

PROTECTING INDIGENOUS KNOWLEDGE USING INTELLECTUAL PROPERTY RIGHTS LAW: THE MASAKHANE *PELARGONIUM* CASE

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ABSTRACT

The use of indigenous knowledge (IK) and indigenous bio-resources by pharmaceutical and herbal industries has led to concerns about the need to protect indigenous communities' interests in regards to the use of IK and indigenous bio-resources. Some commentators believe that intellectual property rights (IPR) law can effectively be used to protect IK and indigenous bio-resources, while others are more sceptical. An analysis of the Masakhane *Pelargonium* case reveals that while the Masakhane community's successful use of IPR law in a case against Schwabe Pharmaceuticals has been lauded as a successful example of a marginalised community using IPR law to protect IK, the facts and results of the case are more ambivalent. Importantly, the Masakhane case shows that existing community resources and the level of mobilisation of the community affect the community's ability to use IPR law

UNISA | 
university
of south africa

Africanus
Journal of Development Studies
Volume 45 | Number 1 | 2015
pp. 62–77

Print ISSN 0304-615X
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effectively. A consideration of the broader context in which IPR law is used is required in order to determine how useful IPR law may be for a particular indigenous community seeking to protect its knowledge and bio-resources. In addition, it also indicates that we need to start recognising communities' existing resources and their determination to be more pivotal to the success of IK-IPR cases.

Keywords: Indigenous Knowledge, intellectual property, law, bio-resources

INTRODUCTION

This article explores the question of whether or not intellectual property rights (IPR) law can successfully be used to protect indigenous knowledge (IK). The increased use of indigenous knowledge (IK) and indigenous bio-resources by pharmaceutical and herbal industries has led to concerns about how best to protect IK, as such knowledge is often used and appropriated without the permission of the communities that hold the knowledge and without ensuring that such communities benefit from the use of their knowledge (Agrawal, 2002; Odora Hoppers 2002a, 2–3; Purcell 1998; Vermeulen 2007, 423). The Masakhane *Pelargonium* case has been lauded as a successful IK-IPR case (see ACB, 2010; Spicy IP blog 2008; Spicy IP blog 2010; De Vries, 2010; McKune, 2010; Third World Network 2010). While the case did lead to the withdrawal of a patent (thus dealing with IPR law), the crux of the matter, however, fell on the content of a Benefit Sharing Agreement for the use of indigenous bio-resources. Often, due to the location of indigenous bio-resources and their associated IK both being in developing countries, bio-resources and IK are addressed together broadly under the terms IK and IPR law.

International agencies such as the World Bank and the World Trade Organisation (WTO) encourage the use of IPR law to protect IK and the world's biodiversity, and point to international agreements such as the Trade Related Aspects of Intellectual Property Rights (TRIPS) of 1995 and the Convention on Biological Diversity (CBD) of 1993 as potential tools to be used to protect IK (Oguamanam 2006). The use of IPR law to protect IK is, however, highly debated and hotly contested (see Odora Hoppers 2002a; Odora Hoppers 2002b; Muzaka 2011; Oguamanam 2006). Despite the contestation, there are several indigenous communities such as the San in South Africa and the Kani in India that have apparently been able to use IPR law to protect their IK (see Vermeulen 2009; Wynberg et al. 2009; Anuradha 1998). This suggests that it is possible to some extent to use IPR law in the interests of indigenous communities.

One such community is the Masakhane community in the Eastern Cape province of South Africa. In 2010, this community successfully challenged patents that were held by the German company, Schwabe Pharmaceuticals, which pertained to the use of the plants *Pelargonium sidoides* and *Pelargonium reniforme* (ACB 2008a).

Closer examination of the implications of the community's victory suggests that the Masakhane community had first tried to take action against the company not so much out of concern about patents, but out of a desire to pressure the company into sharing the benefits it gained through the use of their IK and bio-resources. The European Patent Office's (2010) decision did not require Schwabe Pharmaceuticals to create a Benefit Sharing Agreement with the Masakhane community as the community had hoped and the community is yet to benefit significantly from the commercialisation of medicines produced using *Pelargonium*. Consequently it is not at all clear to what extent the withdrawal of the patent can be understood as a victory for the community and, further, whether this case suggests that IPR law can indeed be successfully used to protect the interests of marginalised communities' knowledge.

This article uses fieldwork conducted among the Masakhane community to reveal and reflect on the limitations of using intellectual property rights law to protect IK. Interviews were conducted with members of the Masakhane community as well as with other stakeholders such as the head of Gowar Enterprises, the company which collects *Pelargonium* from the area concerned.¹

INTELLECTUAL PROPERTY AND THE PROTECTION OF INDIGENOUS KNOWLEDGE

Intellectual property is a legal concept that refers to various kinds of intangible property (Fisher 1999, 1–2; Fisher 2001, 1). Intellectual property rights (IPR) law confers exclusive rights of ownership and economic value in intangible property to inventors or innovators. In essence, anything that is the product of intellectual creativity can be considered intellectual property. This means that so-called 'indigenous knowledge' (IK) – understood as holistic, communally held knowledge which has been produced and passed down over several generations by a marginalised indigenous community – could presumably be protected by intellectual property rights law as it is the product of intellectual creativity. However, the use of IPR law to protect indigenous knowledge (IK) is a subject of much contention.

Those in favour of the use of IPR law to protect IK argue that it is the strongest means to protect intellectual property because it can grant the holder of the knowledge exclusive control and benefits from the sale of the knowledge concerned (Kiggundu 2007, 26; Long 1991).

In contrast to the above position in favour of the use of IPR law, there are various arguments which suggest that IPR law is not an appropriate mechanism for protecting IK. The majority of the arguments stress that by placing emphasis on privately held intellectual property, IPR law marginalises knowledge held in common (Hountondji 1997; Hountondji 2002; Mshana 2002; Shiva 1997a; Abrell 2009). The difficulty is apparent. IPR law requires the identification of one person or juristic entity (a group

of people who can be legally considered as a single composite) as the creator of a novel idea or an inventive step which has industrial application (Firth 1997; Folkins 2004, 346–347; Long 1991). However, IK is typically held in common and while it might sometimes be possible to identify one particular community which holds a particular instance of IK, this is often not possible.

This brief summary of debates on the use of IPR to protect IK shows that the question of whether or not IPR law can be successfully used to protect IK is a very contentious one. The rest of this article focuses on one case – the Masakhane *Pelargonium* case – to see what this case suggests about the ability of IPR law to successfully protect IK.

BACKGROUND TO THE MASAKHANE *PELARGONIUM* CASE

The *Pelargonium* plant is used by Zulu, Xhosa, Khoi and Sotho indigenous communities for various ailments including stomach aches, flu and coughs (Brendler and van Wyk 2008, 421). There is no clear indication as to which community first held this knowledge (Brendler and van Wyk 2008, 421). The first documented use of *Pelargonium* to treat respiratory infections is by Englishman Charles Henry Stevens in 1897 who would take the plant and knowledge of its use to England, where it would later be tested and developed into the remedy ‘Umckaloabo’ (ACB 2008b, 3). The patents for Umckaloabo would eventually be held by German pharmaceutical company Schwabe Pharmaceuticals. Continued production of the remedy required the continued importation of *Pelargonium* from southern Africa. Schwabe Pharmaceuticals collects the plant from various places in South Africa and Lesotho, including land belonging to the Imingcangathelo Xhosa community near Alice in the Eastern Cape.

The *Pelargonium* harvesting value chain for plants collected from the Eastern Cape is as follows: the chain begins with local harvesters, usually from poor communities with high unemployment rates, who collect the wild plant by hand in the rural areas (Qubheka Mkhayi (pseudonym) 2011, Interview). Thereafter, a local harvesting company, Gowar Enterprises (Roy Gowar 2011, Interview), which holds a virtual monopoly on *Pelargonium* harvesting in the Eastern Cape, collects the plants from the local harvesters (Van Niekerk and Wynberg 2012, 534). According to the ACB (2008b, 5), harvesters are paid between R3 and R15 (about \$0.30–\$1.50) per kilogram. However, former harvesters interviewed by the first author (Zuziwe Msomi) in 2011, reported being paid as little as R2 per kilogram (Interviews in 2011 with Nkuleleka Phindani and Nomalanga Phindani (pseudonyms)). Middlemen are reported to receive as much as R1000 per kilogram for the plants (ACB 2008b). At Gowar Enterprises, the plants are washed, packaged and sent to BZH Export and Import, another South African harvesting company in the Western Cape, where,

together with *Pelargonium* plants collected from elsewhere in South Africa, they are further processed before being sent to Parceval Pharmaceuticals in the Western Cape (van Niekerk and Wynberg 2012, 534–535). Parceval, which is a subsidiary of Schwabe, then further processes and prepares the plants for export to Schwabe in Germany. Parceval is the sole exporter of *Pelargonium* in South Africa (Andre and Baux 2011; Van Niekerk and Wynberg 2012, 534–535).

South African law requires anyone wishing to collect bio-resources from rural land under a traditional authority to approach the authority in order to attain Prior Informed Consent and negotiate a Benefit Sharing Agreement (Department of Environmental Affairs 2012; Roy Gowar 2011, Interview). Consequently, Schwabe Pharmaceuticals and Parceval approached the traditional leader of the Imingcangathelo community, Chieftainess Tyali, and through her concluded a Benefit Sharing Agreement with the Imingcangathelo community, for the harvesting of *Pelargonium* on Imingcangathelo land. The benefits which result from the Benefit Sharing Agreement are administered by the Imingcangathelo Community Development Trust, which decides how the benefits are to be used. The Imingcangathelo Community Development Trust consists of representatives from all the villages that make up the Imingcangathelo community under Chieftainess Tyali's authority (Andre and Baux 2011).

While this agreement is supposed to benefit the whole Imingcangathelo community, the Masakhane community – which is part of the broader Imingcangathelo community – claims not to fall under the authority of Chieftainess Tyali, and thus argues that no Benefit Sharing Agreement had been negotiated with them, despite *Pelargonium* having been harvested on their land. Chieftainess Tyali, however, claims that the Masakhane community does indeed fall under her authority as part of the Imingcangathelo Xhosa community and that this community was thus included in the agreement with Schwabe (Andre and Baux 2011; Roy Gowar 2011, Interview).

To understand the situation, it is necessary to briefly outline some of the history of the Masakhane community. This community is a small Xhosa community located in the old Victoria East district of the former Ciskei (now the Eastern Cape), which consists of five villages totalling about 250 families (Jara 2011, 3). The ethnic identity of most of the Masakhane community is that of members of the Imingcangathelo 'tribe' of the broader Xhosa nation – the same 'tribe' over which Chieftainess Tyali claims authority (Jara 2011, 3). The Masakhane community was established during apartheid when white farmers around the Cathcartvale area were forced to leave as a result of the implementation of the Homeland system (Human Sciences Research Council 2006, 21; Jara 2011, 3; Lahiff 2002, 24). The land that was taken from white farmers ought to have been allocated to the traditional leader to govern and allocate land tenure rights (Ntsebeza 2004). However, disorganisation and the complicated and uncertain nature of the land tenure system in rural areas resulted in a lack of clarity about whether the land was ever allocated to a local traditional authority to

rule (Jara 2011). To date, the community has grown to include five villages: Lokwe, Joe, Nomtayi, Mfingxane and Krwanyli (Qubekha Mkhayi (pseudonym) 2011, Interview). In 2001, the five villages together applied to the Department of Rural Development and Land Reform to form a Communal Property Association in order to lodge a land claim for the former white-owned farm land upon which they were living, but of which they were not the indisputable owners (Jara 2011, 3; Lahiff 2002, 24). The Masakhane community claim that this CPA, rather than the Chieftainess, represents them.

Both traditional authorities and democratic structures are recognised in South Africa (Hendricks and Ntsebeza 1999; Southall and De Sas Kropiwnicki 2003). However, in rural areas, traditional authorities are usually recognised as the representatives of rural communities (Ntsebeza 2004; Southall and De Sas Kropiwnicki 2003). This is a particularly contentious issue given that several communities in South Africa challenge the institution of traditional authorities because of the manner in which they were co-opted by the apartheid state (Jara 2011). Some such communities, such as the Masakhane community, refuse to be represented by the local traditional authorities.

ISSUES RAISED BY THE MASAKHANE *PELARGONIUM* CASE

The refusal of the Masakhane to be represented by the local traditional authority in the face of the continued legal recognition of local traditional authorities as representatives of people in the rural areas, as well the community's socio-economic marginality and the individualistic nature of IPR law mean that the Masakhane are still waiting for a Benefit Sharing Agreement to be made with them. A discussion of these issues follows.

IPR Law and the protection of communal property

Although the Masakhane community successfully forced Schwabe Pharmaceuticals to withdraw a patent relating to *Pelargonium*, it is important to note that under current IPR law the community cannot expect to have a Benefit Sharing Agreement negotiated with them. As mentioned above, IPR law requires the identification of one person or juristic entity (a group of people who can be legally considered as a single composite) as the creator of a novel idea or an inventive step which has industrial application. In the case of *Pelargonium*, however, there is more than one community that holds the same knowledge and there is no single body that has been set up to protect the interests of all the affected indigenous communities. Zulu, Xhosa, Sotho and Khoi communities have all been noted to use *Pelargonium* to treat various respiratory infections (Brendler and van Wyk 2008, 421). Since IK is

passed down orally, it is difficult to determine which community discovered this use of *Pelargonium* first.

In the *Pelargonium* case, the knowledge was taken out of southern Africa to make Umckaloabo in Germany, which generates significant profits for Schwabe Pharmaceuticals. While a Benefit Sharing Agreement exists with the Imingcangathelo community, this agreement relates only to the use of their bio-resources rather than the use of the knowledge of the medicinal properties of *Pelargonium*. No Benefit Sharing Agreement relating to the knowledge itself has been negotiated with any community in South Africa or Lesotho, despite the fact that this knowledge generates substantial profits overseas. Situations like this one lead critics of the IPR regime to argue that IPR law aids the misappropriation of IK (Mshana 2002; Riley 2000; Shiva 1997a; Shiva 1997b; Whitt 1998; Whitt 2009).

The victory of the Masakhane community in getting Schwabe Pharmaceuticals to withdraw its patents thus did not place the company under any legal obligation to negotiate a Benefit Sharing Agreement for the use of IK relating to *Pelargonium*. It only allowed others to potentially develop similar applications to Umckaloabo, as Schwabe no longer holds a patent on the method it uses to extract the active ingredients in *Pelargonium*. Schwabe was, however, obliged to negotiate a Benefit Sharing Agreement relating to the use of any community's bio-resources, but the company was under the impression that it did already have such an agreement as a consequence of the agreement it had signed with the Imingcangathelo Community Development Trust, which is associated with Chieftainess Tyali.

The court case highlighted the tensions in the broader Imingcangathelo community, emphasising that the Masakhane community did not understand themselves to be included in that Benefit Sharing Agreement and the response from Schwabe (and the harvesting companies with which it works) was to decide to no longer harvest *Pelargonium* from the disputed areas. This means that the only change brought about by the court case was that harvesting of *Pelargonium* on the Masakhane community's land by companies linked to Schwabe was stopped, which clearly does not benefit the community except, arguably, by reducing the exploitation of their bio-resources. This is the only significant benefit that the Masakhane community can claim. This is as a result of the individualistic nature of IPR law, and the apparently irreconcilable position between the continued legal recognition of local traditional authorities and those communities that refuse their authority. This means that the pharmaceutical company and those that fall under the representation of the local traditional authority draw the largest benefits.

One of the claims of advocates of IPR law is that it fosters creativity and further development in a society (Mukuka 2010; 19, 138-139). Put differently, the protection of people's intellectual property through IPR law allows people to make money from their invention and thus ought to be an incentive for people to be creative and innovative. In addition, as patents expire, considering that they are

only granted for a limited amount of time, the knowledge or innovation becomes available for everyone to use and, therefore, everyone in society supposedly benefits eventually (Mukuka 2010, 19, 138–139). Yet this is exactly the opposite of what has happened in the Masakhane *Pelargonium* case. Knowledge pertaining to the use of *Pelargonium* to treat respiratory infections was used in the past by several people in several communities to treat respiratory complaints. However, once companies wish to use the knowledge and the bio-resources related to this knowledge, the resources are taken out of the community and used to create remedies that benefit only those who can afford them while reducing the availability of the resource for indigenous communities who first held this knowledge. This adds weight to the arguments of Hountondji (2002), Odora Hoppers (2002a), Shiva (1997a, and 1997b) and Whitt (1998) regarding the way that IPR is sometimes used to misappropriate IK, as it can be used without giving recognition to the indigenous communities that hold the knowledge.

Issues of representation

As the previous section reveals, the question of who represents the Masakhane community has been a vital one in the Masakhane *Pelargonium* case. On the one hand, the community has clear, organised and recognised representation through the Masakhane Communal Property Association (MCPA), but on the other hand, the local traditional authorities, led by Chieftainess Tyali, claim to represent the community. If the Masakhane community is indeed considered to fall under her authority, then they are included in the Benefit Sharing Agreement between the Imingcangathelo community (as represented by Chieftainess Tyali and the Imingcangathelo Community Development Trust) and Schwabe and Parceval for the harvesting of *Pelargonium*. As mentioned above, the company's response to this dispute was to stop harvesting *Pelargonium* from the disputed area rather than to negotiate an additional separate Benefit Sharing Agreement exclusively with the Masakhane community.

The case provides some indication that South African traditional authorities can act in ways which disempower the local communities which they are meant to serve. Instead of the larger community benefiting from such schemes, the *Pelargonium* case indicates that benefits may be captured by the local traditional elite rather than the community as a whole due to the traditional authority's ability to claim to speak on behalf of the community under their authority (Van Niekerk and Wynberg 2012).

The power of traditional authorities in South Africa means that the national legislation which is meant to protect the interests and rights of indigenous peoples is sometimes ineffective. On first consideration, it appears as if IPR law and law dealing with traditional leaders in South Africa have nothing to do with each other, but this case demonstrates how at the local level one ends up undermining the other.

The issue of representation also affects whether a Benefit Sharing Agreement can truly be considered to have been negotiated on mutually agreed terms if the negotiating parties are not recognised as representatives of all the people concerned. While it is likely that there will always be some disagreement regarding whether or not the representative party has made the right decisions, a Benefit Sharing Agreement can only be considered fair if most of the community being represented recognises the legitimacy of the representative and accepts the decisions made (see other examples of this issue in Anuradha 1998 and Bodeker 2003).

Indigenous Knowledge and the broader global economic order

The Masakhane case also highlights how monopolisation in the industry ensures that indigenous peoples are not able to capture a slice of the industry's profit despite the provisions in agreements such as the CBD (van Niekerk and Wynberg 2012). The *Pelargonium* industry in South Africa is very small. Harvesting permits have only been granted to Gowar Enterprises and BZH Export and Import, and only one company, Parceval, which is a subsidiary of Schwabe, has the right to export the plant to the international *Pelargonium* market (Van Niekerk and Wynberg 2012). The existence of harvesting permits in line with the provisions of local and international legislation is supposed to protect the environment and to ensure the sustainable use of the plant as well to improve the lives of indigenous communities. The companies referred to above were the first to acquire permits in the industry. When they negotiated an Access and Benefit Sharing Agreement with the Imingcangathelo Community Development Trust, it was stipulated that they have exclusive harvesting rights in the community represented by the Trust (van Niekerk and Wynberg 2012). It is likely that Parceval has also negotiated similar agreements with other communities for the harvesting of their bio-resources. The result is that these companies have considerable control of the industry so that they determine the prices that are paid to the harvesters, who often come from local indigenous communities (Van Niekerk and Wynberg 2012).

An evaluation of the *Pelargonium* value chain indicates that very little value is assigned to the *Pelargonium* plant as a raw material, while the real value of the plant begins at the washing, drying, shredding, and packaging of the plant which occurs at Gowar Enterprises, BZH Export and Import and at Parceval (Van Niekerk and Wynberg 2012). The next step, which is assigned the most monetary value, occurs in Germany at Schwabe Pharmaceuticals, where the plant is further processed and used to create Schwabe's Umckalaobo, the final product that is sold to consumers worldwide (Van Niekerk and Wynberg 2012). The economic order within which the industry operates continues to treat the resources of developing countries as being of little value, assigning much more value to the processing of these resources (Shiva 1997a; Van Niekerk and Wynberg 2012). Part of the reason that developing states

and their peoples are unable to benefit extensively from the commercialisation of their resources is because they often do not have the capital and technology to break into the industry, so that the only benefits they are able to obtain are through offering their labour and natural resources, neither of which are accorded much value. Without access to resources like capital and technology, indigenous communities will continue to be locked out of industries that make millions from their IK and bio-resources. The undervaluing of indigenous communities' knowledge makes Crouch, Douwes, Wolfson et al (2008) doubt whether indigenous communities will gain significantly from the commercialisation of their IK or bio-resources. The *Pelargonium* case supports their suspicion. Contrary to arguments that IPR laws can be changed to suit IK through the development of *sui generis* law or special policy considerations, as suggested by Myburg (2010; 2011), IPR law on its own does not enable indigenous communities to protect their interests sufficiently for them to benefit from their commercialisation.

Community organisation and access to resources

The earlier discussion of the Masakhane community's history reveals that this particular community has a history of self-assertion and self-organisation. Prior to taking on Schwabe Pharmaceuticals, they had used the law to win a claim to some of the land they live on and had refused to fall under the jurisdiction of the traditional authority that claimed to rule over them. The community has won control over some of the land on which it lives (which is typically controlled by traditional authorities) and has other resources and networks which it has used in furthering its interests. Commenting on the San *Hoodia* case, Munzer and Simon (2009) and Vermeulen (2007; 2009) argue that the successful protection of IK through the use of IPR law is heavily dependent upon the resources to which the community has access. Due to a history of discrimination and, in many cases, dispossession, many indigenous communities find themselves on the social and economic margins of society (see Munzer and Simon 2009; Suzman 2001). Munzer and Simon (2009) argue that one of the most important resources that determine whether or not a community will be able to successfully use IPR law is land rights. This is because strong land rights not only provide a means to access other resources such as loans, for example, but also because strong land rights often correlate to a strong cultural and group identity (Munzer and Simon 2009). Most indigenous communities, however, have weak or insecure land rights.

In the San *Hoodia* case, the effect of winning two landmark claims in *Alextor Ltd. v. Richtersveld Cmty. & Others* 2003 (South Africa) and in *Sesana & Others v. Attorney General* 2006 (Botswana) gave the community experience in using the law, which assisted them in a later case against the Council for Scientific and Industrial Research (CSIR) (Munzer and Simon 2009). Not only did community

members state that the cases gave them the confidence to take on the CSIR, but the San communities which had been directly involved in the case felt inspired by their outcomes (Vermeulen 2009, 433). Winning some of their land in a land claims case in 2002 had a similar effect on the Masakhane community. From a land claim case made in 2001 the Masakhane community own 674 hectares (Lahiff 2003, 24) of the 7000 hectares (Jara 2011, 3) on which 250 families of the 5 villages are settled. Although their claim to the rest of the land remains uncertain, the Masakhane community's struggle to establish their land rights helped to build a strong group identity.

While land rights are clearly important, the Masakhane case highlights other resources that can assist communities in their quest to use IPR law to their benefit. For example, it may be helpful to also focus on what could be called 'confidence and network resources'. The Masakhane *Pelargonium* case, for example, is unlikely to have started without the unique confidence and network resources that were held by this community. It was a community member, Nomthumzi Api, who managed to draw attention to their situation through networks she had in the town where she works, and it was the community's existing strong sense of unity that enabled them to work together to advance their case against Schwabe. Community members interviewed stress that meetings were conducted with the involvement of the whole community to discuss the case (Interviews in 2011 with Nkuleleka Phindani, Nomalanga Phindani, Qubekha Mkhayi and Zama Hemepe (pseudonyms)). Organising such meetings in a rural area is no mean feat, but the community had an existing structure, the MCPA, which had representatives in each village and an existing process for organising community meetings (Interviews in 2011 with Nkuleleka Phindani, Nomalanga Phindani, Qubekha Mkhayi and Zama Hemepe (pseudonyms)). What this shows is the way in which the community drew on existing structures and practices which helped draw them together in the case.

When a community has won a landmark court case or any other recognition of their rights, they are much more likely, due to the experience and confidence gained from their success, to fight for their rights in other matters. The confidence the Masakhane community gained from the mobilisation around their land claim was useful in their attempt to use IPR law. What is more, their subsequent victory against Schwabe may give them further confidence to continue fighting for their rights. Thus, while this particular legal struggle has yet to yield any obvious financial benefits, it is likely to contribute to further building a sense of community and confidence among the Masakhane community which can be helpful in further attempts by the community to advance their interests.

The latter point is an important one which suggests that while we certainly ought not call the *Pelargonium* case a victory for the community concerned too quickly, we should also not be too quick to dismiss legal victories just because they do not lead to immediate, concrete gains. As Madlingozi (2013) points out 'legal victories can have indirect and inspirational outcomes which may result in productive future

alliances and which can help mobilise marginalised communities and legitimise their ongoing struggles'. Similarly, Tissington (2012) argues that we need to look beyond the material gains that legal struggles bring when assessing how useful they are. She points out that winning legal victories can help communities politicise their situation which may, in the long-term, have helpful effects.

Madlingozi (2013) and Tissington (2012) make these points with regard to the legal struggles around socio-economic rights, rather than around IPR law. However, their basic point about the indirect results that legal victories may bring are important to bear in mind when assessing the usefulness of using IPR law to protect IK. While it is too early to tell what the long-term effects of the Masakhane community's legal victory will be, it is possible that it might play a role in further consolidating the community spirit and confidence of the community concerned which already exists. This consolidation could help them not only to find other ways of protecting their IK, but also to find other channels to advance their community's interests more generally. Therefore, when thinking more generally about whether or not indigenous knowledge can be protected by IPR law, it is necessary to look at the role that the use of IPR law plays within a larger context of mobilisation in favour of the rights of indigenous (and other marginalised) communities, rather than looking at the use of IPR law in isolation. Furthermore, it should also be recognised that many relatively marginalised communities are able to successfully mobilise to advance their own interests, even in contexts which are fairly hostile, through relying on the networks and resources of their communities.

CONCLUSION

From the above, it is clear that the answer to the question of whether IPR law can be used to protect IK is dependent upon many factors. Firstly, where more than one community holds IK and it is difficult to determine which community owned the knowledge first, IK cannot be adequately protected under IPR law. Secondly, representation can prove to be a problem where there are tensions between different forms of representation with no clear means of recourse.

Thirdly, a further consequence of contested representation and the marginal position of indigenous communities in society is that the community's IK may end up principally benefiting local and international elites who are able to commercialise communities' bio-resources and the IK associated with such resources. Finally, it should be noted that the ability of an indigenous community to use the law to protect its IK depends upon the community's access to other resources and their own networks. We should further note that the successful use of IPR law may help galvanise longer term community attempts to improve their situation, even where it does not yield concrete, immediate material benefits. While this possibility is not sufficient to justify enthusiasm about the use of IPR law to protect IK, it does at least

suggest that when assessing the usefulness of IPR law, we do need to look beyond the immediate material effects of the use of the law.

NOTE

1. Where the names of community members have not been made publicly available, pseudonyms have been used for the sake of privacy.

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