

Beyond Patents: The Cultural Life of Native Healing and the Limitations of the Patent System as a Protective Mechanism for Indigenous Knowledge on the Medicinal Uses of Plants

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1. Introduction and Overview

In the past decade, indigenous knowledge systems have witnessed a belated renaissance, both in policy instruments of international organizations¹ and in some international law agreements.² In the progressive emancipation of indigenous knowledge systems, two key issues have arisen. The first is the controversial appropriation of various products, innovations, art forms, and intellectual property of indigenous knowledge systems. A particularly contested aspect of this phenomenon has been characterized as biopiracy.³ The second closely related issue is whether dominant regimes for the protection of intellectual property are compatible with indigenous knowledge systems. The latter issue often finds resonance in contemporary debates on how best to make the legal regimes of impoverished states compatible with the demands of the World Trade Organization. Both issues are recondite and complex, especially in light of the fact that indigenous knowledge systems traverse a wide gamut of life, experiences, epistemologies and empiricisms of thousands of disparate cultures.

Indeed, indigenous knowledge systems are implicated in ecology, agronomy, agriculture, medicine, animal husbandry, music, storytelling, and cloth weaving, to name but a few areas, across several thousands of different cultures and peoples. Given the multitudinous nature and diversity of indigenous knowledge systems, it becomes intellectually risky, if not fraudulent, for general claims to be made regarding such knowledge systems. With particular reference to innovations and inventions made within the context of traditional knowledge systems, it is impossible to resolve the question of the relationship between patents and indigenous knowledge systems without first narrowing the scope of inquiry to a specific set of indigenous knowledge systems.

Thus, with respect to the contested issue of biopiracy and the related issue of how best to protect indigenous knowledge from the predations of unscrupulous “free-riders” and “bioprospectors”,⁴ I limit my analysis to traditional knowledge on the medicinal uses of plants. Indeed, my analysis is further limited to the protocols, norms and practices regulating the acquisition, use, transfer, and alienation of such knowledge among indigenous healers, particularly herbalists of southern Nigeria. The question that this paper seeks to tackle is whether in the contest of allegations of biopiracy and in the search for effective mechanisms for the protection of indigenous knowledge of the medicinal uses of plants possessed by traditional healers of southern Nigeria, there is any role for the patent regime. Given the popularity of alternative forms of health care,⁵ this question is of importance in contemporary discourse.⁶

Before delving further into the aforementioned issues, the concept of biopiracy needs clarification. What is “biopiracy”? Does the term have a relevant and juridical significance beyond its apparent rhetorical⁷ and emotive value? The term “biopiracy” was coined by the Canadian activist Pat Mooney. As a concept, “biopiracy” was devised as

[P]art of a counter attack strategy on behalf of developing countries that had been accused by developed countries of condoning or supporting “intellectual piracy”, but who felt they were hardly as piratical as corporations which acquire resources and traditional knowledge from their countries, use them in their research and development programs, and acquire patents and other intellectual property rights — all without compensating the provider countries and communities.⁸

When the concept of biopiracy is used or deployed in relation to plant resources,⁹ there is a distinction between traditional knowledge of the medicinal uses of plants and the broader issue of indigenous peoples’¹⁰ knowledge. The former is only an aspect of the latter.

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The concept of traditional knowledge of the medicinal uses of plants pertains specifically to the diverse knowledge possessed by the relevant healers of the various medical uses or properties possessed by certain parts of certain plants. Such knowledge differentiates other uses and properties of such plants, such as food, as distinct from the plants' medicinal efficacy. Second, it must be borne in mind that peoples' health systems are a reflection of their philosophical and cultural tenets.¹¹ Consequently, knowledge of the medicinal uses of plants is just part of a more holistic conception of disease, treatment, and recovery. Traditional medicine, it must be emphasized, focuses on the psychosomatic dimension of illness. It is therefore invidious to examine traditional uses of medicinal plants outside of the prevailing cultural conception of illness in traditional societies. Third, it must be clarified at the outset that the notion of traditional knowledge as an antiquated and inferior body of knowledge is clearly rejected.

The central question posed in this paper is whether the patent system is relevant or useful for the protection of indigenous knowledge of medicinal uses of plants.¹² This question cannot be resolved without some reference to the politics of intellectual property rights vis-à-vis plant resources.¹³ Of course, such an inquiry must also take into account the theoretical justifications for the existence of patent regimes, the search for effective legal measures to protect indigenous knowledge systems, and the growth of medical pluralism around the world.¹⁴ There are also issues related to the ramifications of globalization and the economic, political, and human rights implications of the emergent dispensation of patents on indigenous peoples' knowledge. In sum, the debate is inherently complex, especially on matters pertaining to the increasing role of patent systems in contemporary global politics and economics.¹⁵

The analysis in this paper is divided into four parts of which the first, presented above, is introductory.

Part two briefly examines the origin, nature, and functions of the modern patent system with particular attention to the dominant theories advanced to justify its existence.¹⁶ The central thrust of part two is that the patent system, developed in the cultural hearth of Europe, is fundamentally construed as an incentive mechanism for the encouragement and protection of inventors in a capitalist market.

Part three explores the nature and diversity of native healing in southern Nigeria. A feature of this phenomenon often overlooked by scholars is that native healers are largely categorized into two groups: diviners and herbalists. Both categories require immense and rigorous training and tutelage. More importantly, native healers embody and reflect the cosmological world view of indigenous peoples. As practitioners of a distinct type of health care, native healers operate from a theoretical standpoint that construes ailment and disease as psychosomatic, rather than biological or pathogenic. Hence, as

part two argues, the practices of native healers constitute a complex institution and unique paradigm distinct from the Western allopathic theory of illness. This epistemic schism is at the root of the misunderstanding between Western allopathic medicine and the indigenous psychosomatic conception of illness.

Consequently, native healers' knowledge of the medicinal uses of plants cannot be narrowly construed or understood as knowledge about the "active ingredients" in a given plant. This striking feature of the conception of medicinal uses of plants is at the centre of the antimony and conflict between the doctrine of patentability and the holistic world views of indigenous healers. While the patent system seeks to isolate and privatize the "active ingredient" in any given medicinal plant, native healers tend to conceive of the plant as one part of a larger repertoire for the alleviation of illness. More importantly, native healers do not require the incentives offered by the patent system.

Another fundamental philosophical difference between patents and indigenous protocols for the identification and protection of indigenous knowledge of the medicinal uses of plants is that while the patent system is designed to recompense investors with a temporary monopoly over the invention, indigenous protocols for the protection of the knowledge of native healers are deployed in the service of status and division of labour in a traditional economy. Consequently, this paper argues that whether as an incentive mechanism or as a protective regime, patents do not offer much benefit to the native healers of Southern Nigeria.

In expatiating on some of these difficult issues, part three explores and assesses recent doctrinal changes in patent law. Hence, this paper analyzes whether as an incentive mechanism and protective regime, contemporary patents afford sufficient inspiration to native healers while providing effective protection from biopirates. If the answer is in the negative, what then is the best manner by which to encourage native healers and to protect their knowledge from the grasp of unscrupulous "free-riders" and "biopirates"?¹⁷

In sum, it is argued that inasmuch as the patent system has shown itself to be eminently flexible,¹⁸ it is theoretically and operationally incapable of accommodating the peculiar demands of native healers. Ultimately, the best method for the protection of such indigenous knowledge is to give juridical legitimacy to the various pre-existing methods by which native healers in southern Nigeria historically encouraged and protected their practices. Thus, a conception of intellectual property rights as a policy instrument of states¹⁹ is crucial to fashioning a juridical response to the problem of biopiracy.²⁰ Neither indignant outrage against "biopiracy"²¹ nor the neglect of native healers yields an institutionalized solution to the problem of biopiracy and the delegitimation of indigenous approaches to healing.²²

2. The Patent System

What is a Patent?

Although there is no universal patent law *per se*, Article 27(2) of the TRIPS Agreement defines patents in terms of a legal protection for products or processes that are *new, involve an inventive step, are useful and capable of industrial application*.²³ The *Patent Act* of the United States provides that "whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor".²⁴ Machlup defines a patent as "that which confers the right to secure the enforcement power of the State in excluding unauthorized persons, for a specified number of years, from making commercial use of a clearly defined invention."²⁵

The essential ingredient of a patent is that it is a time-limited type of property right granted by the state²⁶ to a person who has met certain criteria in respect of an invention. Patents purport to encourage inventiveness as well as to protect the invention from unauthorized manufacture, use, or commercialization. However, a patent does not offer any guarantee that the inventor will in fact be adequately recompensed. There are three basic types of patents: utility patents for utilitarian inventions; design patents to protect new, original and ornamental designs; and plant patents. Controversy around patents centres largely on utility and plant patents.

Theories of Patents

Various theories have been posited to justify the existence of patent systems. A careful survey of various patent regimes shows that patent systems have no universal theory²⁷ but are premised on a mixture of theories. However, four leading theories on patents (the natural right theory, the contract/disclosure of secrets theory, the reward theory, and the incentive theory), are discernible from the gamut of national patent systems.

The Natural Rights Theory of Patents

This theory posits that an inventor has a natural right in her invention and that society, represented by the state, has an obligation to recognize, protect, and enforce that right. Not surprisingly, this theory sprung from the French Revolution and is eloquently enshrined in the French *Patent Law* 1791. The natural rights theory is a flawed justification for the patent system. First, it requires an acceptance of the notion that ideas are possible subjects of exclusive ownership. This is a problematic proposition that is difficult to maintain in ordinary societal relations and experience. Second, it posits that patents are not governmental privileges but an inherent right of the inventor. Such a proposition flies in the face of various limitations contained in virtually all nations' patent laws. The limitations in question often pertain to patentable subject-matter, duration of patents, compul-

sory licensing, and government appropriation of certain inventions.²⁸

Consequently, no patent law of any state is based on natural law theory. Instead, patent systems are often based on policies of economic and political orientation. Indeed, the natural rights theory of patents has been forcefully rejected in a report by the Secretary-General of the United Nations.²⁹ According to the report:

[P]atent legislation has never been based solely on the concept of the patent as the confirmation of an inherent, rather than the creation of a statutory, property right. Such a concept would have left no room for such restraints on the patent grant as its fixed duration, its exclusion for inventions in certain fields ... and the forfeiture or compulsory licensing of patents for failure to work them.³⁰

However, failure of a state to recognize or create effective legal regimes for the protection of indigenous knowledge may raise issues of discrimination and human rights violations. It is within this context that various indigenous peoples' groups have protested against the privileged status of the dominant forms of intellectual property rights. Given that intellectual property rights are often a reflection of the interests of dominant segments of society, it is not a coincidence that indigenous knowledge systems play a marginal role in comparison to major intellectual property rights regimes.

The Reward Theory

This theory posits that inventions come forth because the patent system offers rewards to inventors. By this theory, without the reward promised by the patent system, there would be no inventions.³¹ Problems with this theory include the undue emphasis on monetary gain. Not all inventions are motivated by lucre or expectations of material fortune. Moreover, commercialization of inventions and inventiveness *per se* are two distinct phenomena, and one ought not to confuse them. Human experience shows that irrespective of a patent regime, inventions would always occur.

The Contract/Disclosure of Secrets Theory

The contract theory describes a patent as a contract between the inventor and the state or society. The inventor grants society access to valuable information and knowledge in return for the limited monopoly over the use of the invention. This theory is problematic on several fronts. First, it has been pointed out that where secrecy is possible, inventors and industry prefer to employ legal protection through trade secrets. Indeed, it is a matter of fact that even if the inventor kept his or her invention secret, others might eventually hit upon it because invention is ultimately called forth by the needs of society. Necessity, it is often said, is the mother of invention. Further, it is always uncertain whether the monopoly granted to the inventor is actually equal to the social benefit of the invention. Several inventions that later proved immensely useful were somewhat ahead of their time when patented, earning nothing for their cre-

