TOP SECRET INTELLIGENCE

Mat Callahan's quarterly newsletter of music, art, and philosophy
www.matcallahan.com **info@matcallahan.com**

Dear Friends:

This is a special edition of my newsletter. It is a result of my participation in the debate over Intellectual Property Rights (IPRs). This includes everything from internet file sharing of music to the patenting of drugs. Needless to say, claims and counterclaims resound. From apocalyptic warnings to euphoric promises we are told that THIS IS IMPORTANT and we should pay attention. Why, exactly, is not so clear. While I categorically reject the fundamental premise of the entire enterprise-namely, that ideas can be property and that, furthermore, they must be privatized to spur innovation-it is impossible to ignore the debate. It arises in everyday conversation. And, as I hope to show, it is indeed a matter of grave concern-although not for the reasons we are most often told it is.

Largely, what we read or hear is directed at us as "consumers". Our reason for being is to buy. Our only choice is what to buy. That this is a lie does not prevent it from successfully obscuring what is really at stake. What I'm presenting here are three statements that shed some light on this. One is from an indigenous group, The Tulalip Tribe in Washington State, another is from Josef Brinckmann, an expert on medicinal plants and the other is from me. Each offers a different perspective while having one thing in common. We are profoundly skeptical of the process and its objectives while, nevertheless, in good faith, participating to contribute what might ultimately produce the greatest good. This has been done through the channels of the United Nations.

Keep in mind that in many agencies of the UN conflicts over human rights and international trade have been going on for decades. It is a labyrinth of politics, law, jurisdiction and definition. What one needs to know, though, is simply this: Guided by justice and an egalitarian spirit, we can venture into the maze without fear. Ariadne will lead us to slay Minotaur and back again.

Happy New Year!

Broken Arrow Records
1395 San Carlos Ave.
Suite C
San Carlos, CA 94070
email: twharton@brokenarrowrecords.com
web: www.brokenarrowrecords.com
Ph: 650.654.1700

WIPO at an Impasse or The Bankruptcy of an Idea

I attended the 10th meeting of the Intergovernmental Committee on Traditional Knowledge (TK), Traditional Cultural Expressions (TCEs) and Genetic Resources (GR) in Geneva Nov 30–Dec 8. My NGO, Music In Common, is accredited by this body whose mandate derives from WIPO (The World Intellectual Property Organization-an agency of the UN) This is the same body to which, in April 2006, I presented a proposal drafted by Pete Seeger and myself.
(click here to read the proposal)

After my fourth day at WIPO a picture began to emerge. This includes what the stakes are, the forces arrayed and possible outcomes. Given that one week previously, in NY, the African States (led by Namibia) blocked passage of the Draft Declaration on Indigenous rights, there was an added dimension to the present IGC discussion. (http://www.globalissues.org/HumanRights/indigenous/) I heard indigenous groups sharply questioning the African states in a special meeting called by the latter to improve working relations with the former. This exposed the gap between the stakes as they are reckoned inside WIPO discussion – who wins and loses in this meeting – and the stakes all players reckon with outside. Not only is there formal incongruity between UN Agencies but there is a substantive incongruity between IPRs (Intellectual Property Rights) and Human Rights in general. Few are saying that openly, of course, but many are asking the question privately. I am neither privy to internal wrangling nor am I well enough versed in UN practices to offer detailed analysis of the diplomatic aspects. I can say with certainty, however, that one must look beyond WIPO to grasp what's happening within WIPO. No matter how important these deliberations are for those participating in them, they take place within a larger geo-political context and the current mania with IP is a smokescreen. That indigenous people view the deliberations as significant is one thing. For them this is one more front in the struggle for human rights. Besides, in these meetings their concerns are given greater weight than in the world at large. Conversely, the way the IP issue is hyped by telecommunications and entertainment industry groups smacks of the same delusional thinking exposed by the dot com fiasco. Add to this mix the publishers, lawyers and pharmaceutical reps who come to peddle their wares and you get the idea that this is all a matter of protecting the "entrepreneur" without whose genius humanity would have never emerged from the primordial ooze. Uniformly, these folks feign ignorance of the fact that the States *already* represent their interests making their interventions more boosterism than substantive (although some useful data get presented and, occasionally, their true agenda is revealed). What few speak of is a fundamental clash of interests that calls into question the legitimacy of authority in WIPO,

in the States, as such, and the notion of private property-at least in its classical, bourgeois form. Yet these questions haunt the proceedings like poltergeist.

Among the forces arrayed are, of course, the States. Preeminent among them is the US. Allied with the US are Japan, Switzerland, Canada, Australia, New Zealand and to a certain extent the EU, China, Russia and a few others. Against this loose bloc are all the developing countries, including Africa (all of it) most of Asia (particularly India and Indonesia) all of Latin America including Mexico and most of the Island States. Thus, with the glaring exception of China, the vast majority of States in the developing world oppose the Hegemon. The imperium is challenged on all sides. All states have in common a crisis of legitimacy as the Empire looks more and more like the only game in town and the Nation-state less and less the ascendant, emancipating structure it was in the post-colonial period following W.W.II. Indeed, the appearance of equality in these meetings conceals the profound inequality by which the world is ruled. As African countries, in particular, cling desperately to the fig leaf of national sovereignty with one hand, they grasp desperately for crumbs from the actual powers in the world with the other. It is painful to watch. Particularly as this puts them in the peculiar position of having to deny the existence of indigenous peoples in Africa while being forced to reckon with the plundering of TK, TCEs and GRs that is going on in a continuum of exploitation that goes back, uninterrupted, to the worst days of (formal) colonial rule. While their struggles for independence still resound, they are all, willy-nilly, embracing the regime of IP which is destined to make even their ideas the property of their former colonizers! It should be added, however, that in Latin America where popular resistance is growing rapidly, the arguments take on another, more promising aspect.

Among the NGOs are a disparate array of indigenous people's groups, professional and industry groups (lawyers, publishers, pharmaceutical companies, etc.) and many folkloric, ethnologic and public policy organizations. These do not constitute a united body at all. Indeed, even among the indigenous there are differences at least in terms of priorities and style. The only thing virtually all these groups have in common is dissatisfaction. No one likes the present regime and seeks one or another remedy from WIPO. In a candid observation made by the member of the Secretariat who invited me to attend it was revealed that, perhaps, these issues cannot be resolved within IP regimes and that WIPO is the wrong forum for discussion of them. This was, for me, a startling admission. Startling because it confirms my own view going into this at the same time it contradicts the ostensible reason I was invited to participate. And yet, it was evinced by the simple fact of impasse. The meetings will produce nothing. No binding treaties, no declarations, nothing but quandary. If this is the actual aim of the US then it has been achieved. I was told, informally, by an indigenous delegate that Japan, in particular, was playing point man by insisting on redefining a whole list of terms and conditions as a precondition for continuing discussion. These are the very terms and conditions that were already defined two years ago. An old game.

Consider that a background. What's of real interest here is the profound poverty of the idea of property. Yet, property, coupled with the idea of the individual as basic unit of society, is the cornerstone and ruling idea of Western Civilization. Hence, the spectacle of hundreds of delegates-highly educated and presumably well intentioned-toiling tirelessly to force reality to fit a notion that resists every attempt to do so. Of course, it is understandable why tribal peoples would seize on this as one more front to harry their oppressors; to, once again, take these latter-day conquistadors to task on their most sacred ground-that of property-and to challenge them to live up to their lofty claims embodied in the phrase: The Rule of Law. But as for the property "framework" which is the premise on which WIPO was founded and functions it is devoid of any creative or innovative content. Indeed, it fails to meet the simplest empirical criteria for judging the truth or falsehood of a proposition: it's regime has manifestly produced war and injustice on an unprecedented scale instead of ending them. It is a dinosaur of a period of history that, in my view, is coming to a close. Perhaps that close will be the extinction of our species. Perhaps it will be global revolution. Perhaps it will be a novel experiment of an unprecedented kind. In any case, the engine of progress unleashed by the bourgeois era (John Locke's theorizing comes to mind) is spinning aimlessly and destructively with nothing but inertia to keep it going. This is why the indigenous arguments which are tantamount to a form of communism are so dynamic. The old is new again. And in the most universal sense. (as opposed to the particularities of tribes or ethnic groupings) What is most interesting from the point of view of *thinking* is the universal, human, component of the indigenous claims. They, at least, have an Idea. And it is certainly debatable. That is, it is contentious and subversive in a most provocative way since it exposes the fallacies and inconsistencies of prevailing wisdom (or lack thereof).

So, on the one hand, I am doubtful whether the indigenous peoples will achieve their goals in the short term. On the other, I am inspired by what they bring to the struggle for all humanity. Meanwhile, there is the background noise of increasing unrest in all quarters. Chavez was reelected while this meeting was taking place. Ecuador's new president is a Chavez supporter, and so on. While, doubtless, these are only electoral victories for established parties they do signify an attempt by the world system to ameliorate or absorb a genuine movement from below that threatens to break out of the norms of governance that have dominated since the collapse of communism and the temporary subsumption of any kind of revolutionary politics (punctuated by the post-9/11 period, now over). In other words, a revolutionary politics is threatening, once again, to sweep over an increasingly polarized and paralyzed world. One must never forget that in the midst of all the polite palaver in these palaces of power.

Mind you, there are numerous excellent economic analyses that expose the precariousness of the current situation. Moreover, the best include critiques of both capitalist and "Marxist" views that failed to account for the far reaching and unprecedented effects of new financial instruments (such as hedge funds) and their proliferation in the final decades of the last century. Nonetheless, simple cost-benefit analysis reveals the unsustainability of the regime of Capital. Indeed, it underscores the fundamentals of wealth accumulation: seizure of land, water, raw materials, etc. combined with labor inputs to compose value. These have not and will not change no matter how elaborate the financial games become. Hence, the emergence of China as an economic powerhouse along the lines of England at the dawn of the Industrial Revolution-and for similar reasons.

Anyway, I'll leave off the abstract theorizing and get to the nuts and bolts as they appear to me, now. First, the IGC will meet again in July 07 and perhaps exhaust, perhaps renew its mandate. No binding instrument will come out of this and it would not surprise me if the IGC ceases to function in an embarrassing failure for which the UN will get a black eye. Second, NGOs of all types will likely focus on the WTO, UNESCO, ILO, Human Rights Commission and other UN agencies that have had some success in defining and enacting guidelines for international trade. (although, to date, there are few Laws governing TK, TCEs and GRs) Meanwhile, WIPO will continue to encourage "best practice" pilot projects which attempt to demonstrate how IP could protect indigenous and other local communities They will continue to provide information for UN functionaries. I don't mean this to sound cynical. The projects can be useful and there are many data-filled documents produced. But in the plethora of information there is little to suggest a way out of the current impasse. This only reveals the basic flaw in the concept: intellectual property is a dubious framework for thinking about justice.

This is not only an abstract question but one that demands answers on the ground. With astonishing clarity one sees that Traditional Knowledge is held, mainly, by impoverished people and is coveted by wealthy corporations who would extract it as they have already extracted mineral or other tangible wealth from beneath the feet of these very same people. This they would return to the world as patented, trademarked and copyrighted products which would further impoverish the people from whom it was taken. Until this circumstance is confronted in word and deed, justice will be wanting and there will, therefore, be no peace.

PS: If you haven't already heard of this book check it out. The author gave a persuasive presentation at the start of this session: **Global Biopiracy,** ISBN 0-7748-1153-8 written by Ikechi Mgbeoji (professor of law at York U, Canada)

The following is an article by an old friend, Josef Brinckmann, who has been working with medicinal plants for decades. His expertise has brought him into contact with farmers, merchants, botanists and diplomats the world over. He has presented papers at many UN fora and at industrial and public policy functions in many countries.–MC

The Fight Against Bio-piracy

An update on the case of maca (Lepidium meyenii) from INDECOPI (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual Dirección)

Reprinted with permission of the author. This article originally appeared in the Market News Service for Medicinal Plants and Extracts, Issue Nr. 21 (December 2006), a quarterly publication of the International Trade Centre (ITC) of the United Nations Conference on Trade and Development (UNCTAD)

Lima, Perú: One, of many, highlights of the recent Perú Natura 2006 (forum and exhibition for natural products and ingredients) was a presentation made on 27 September 2006 by Sylvia Bazán Leigh, a representative of INDECOPI (Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual Dirección). Mrs. Bazán discussed cases of biopiracy for several Peruvian natural products and the actions that have been taken in response to challenge them. Specifically the case of the traditional Peruvian food- and medicinal- plant "maca" was used as the primary example, although maca is just one of 32 Peruvian botanicals that have been prioritized for protection against biopiracy. Maca root (fresh or dried hypocotyl of Lepidium meyenii Walpers, Fam: Brassicaceae), is an herbaceous, perennial, cultivated crop, found only on the Andean central sierra of Peru (in Junín and Pasco), in the puna agro-ecological zone above 4,000 m.

According to the ETC Group (Action Group on Erosion, Technology and Concentration), "Biopiracy refers to the appropriation of the knowledge and genetic resources of farming and indigenous communities by individuals or institutions who seek exclusive monopoly control (patents or intellectual property) over these resources and knowledge. ETC group believes that intellectual property is predatory on the rights and knowledge of farming communities and indigenous peoples" (ETC Group, 2006). On 1 May 2004, The Peruvian Congress passed Law No. 28216: "The Law Protecting Access to Peruvian Biological Diversity and the Collective Knowledge of Indigenous Peoples." The definition of biopiracy, according to Peruvian Law No. 28216, is "unauthorized and uncompensated access and use of biological resources or traditional knowledge of indigenous peoples by third parties, without corresponding authorization and in violation of the principles established in the Convention on Biological Biodiversity (CDB)..." (Congreso de la Republica del Perú, 2004). Law No. 28216 also established the "National Commission for the Protection of Access to Peruvian Biological Diversity and to the Collective Knowledge of the Indigenous Peoples," hereinafter referred to as the "National Anti-Biopiracy Commission."

The National Anti-Biopiracy Commission has the task of developing actions to identify, prevent and avoid acts of biopiracy with the aim of protecting the interests of the Peruvian State. Its main functions are to establish and maintain a register of biological resources and traditional knowledge, provide protection against acts of biopiracy, identify and follow up patent applications made or patents granted abroad that relate to Peruvian biological resources or collective knowledge of the indigenous peoples of Peru, make technical evaluations of the above-mentioned applications and patent grants, issue reports on the cases studied, lodge objections or institute actions for annulment concerning the above-mentioned patent applications or patent grants, establish information channels with the main intellectual property offices around the world, and to draw up proposals for the defence of Peru's interests in different forums (WTO, 2005a).

In the case of alleged biopiracy involving maca root, the process actually began in mid-2002, two years prior to the establishment of the National Anti-Biopiracy Commission, after discovering that patents had been granted in the United States of America (USA) for "inventions" related to maca root. INDECOPI solicited the participation of several institutions in order to form a Working Group to analyze the granted patents and to determine as to what extent the patents could affect exports of maca products from Perú. The Working Group, coordinated by INDECOPI, was made up of representatives of the (Peruvian) Ministry of Foreign Relations, Ministry of Foreign Trade and Tourism (MINCETUR), National Environmental Council (CONAM), National Institute for Agricultural Research and Extension (INIEA), International Potato Center (CIP), Peruvian Environmental Law Society (SPDA), Pro Biodiversity of the Andes Peru (PROBIOANDES), Peruvian Institute of Medicinal Plants, and the Association for Nature and Sustainable Development (ANDES) (Bazán Leigh, 2006).

The author of this article was first made aware of the controversial maca patents in the USA from a presentation made at the Latin Pharma 2003 by Dr. Beatriz M. Garcia Delgado, department head of the Scientific Activity Organization at the National Center of Scientific Research (CNIC), Havana, Cuba. That presentation, entitled "Importance of Patent Information," provided examples of patents that have been awarded to inventors in developed countries – particularly natural products companies in the United States, Japan, and European Union – that appear to be based on already existing Traditional Knowledge from Latin American sources. One main point of Dr. Delgado's presentation was that producers in developing countries need to become acutely aware of the increasing number of patents that are being issued to corporations in developed countries that may threaten the future ability to produce and market certain value-added forms of native plants, even when they are promoted for traditional uses. In these cases, the patents will need to be challenged (Brinckmann, 2003).

As part of the maca response strategy, the Working Group initially prioritized the investigation of 3 granted maca patents. They collaborated with scientists and maca exporters to compile documents on maca preparation and prior use with verified dates prior to the filing dates of the patent applications (Bazán Leigh, 2006). The first prioritized patent for the Working Group was a World Intellectual Property Organization (WIPO) international application entitled "Compositions and Methods for their Preparation from Lepidium," listing 132 countries for registration. This was Application PCT/

US00/05607 filed by Pure World Botanicals, Inc. (New Jersey, USA) on 3 March 2000, claiming priority on the basis of application no. US 09/261,806 of 3 March 1999, and published on 8 September 2000 in the Patent Cooperation Treaty (PCT) Gazette as WO 00/51548 (Zheng et al., 2000). It contains 54 claims referring to extracts, macamides, an extraction process and therapeutic methods (WIPO, 2003). The second priority was US Patent 6,267,995 (filed on 3 March 1999 and granted on 31 July 2001), also assigned to Pure World Botanicals, entitled "Extract of Lepidium meyenii roots for pharmaceutical applications" (Zheng et al., 2001). And the third priority was US Patent 6,428,824 (filed on 19 October 2001 and granted on 6 August 2002), again assigned to Pure World Botanicals, entitled "Treatment of sexual dysfunction with an extract of Lepidium meyenii roots" (Zheng at el., 2002).

Aside from the three initially prioritized patents for investigation there have been other maca patents assigned in the USA including "Maca and antler for augmenting testosterone levels" (DeLuca et al., 2000), "Dietary supplement" (Hastings et al., 2002), "Herbal composition for enhancing sexual response" (Heleen, 2002), and yet another patent assigned to Pure World Botanicals entitled "Imidazole alkaloids from Lepidium meyenii and methods of usage" (Cui et al., 2005).

The Working Group drew up a report entitled "Patents referring to Lepidium Meyenii (maca): Responses of Peru", which was submitted by the Peruvian delegation at the fifth session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 9 May 2003 (WIPO, 2003). According to a revision of the communication from Perú, dated 28 February 2005 and circulated by the World Trade Organization (WTO) Council for Trade-Related Aspects of Intellectual Property Rights on 19 May 2005, "The report shows some of the problems that a country like Peru has to face upon identification of a pending patent application or patent grant whose subject-matter concerns an invention obtained or developed from the use of a biological resource or traditional knowledge without securing the prior informed consent of the country of origin of the resource or the indigenous people owning rights in the knowledge, and without providing for any type of compensation to that country or indigenous people" (WTO, 2005a).

Pursuing the case of maca biopiracy has been made possible, in part, by participation from many interested parties including a group of attorneys in the USA who are working on a pro bono basis, and those involved with the researching, compiling and shipping of documentation to the attorneys, financial support from the International Potato Center for the analysis of alcoholic extracts of maca, coordination of technical recommendations for new analysis on the extracts, and those responding to the appearance of new problem cases to investigate. For example, obtaining copies of maca patents recently filed with the Japanese Patent Office by applicant Towa Corporation and arranging for the translation of the technical documents to Spanish (Bazán Leigh, 2006). Japanese Patent application number 2003-081157, filed on 24 March 2003 by Towa Corporation (published on 8 January 2004), is entitled "Functional food product containing maca" (Ogawa et al., 2004). Towa Corporation filed a subsequent Japanese Patent, application number 2004-123438, on 19 April 2004 (published on 4 November 2005), entitled "Testosterone-increasing composition, testosterone-increasing food, testosterone-increasing skin care preparation for external use and testosterone-increasing medicine" (Ogawa and Matsuo 2005). But there have been many other Japanese maca invention patent applications in the meantime, none of which mention Perú, including, among others, an application published on 1 November 2005, from applicant Suntory Ltd entitled "Alcoholic drink containing maca extract," (Matsumoto and Kato 2005), an application published on 16 March 2006, from applicant Yukihiro Hirose entitled "Composition for preventing male climacteric disorder and beverage and foods including the same," (Hirose et al., 2006) and another application published on 8 June 2006 from applicant Nippon Menaade Keshohin KK entitled "Improving agent of indefinite complaint accompanying with autonomic imbalance" (Yamada et al., 2006).

Actions taken thus far by Perú's National Anti-Biopiracy Commission against the Japanese patents include the submission of technical documents to the Japanese Patent Office in order for them to evaluate whether the Towa Corporation patent meets the requirements of novelty and inventiveness. Concerning the aforementioned US patents assigned to Pure World Botanicals, the current state of action is the coordination for the opposition of the patents.

Related Documents, Publications and Events

In March 2005, the delegation of Perú presented to the WTO a document entitled "Article 27.e(B). Relationship between the TRIPS Agreement and the CBD and Protection of Traditional Knowledge and Folklore" (WTO, 2005a). In October 2005, the delegation of Perú presented to the WTO the document "Analysis of Potential Cases of Biopiracy: The Case of Camu Camu (Myrciaria dubia)" (WTO, 2005c). And in November 2005, a seminar on the topic was held entitled "Nuevos Retos para el Perú: Biopiratería, ¿cómo enfrentarla?" Related documents submitted to WIPO include "Patents referring to Lepidium meyenii (Maca): Responses of Perú" (WIPO, 2003) and "Patent system and the fight against biopiracy — The Peruvian experience" (WIPO, 2005). Additionally, in August 2005, INDECOPI published a report "Analysis of potential cases of biopiracy in Perú."

Progress to Date

In relation to the validity of the patents related to maca, certain claims in the international patent (PCT/US00/05607) have been determined to not meet the novelty criteria, while other claims are not inventive. Additionally, certain claims found in US patents 6.267.995 and 6,428,824, respectively have been analyzed and determined that they do not meet the inventiveness level (Bazán Leigh, 2006). In a communication filed with WTO in November 2006, the delegation of Perú concludes "Perú's position is clear: despite the existence of useful tools for improving the patent system and verifying compliance with existing patentability obligations, especially as regards thte novelty and inventive step criteria — the inclusion of the requirements to disclose the source and/or origin of biological resources, as proposed in document IP/C/W.473, is essential if the patent system is to reflect adequately the obligations arising from the CBD, obligations which Perú and all Member States are required to fulfill" (WTO, 2006).

Challenges Ahead

There are insufficient resources available to challenge inappropriately assigned patents, while there are new requests of maca patent cases to analyze. There are limitations and problems faced by countries like Perú in identifying, monitoring and studying patent applications or granted patents that involved improperly granted rights or weaken regimes for access to and/or protection of Traditional Knowledge (WTO, 2006).

For more information, contact:

Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad Intelectual
Calle de la Prosa 138 - San Borja
TEL: (511) 224-7800 (511) 224-7777
FAX: (511) - 224-0348
WEB: http://www.indecopi.gob.pe

Josef Brinckmann

(detailed references are available by clicking here)

The following is an intervention made Dec 4, 2006 in Geneva by a spokesperson for the Tulalip Tribes of Washington. It was kindly furnished to me in hopes that you, my friends and colleagues, might better understand their position. I was struck by the clarity and concision of this statement and offer it as representative of views widely held by indigenous groups throughout the world. (it also gives a glimpse of the language used at these gatherings)

Tulalip Intervention

Thank you, Mr. Chairman

The Tulalip Tribes of Washington warmly congratulates you on you Chairmanship of this 10th Session on the IGC, and enthusiastically endorses your recommendations on making concise and constructive interventions.

We believe much progress has been made in the draft objectives and principles on traditional knowledge and TCEs that the Secretariat has ably compiled and explained. We look foreword to making progress on genetic resources and associated traditional knowledge during this session. We appreciate the opportunity to directly present indigenous views to parties during the opening indigenous panel at this session and at IGC, and thank the large number of delegates who attended and listened so attentively. We especially thank the states for establishing the voluntary fund and [voluntary fund contributors] for helping to ensure indigenous presence and participation.

Distinguished delegates, we have been going steady for quite some time now, and it is time to take this relationship to a new level. We hope that together we can forge a dazzling engagement ring at this and the next session of the IGC, so that we may announce our full intentions and commitment to the next WIPO General Assembly.

In regards to the program of work, we have many options still in front of us. Some fully reflect the rights and aspirations of indigenous peoples and other holders of traditional knowledge and TCEs. Some do not. As we simplify and choose among options, we urge parties to incorporate indigenous participation in utmost good faith. Delegations should carefully consider indigenous submissions, presentations and interventions, as well as national experiences, to choose options that fully respect the rights and aspirations of indigenous peoples and other owners of traditional knowledge and TCEs.

Mr. Chairman, we must be ever vigilant against problem displacement and unintended consequences. Delegations here are trying to resolve issues in intellectual property law. This body of law does not reflect the primary motives of indigenous peoples for their practices and innovations in traditonal knowledge and TCEs. Indigenous peoples are trying to adapt in a holistic manner to many changes in their economies, cultures and environment that imperil their traditional ways of life. Many are engaged in desperate battles for cultural survival, with loss of and threats to their ancestral homelands, the loss of cultural resources necessary to the practice their traditions and maintain their cultures, and the degradation and loss of traditional knowledge, tribal integrity and tribal identity.

When nations first regulated air pollution, many industries built higher smokestacks. This solved local air quality problems, but created acid rain that harmed distant communities. Green tags perhaps contribute to solving global carbon problems, but allows higher pollution in distant regions that harms local communities. We must ensure that proposed solutions to intellectual property problems do not similarly effect the holders of traditional knowledge and TCEs. Traditional knowledge registers, for example, may make traditonal knowedge more available to the public. If not consructed to fully protect indigenous control over their traditional knowledge associated cultural resources, a patent monopoly solution may violate customary laws, impose insurmountable documentation burdens, and make non-monopolistic use of traditional cultural resources more common. This may remove any practical hope of control or benefit sharing for indigenous peoples. An improperly constructed instrument to prevent unjust enrichment could contribute to cultural extinction by disturbing spiritual relationships, eroding traditional values and preventing indigenous peoples from accessing resources necessary for cultural survival.

Mr. Chairman, if this grand policy experiment fails, it will not be the nation states that will bear the burden of policy failures. It will be indigenous and local communities themselves. Economic interests must never be traded against cultural survival.

The Tulalip Tribes believes our primary directives should be protection and respect for customary law. Customary law is the law that most matters for indigenous peoples and is inalienable from their identity and integrity. Our interpretation of the “promotion” of traditional knowledge and TCEs is that measures should protect and reinforce their use and regulation by their owners. Sharing can only occur with the free, prior informed consent of their owners using terms of protection, use and benefits that are mutually agreeable.

Honorable delegates, faithfully discharge your trust obligations. There should be no picking the fruits unless first protecting the roots.

Thank you, Mr. Chairman

Music In Common Proposal

January, 2006

Old songs, worldwide, now in the Public Domain are often "adapted and arranged" and the new song copyrighted. We propose that a share, .01% or 99.99%, of the mechanical, print, and performing royalties go to the place and people where the song originated. Every country should have a "Public Domain Commission" to help decide what money goes where.

Pete Seeger
The Committee for
Public Domain Reform

Plan for implementation proposed by Music In Common:

The duties or functions of a Public Domain Commission would fall under three main categories. Preservation and Development, Resource Allocation and Accounting and Accountability. Each category is further defined below.

1. Preservation and Development-The Conservatory

a. Canon formation

b. Archive/library

c. Masters/teachers

Exemplary works held to be so by general acclamation of the community, tribe, ethnic group or nationality involved would be assembled and performed by similarly exemplary masters of the tradition. These might be recorded in both print and sound forms but they would necessarily be carried on in oral form to be passed on as they have already been for generations or centuries. (this has been accomplished in some cases, has been partially done in others, and has yet to be undertaken systematically in still others)

2. Resource Allocation

a. Funds for training youth

b. Funds for exemplary performance (regular festivals, customary events, etc.)

c. Funds for instrument building and performance space construction and maintenance

d. Funds for sustaining Master crafts people (instrument builders, performers and composers)

To ensure the traditions are kept vital and alive new generations must be introduced to them in a way that honors the music itself as well as those who maintain its highest forms of expression. Infusions of new energy and enthusiasm must be balanced with the mastery of the spiritual and practical skills needed to perform the music well. Structures suited to local conditions and histories should be constructed to ensure long-term sustainability.

3. Accounting and Accountability

a. Monitoring the health of the music, the musicians, and the community it arises from and serves

b. Monitoring the uses to which the music is put in the rest of the world

c. Collecting funds generated anywhere

d. Dispersing funds correctly according to the principles outlined above

Through international agencies, performing rights societies, governmental bodies or combinations of all three, the uses of music can be monitored and evaluated. That the Public Domain be maintained in the public interest and available to all, as is a library, should not mean that moneys generated by sale somewhere not be returned to their source of inspiration: namely the peoples or countries whence they arose. Indeed, it would be one function of the Public Domain Commission to ensure that two apparently contradictory purposes are served: to ensure preservation and development of a "natural resource" for the benefit of all and at the same time limiting use by those seeking to profit from it and ensuring that a reasonable portion of those profits are returned to the source to sustain it. Ultimately, accountability to the local Public Domain Commission should be the rule. Thus, a universal principle would be applied locally by those entrusted to do so.

The composition of the Public Domain Commission should include music makers (musicians, composers and instrument builders) recognized as masters of their crafts. It might also include musicologists, historians and others sufficiently trained to ensure traditions are honored and healthily maintained. Educational and administrative functions corresponding to local conditions need to be constructed but oversight should always include music makers.

A UN Public Domain Commission

There are three areas where a UN Public Domain Commission would be useful in the implementation of these proposals:

Origins, Jurisdiction and Rights Designation

The origins of much of the world's music precede the formation of present-day Nations. Indeed, much of the world's music continues to be made and used by tribal, ethnic or other groupings that reside in different countries simultaneously. Furthermore, there are cases where no national body is recognized or trusted by ethnic groups whose music is in question. In such situations a UN Public Domain Commission might afford the best solution.

This should not, however, be merely a juridical "court of appeal". On the contrary, the principal function of such a body would be to ensure the preservation and development of the music in question in accordance with the needs and wishes of the people actually involved in making it. If no local entity has the capacity or authority to carry out this task then the UN Public Domain Commission should undertake it.

In determining a specific music's origin the following questions should be answered:

– Who makes the music now?

– For what purpose is it made? (sacred, festive, work, education, etc.)

– How will this be preserved and developed in the future?

In determining what kinds of rights are applicable a UN Public Domain Commission should use the Conservatory model proposed above. The Conservatory's basic function is to ensure that the makers and users of the music in question continue to flourish. Prohibition or limitation of use is a secondary function only useful in the context of the successful fulfillment of the first. This means:

– Resources from taxation, charitable institutions or profitable sale should be directed, first and foremost, to the preservation and development of the music and music makers involved

– Access to music should not be limited unless those who make and use it specifically designate it secret, sacred or otherwise unavailable to the world at large (in which case its unautho-

rized appearance would not only constitute simple theft but desecration subject to human rights protections)

– Respect for the work, skill and creativity that have been and continue to be invested by those involved. This requires public education within and beyond the communities in question to ensure that all who hear the music know the history and present circumstances of the people who made it.

Pete Seeger's examples:

When I learned the story of how little royalties for the song "Mbube" ("Wimoweh" in the USA) had gone to the African author {Solomon Linda}, I realized that this was a worldwide problem. Why not try to start solving it? I had been collecting book and record royalties for "Abiyoyo", a children's story I made up in 1952. It uses an ancient Xhosa lullaby. The royalties are now split 50–50, with half the royalties going to the Ubuntu Fund for libraries and scholarships for Xhosa children near Port Elizabeth, in southeast South Africa.

Another example: in 1955 I put together a song "Where Have All the Flowers Gone". The basic idea came from an old Russian Folk song, "Koloda Duda". Some royalties for the song will now go to the national folk song archives in the Moscow library.

In 1960 I put a melody and three words, "Turn, Turn, Turn" to a poem in the Book of Ecclesiastes, written 252 BCE. The English translation was done in London 400 years ago. I have decided to send some royalties to an unusual group in Israel which is trying to bring Arabs and Jews together.

In the USA all the royalties for the song "We Shall Overcome" have gone, for 40 years, to the "We Shall Overcome Fund" which every year gives grants for "African American Music in the South". Bernice Johnson Reagan (Sweet Honey In the Rock) is the chairperson of that fund.

REFERENCES ▲ *back to the article*

Bazán Leigh S. Casos de Bio-pirateria para productos naturales y acciones adoptadas. In: Perú Natura 2006: Foro y exposición de Ingredientes y Productos Naturales, 26 y 27 de Septiembre 2006, Hotel Plaza del Bosque, San Isidro, Lima, Perú.

Brinckmann J. LatinPharma Expo 2003, Lima Perú: Natural Products Roundtable, Trade Show, Buyers/Sellers Meeting. HerbalGram. 2003;60:68-70.

Congresso de la Republica del Peru. Ley No 28216: Ley de protección al acceso a la diversidad biológica Peruana y los conocimientos colectivos de los pueblos indÍgenas. El Peruano Diario Oficial — Normas Legales. 1 de mayo de 2004;XXI(8714):26758-26759.

Cui B, Zheng BL, He K, Zheng QY. Imidazole alkaloids from Lepidium meyenii and methods of usage. United States Patent 6,878,731. Washington, DC: United States Patent and Trademark Office (USPTO). 12 April 2005.

DeLuca DL, Sparks WS, DeLuca DR. Maca and antler for augmenting testosterone levels. United States Patent 6,093,421. Washington, DC: United States Patent and Trademark Office (USPTO). 25 July 2000.

[ETC Group] Action Group on Erosion, Technology and Concentration. Biopiracy. Ottawa, ON: ETC Group. 2006. Available at: http://www.etcgroup.org/en/issues/biopiracy.html

Hastings CW, Barnes DJ, Daley CA. Dietary Supplement. United States Patent 6,368,617. Washington, DC: United States Patent and Trademark Office (USPTO). 9 April 2002.

Heleen PA. Herbal composition for enhancing sexual response. United States Patent 6,444,237. Washington, DC: United States Patent and Trademark Office (USPTO). 3 September 2002.

Hirose Y, Hirose K, Nakajima H, Nakajima H. Composition for preventing male climacteric disorder and beverage and foods including the same. In: Patent Abstracts of Japan—Publication number: 2006-069970. Tokyo, Japan: Japanese Patent Office. 16 March 2006.

Matsumoto T, Kato M. Alcoholic drink containing maca extract. In: Patent Abstracts of Japan—Publication number: 2005-312430. Tokyo, Japan: Japanese Patent Office. 10 November 2005.

Ogawa H, Mitsunaga T, Kawamura Y. Functional food product containing maca. In: Patent Abstracts of Japan—Publication number: 2004-000171. Tokyo, Japan: Japanese Patent Office. 8 January 2004.

Ogawa H, Matsuo T. Testosterone-increasing composition, testosterone-increasing food, testosterone-increasing skin care preparation for external use and testosterone-increasing medicine. In: Patent Abstracts of Japan—Publication number: 2005-306754. Tokyo, Japan: Japanese Patent Office. 4 November 2005.

[WIPO] World Intellectual Property Organization. Patents Referring to Lepidium meyenii (Maca): Responses of Peru. In: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fifth session Geneva, July 7-15, 2003. Geneva, Switzerland: WIPO. 12 May 2003; WIPO/GRTKF/IC/5/13.

[WIPO] World Intellectual Property Organization. Patent System and the Fight Against Biopiracy — The Peruvian Experience. In: Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Eighth Session, Geneva, June 6 to 10, 2005. Geneva, Switzerland: WIPO. 30 May 2005; WIPO/GRTKF/IC/8/12.

[WTO] World Trade Organization. Article 27.3(B), Relationship between the TRIPS Agreement and the CBD and Protection of Traditional Knowledge and Folklore. Communication from Peru (Revision). Geneva, Switzerland: WTO Council for Trade-Related Aspects of Intellectual Property Rights. 19 May 2005a; IP/C/W/441/Rev.1.

[WTO] World Trade Organization. Article 27.3(b), Relationship between the TRIPS Agreement and the CBD and Protection of Traditional Knowledge and Folklore. Communication from Peru. Biodiversity, Traditional Knowledge and Intellectual Property: Peru's Position in Relation to Disclosure of Origin and Legal Provenance. Geneva, Switzerland: WTO Council for Trade-Related Aspects of Intellectual Property Rights. 8 June 2005b; IP/C/W/447.

[WTO] World Trade Organization. Analysis of Potential Cases of Biopiracy: The Case of Camu Camu (Myrciaria dubia). Communication from Peru. Geneva, Switzerland: WTO Council for Trade-Related Aspects of Intellectual Property Rights. 7 November 2005c; IP/C/W/458.

[WTO] World Trade Organization. Response to Comments Contained in Document IP/C/W/469 Relating to the Peruvian Communication IP/C/W/458. Communication from Peru. Geneva, Switzerland: WTO Council for Trade-Related Aspects of Intellectual Property Rights. 2 November 2006; IP/C/W/484.

Yamada S, Nasu A, Iwata Y. Improving agent of indefinite complaint accompanying with autonomic imbalance. In: Patent Abstracts of Japan—Publication number: 2006-143664. Tokyo, Japan: Japanese Patent Office. 8 June 2006.

Zheng BL, Kim CH, Wolthoff S, He K, Rogers L, Shao Y, Zheng QY. Compositions and Methods for their Preparation from Lepidium. WO Patent 00/51548. PCT Gazette, Section I. 8 September 2000;12758.

Zheng BL, Kim CH, Wolthoff S, He K, Rogers L, Shao Y, Zheng QY. Extract of Lepidium meyenii for pharmaceutical applications. United States Patent 6,267,995. Washington, DC: United States Patent and Trademark Office (USPTO). 31 July 2001.

Zheng BL, Kim CH, Wolthoff S, He K, Rogers L, Shao Y, Zheng QY. Treatment of sexual dysfunction with an extract of Lepidium meyenii roots. United States Patent 6,428,824. Washington, DC: United States Patent and Trademark Office (USPTO). 6 August 2002.

Zheng BL, He K, Shao Y, Zheng QY. Compositions and methods for their preparation from Lepidium. United States Patent 6,552,206. Washington, DC: United States Patent and Trademark Office (USPTO). 22 April 2003.