendering invisible the contributions of TK and EoF to the development of highly profit- able pharmaceutical inventions or musical innovations partakes of the patterns of colonialist reasoning.

> [A]ppeals to common property, private property, and usually both in succession constitute the legitimating rationale of cultural imperialism. Itenables the dominant culture to secure political and social control as well as to profit economically from the cultural and genetic resources of indigenous cultures. Just as the concept of *terra nullius* once provided legal and moral cover for the imperial powers' treatment of indigenous peoples, the concept of public domain plays a comparable role within late capitalism.[28]

---

[70] Marlon B. Ross, "The New Negro Displayed: Self-Ownership, Proprietary Sites/Sights, and the Bonds/Bounds of Race", in Elazar Barkan and Ronald Bush (eds.), *Claiming the Stoner, Naming the Bones: Cultural Property and the Negotiation of National and Ethnic Identity* (2002) p. 259.

[71] Martha Woodmansee, "The Genius and the Copyright", 17 *Eighteenth Century Studies* (1984) p. 447.

[72] James Boyle, Shahmans, *Software and Spleens: Law and the Construction of the Information Society* (1996) p. xiv.

[73] Laurelyn Whitt, *Science, Colonialism and Indigenous Peoples: lhe Cultural Politics of Law and Knowl- edge* (2009) p. 162.

[74] *Ibid* p. 162.

thin a contemporary framework, the persistence of these colonialist notions of "originality" l "novelty" may be traced to the General Agreement on Tariffs and Trade (GATT)[29] and its ovisions on Trade-Related Aspects ofIntellectual Property Rights, which were forged by the minant powers, among which was the US. "According to the U.S. initiative in the GATT, other nation-states want[ed] to engage in trade with the United States, they [had to] opt U.S. stipulations regarding intellectual property which [were] contrary to their cus- nary practice and which enable[d] acquisition of their genetic and cultural resources."[30] e most salient critique of the optimist narrative, evident in the quotation above, lies in earthing the narrative's colonialist overtones, with the familiar theme of bringing light to witting indigenous communities, whose benefits are both economically advantageous and rally gratifying to the "torch- bearers." In a similar manner, the same pattern emerges: as sey and Outfield remark, TRIPS refuses to recognize "the more informal, communal tem of innovation through which Third World farmers produce, select, improve and ed a plethora of diverse crop varieties."[31] At this point as well, we have come full circle, ing how interconnected TK and EoF are, and how tricky it becomes to fully demarcate m.[32]