



Intellectual property laws have existed for many decades in a number of Pacific island countries (see Farran 2009). Yet, until recently, they have remained rather remote from the realities of both commercial and cultural life in the region. This is illustrated by the limited number of cases that have ever invoked those laws: only 16 copyright cases, no patent or design cases, and 14 trademark cases.¹ However, there has been a growing interest in such laws in the region recently. This has been spurred in part by the requirement for all World Trade Organization (WTO) members to ensure a minimum standard of intellectual property protection; bilateral and multilateral Free Trade Agreements, which often impose intellectual property requirements; and repeated awareness raising symposia by the World Intellectual Property Organization (WIPO). Largely as a result of these stimuli, many Pacific island countries are expending or poised to expend considerable resources in the next few years to establish or update their intellectual property regimes. For example, Fiji is currently establishing the Fiji Intellectual Property Office, Samoa is undergoing revision of its intellectual property laws and developing a national Intellectual Property strategy, Vanuatu has just set up a new Intellectual Property Office, and Tonga is updating its intellectual property regime in line with its WTO commitments.

Justifications for intellectual property laws and associated institutions revolve around the creation of incentives for innovation and creativity, investment in quality, the protection of the natural or moral rights of authors and inventors and the prevention of free-riding (Forsyth 2003:198–99; Ricketson 2004:8–20). Intellectual property regimes are also claimed by some economists to be a ‘power tool for economic development and wealth creation’ (Idris 2003) as they are seen to

encourage technology transfer, stimulate innovation and bring collateral benefits by strengthening the investment climate and attracting more foreign direct investment (UNCTAD 2007:93). Arguments such as these have been used in policy debates regionally and nationally in Pacific island countries to promote the introduction and strengthening of intellectual property rights. For example, in introducing the Vanuatu Patents (Amendment) Bill 2011 in Parliament, the prime minister stated ‘Vanuatu is developing ... it is important and simple — if an indigenous ni-Vanuatu invents or produces something no one has ever done it has to be protected’ (Joshua 2011). Further, at the Forum Economic Ministers Meeting in 2000, the ministers ‘agreed that an effective system of intellectual property rights is one element which contributes to a confident and secure business environment and can lead to increased investment’ (Pacific Islands Forum Secretariat 2000; see also Nathan Associates 2007:40–41).

In general, intellectual property laws seek to achieve these goals by awarding limited monopoly rights over certain categories of intangible property (such as a literary work or design or invention) in return for the public being given access to it. However, to date there is no clear empirical evidence about a link between higher levels of intellectual property rights and increases in technology transfer or innovation in developing countries (Deere 2009:103; UNCTAD 2007:93). Consequently, claims about the potential advantages of intellectual property regimes are necessarily being made at a highly abstract and theoretical level.

The aim of this paper is to seek to bridge the gap between these theoretical justifications and the local context of the Pacific islands region. In doing so, it builds upon the growing body of literature that questions the relevance and utility of intellectual

property laws in developing and least developed countries,² and indeed the expansionist approach to intellectual property worldwide (see The Washington Declaration on Intellectual Property and the Public Interest 2011). In particular, it contributes empirical evidence regarding countries with weak technical absorptive capabilities, which are often not explicitly considered in empirical studies of developing countries, suggesting that intellectual property rights do not affect all developing and least developed countries in the same way (see Hassan, Yaqub and Diepeveen 2010). This supports Lall's argument that countries at different stages of development face very different economic costs and benefits from intellectual property laws (Lall 2003:1657–80). The analytical device used in this paper is the presentation of six case studies that investigate the background to the recent invocations of trademark patent, design laws and copyright by a number of local people in Samoa, Fiji and Vanuatu.³ Each case study identifies the particular circumstances that led to invoking these laws, the motivations and expectations of the parties, and the factors that have facilitated or prevented them from operating as desired or expected. The case studies also identify some of the interest groups behind the expansion and use of these laws, and the narrow sectoral interests and involvement of external players who are often involved. The use of such a qualitative approach is an attempt to contextualise some of the literature concerning intellectual property and development, which to date remains heavily biased in favour of quantitative studies (see Hassan, Yaqub and Diepeveen 2010). As this paper demonstrates, there is a big difference between the registration or recognition of an intellectual property right, which may be captured in a quantitative study, and the actual derivation of any social or economic benefit from it, which is generally not captured in such studies.

Overall, these case studies cast doubt on whether intellectual property regimes, as currently implemented and planned, are likely to result in the benefits attributed to them by (neo)liberal economic theories in the Pacific islands regional context. This insight is important for at least two

reasons. First, the establishment and maintenance of intellectual property regimes is extremely costly in both financial and human resources terms, and consideration needs to be given as to whether the resources could be better deployed elsewhere.⁴ Second, there is a developing body of evidence demonstrating that intellectual property rights may have serious negative consequences for developing and least developed countries, particularly in the areas of access to medicines, education and genetic materials for agriculture (see Correa 2000; Drahos and Mayne 2002; Maskus and Reichman 2005). There should, therefore, be clear benefits for the population as a whole if an intellectual property regime is to be justified, and there is a need to ensure that the privileges of a few are not obtained at the expense of the majority.

In conclusion, the paper will reflect on a number of insights from the case studies and point towards the need for regulatory regimes that are specifically adapted to the Pacific islands context, rather than the wholesale copying of the institutions of its development partners — a common development strategy in the region (see Hooper 2005).

A Registered Design in Samoa: MENA

This case study investigates the background to the first registration of a design in Samoa by a Samoan resident under the Industrial Designs Act 1972. MENA is a very successful Samoan clothing label developed by two sisters, one resident in New Zealand and one in Samoa. The garments are designed and produced in Samoa and use fabric designed by one of the sisters. These designs generally take their inspiration from Samoa's flowers and plants, and also from traditional Samoan and Māori designs. The designs are handpainted onto fabric, meaning that each garment can take up to four hours to make. When MENA was initially established the owners thought they would be mostly making for the tourist market, given the high prices of their products,⁵ but, in fact, about 80 per cent of the market is local. It has become very fashionable in Samoa to wear 'a MENA'. There are also markets in Honiara, Hawai'i, Cook Islands, Japan, American Samoa, and a retail store in Auckland.

MENA's owners have been struggling with problems of people copying their clothing designs since they started to become successful. Their designs have a very distinctive look and copies of this look come out in local shops within days of launching of new designs. As well as being discouraging for the sisters, this led to loss of customers and also to customer complaints about having to pay high prices for the original whilst others get around in cheap copies. However, the owners have also found that many customers have returned to them as the quality of the copies is not as good, and there is a cachet to having an original. They tried addressing the problem of copying by writing letters of complaint and also by introducing a distinctive external side label with 'MENA' on it. However, they had little response to the letters and have found that the side pip has been copied as well, although without the trademark on it.

Matters finally came to a head for the owners when one of their employees found a Samoan department store selling big rolls of imported fabric bearing exact copies of their designs. The designer said that she can spend up to six weeks perfecting a design, and found this to be too much to bear. She then started to investigate whether intellectual property laws could assist her and attended some awareness-raising sessions given by WIPO. She also discussed the problems with the head of the Samoan Intellectual Property Office, who suggested that MENA register its designs under Samoa's Registered Designs Act. In 2011, the owners registered all the designs in their new 'teuila' (the ginger flower, Samoa's national icon) collection, the first Samoans to ever do so. When asked whether she thought this would make a difference, one of the owners responded:

If I see someone who has copied it I can do something about it. Once I find out who is selling it, [the Head of the Intellectual Property Office] can write a letter to say it is a registered design. If people don't stop doing it then I can take them to court. Because we are exporting now we don't want people to interfere with our export market by selling the print, and also our local market too. [The

Head of the Intellectual Property Office] will write and ask them to stop selling the print.

As the designs have only recently been registered, it is too early to tell whether this optimism will prove correct.

We can see from this case study that the advocacy of the benefits of intellectual property laws by WIPO, and the active support of the Samoan Intellectual Property Office, was crucial to MENA's owners' decision to use intellectual property laws. The assistance supplied by the Samoan Intellectual Property Office in particular goes far beyond what such an office would do in most developed countries, extending as it does to helping with enforcement by writing letters, and raises the question of the extent to which it is sustainable/ an appropriate use of public funds. However, it could be argued that this is necessary when intellectual property laws are in their infancy and not much is known about them by private lawyers, and also where local businesses cannot afford legal fees. As discussed below, the issue of enforcement is one that must be addressed if intellectual property laws are to be of relevance to citizens in the region.

Another observation is that the fabric designs themselves copied some traditional Samoan tattoo designs and distinctive Māori spiral designs without permission. This illustrates the limits of state-based Western intellectual property laws that protect new and original designs, but not traditional ones.⁶

A final insight from this case study is that MENA's runaway success may mean that it will have to move its manufacturing base away from Samoa, as there are not enough sufficiently skilled workers to keep up with demand. One of the owners commented that although they have alerted the government to this problem, and asked them to establish technical sewing classes, to date this has not been acted upon. This indicates that industrial design laws, in themselves, are not sufficient to ensure the success of a design and manufacturing industry, and that the regulatory emphasis should possibly lie elsewhere. Indeed, MENA's continued growth and success despite the copying, and the acknowledgment by the owners that customers remain loyal despite the availability of cheaper

copies, suggest that unauthorised copying is less detrimental to the bottom line than may commonly be assumed. However, the damage caused by copying will, of course, be heavily dependent upon both the quality of the product being copied and also the kind of economy in which the copying is taking place. It is likely that high-quality, originally designed and well-marketed products are less susceptible to damage caused by copying than cheaper and poorer quality items. In addition, the economic conditions of the countries in the region suggest that the greatest danger of unauthorised copying comes from outside, rather than internally. These considerations indicate that greater attention to designing effective customs regimes to protect local industries may be of as much or more practical utility as domestic design laws.⁷

A Trademark in Vanuatu: Tanna Coffee

This case study investigates the circumstances behind the registration of one of the few local trademarks in Vanuatu. Tanna Coffee has a long history in Vanuatu, with coffee having been grown on the island of Tanna, in Vanuatu's south, since 1852. Although its main market is domestic, it is also one of Vanuatu's few agricultural exports, and is sold dry and roasted in distinctive packaging, thus value-adding considerably to the original product. According to the owner, the Tanna Coffee Company operates by buying dried coffee beans from 350 farmers at a set price, having provided them with seedlings, tools and access to the plantation (land held by the company under a long-term lease from the landowners).⁸ A trademark over the name Tanna Coffee was only registered in 2010, as a result of a dispute between the expatriate owner of Tanna Coffee and a new expatriate investment partner. The owner of Tanna Coffee decided that one way he could secure his market was to register Tanna Coffee as a trademark. At the time he did this, Vanuatu still had its old trademark law, which required a trademark to be registered first in the European Union before it could be re-registered in Vanuatu. This changed in February 2011 when the 2003 Trademarks Act was finally gazetted, and now it appears that trademarks can be registered

directly in Vanuatu. However, as there is currently no administrative system set up to facilitate this, it remains to be seen how this will work in practice.⁹

The cost of registering the trademark under the old system was extremely high, and the owner commented that this was why it had not been done previously. Given that Tanna Coffee is one of the country's success stories in terms of product development, this indicates the general inaccessibility of trademark registration for local businesses. Moreover, the owner indicated that he has not been able to act as yet to enforce his trademark rights because of cost.

This case study demonstrates the crucial importance of more streamlined registration and enforcement mechanisms if citizens are to be able to use intellectual property laws. A useful comparison with the situation in Vanuatu is that of Fiji, where the trademark register is administered locally. The registration fee is very low, and registration does not need to be done through a law firm. The problem there, however, is that the staff have no expertise in intellectual property and are regularly rotated to other areas, meaning that, in practice, marks are registered without much scrutiny unless there is an opposition. However, although there is provision in the Act for opposition hearings, no such hearings have been held for over a decade because the Administrator General's office has been vacant for about 11 years and this is the office designated by statute to hear the applications under the Trademark Act. As a consequence, when oppositions are filed they are simply put in the filing cabinet and the matter pends indefinitely. In some ways, this situation is therefore just as unsatisfactory as in Vanuatu.

The registration of 'Tanna Coffee' as a trademark also raises an issue of whether island names should be registerable as trademarks. Arguably this could give an unfair monopoly over the first to register for that particular class of goods and services, and trademarks, unlike patents and copyright, can be renewed indefinitely. Countries in the region should consider whether there should be a special provision disallowing the use of place names on the grounds that these are not inherently distinctive as required by trademark law generally. Fiji faced this issue recently, after the registration of the trademark

'FIJI' for the internationally successful, and foreign-owned, Fiji Water brand. In response, the government issued a Practice Direction in 2008, disallowing any future registrations including the words 'Fiji', 'Fijian', and the names of Fiji's 14 provinces. If countries do use overseas offices to examine trademark applications, it may be best to have a two-tier process whereby certain criteria for registrability that are of local significance (such as place names or chiefly titles or important words in the local vernacular) can be assessed in-country first before referral to the foreign trademark office. This would also allow for the screening of trademarks that may be considered offensive by a sector of the population, such as is provided for in the New Zealand Trade Marks Act 2002.

A Trademark in Samoa: Tagiilima Handicrafts

The Tagiilima Handicraft Association is a group of about 60 couples, funded by the New Zealand Aid Programme, who make handicrafts such as necklaces, earrings, weavings, carvings, *elai* printing (traditional block fabric designs) and so forth. The association holds workshops for its members to encourage the development of quality craftsmanship, and their products are sold in the local markets and overseas through a website. Members also attend overseas trade fairs to promote their products. The association faces a continuing problem whereby an online entrepreneur from New Zealand comes and buys their products from the local market and then resells them online without referencing the association, and undercutting their online market. In 2008, they registered the trademark 'Tagiilima Handicraft'. Although it has not allowed them to take direct action against the online entrepreneur (for a variety of practical difficulties, such as the difficulty and expense of bringing legal action overseas), they have found the trademark has assisted their business. The director of the association stated:

... when we registered it in 2008 we had advertisements on TV, radio and in the newspaper to raise awareness of the mark. Since then we have had a lot of changes. Our finan-

cial reports show that we have been selling more goods locally. Also we have more markets overseas and greater opportunity to go overseas and sell our goods. Also we take our goods to sell on the cruise boats and people always ask about our association and want to take our business cards.¹⁰

This case is a good example of trademark laws being successfully used to assist a grassroots business, although it was the marketing associated with the trademark that brought benefits rather than its defensive use against other manufacturers. A factor that undoubtedly contributed to its successful use was the financial support and technical assistance supplied by the New Zealand Aid Programme. This demonstrates again that active support networks are necessary if intellectual property laws are going to be meaningfully used by indigenous populations.

A Patent in Fiji: A Coconut Oil Extractor

The patent register in Fiji has been in existence since 1883, and 1095 patents had been registered by September 2011. Approximately 75 per cent of the patents registered are pharmaceutical patents from overseas, and the vast majority of others are also patents re-registered from overseas.¹¹ However, in the past 20 years there have been 19 successfully registered local patents, all of which were sent to Australia for examination (to determine if they met the requirements of patentability),¹² as there is not the technical capacity to do so in Fiji. Out of the three countries considered here, Fiji is the only one with registered local patents.¹³ A selection of the subject matter of these give an insight into the diverse nature of inventiveness in Fiji today: 'text lotto' electronic game, 'the twin aeroplane', 'O'Connor's self-contained toothbrush', 'solar energy transmitter', 'pneumatic pump', 'locking device', 'improved catamaran', and a 'portable expandable container house and office solutions folding into a 20 foot sea container'. However, it is unclear if any of these patents are actually in use.¹⁴ To date, there have not been any court cases concerning patents in the entire region, and a spectrum of legal practitioners in Fiji, Vanuatu and Samoa all reported very little or no patent activity in their work.

The patent this paper focuses on is for a coconut oil extractor, developed by a Mr Lal, an agricultural engineer at the Ministry of Agriculture in Fiji. The story of how this invention came into being, and its subsequent history, provides a useful insight into the role of patents in Fiji, and into broader issues concerning incentives, stimulus and opportunity for innovation in the Pacific islands region generally. The immediate stimulation for the invention was the wearing out of gears on a number of coconut oil extractors that had been donated by AusAID some years previously. Mr Lal was sent to investigate new parts, and found that the cost of having the gears replaced was exorbitant in Fiji. So he set out to design a new oil extractor that did not have costly parts that would wear out, and that was 'something cheaper and easier to use, safe and environmentally friendly and of use in rural areas where there is no access to electricity'. He came up with a new design based on a hydraulic lever, which could be manufactured almost entirely in Fiji (apart from the imported central stainless steel cylinder with perforated holes). He estimates that his extractor would cost about half the price to manufacture of the ones currently in operation, and the only part that would wear out would be the hydraulic lever, which could be easily and cheaply replaced. The invention would allow farmers to extract virgin coconut oil, which fetches a good price internationally, rather than just selling off their coconuts at very little profit as they do at present.

Mr Lal took out a patent on his invention in 2005 because, in his words, 'after I had developed it I thought I might as well patent it'. He was primarily concerned to stop anyone else making a profit from his invention without acknowledging or benefitting him. He had learnt about patents when attending a seminar on intellectual property held by the Attorney-General's Office. The process of application was a lengthy one — over six months — and not long after it was done Mr Lal retired. He tried to interest the Ministry of Agriculture in developing his invention further, and they referred him to the Coconut Industries Development Authority, but this was disestablished before he got any feedback from them. He also advertised his extractor in local newspapers

but there was no interest. Since he left, the Ministry of Agriculture has not employed another agricultural engineer, and although his prototype is being used by the ministry, it has not been developed any further, and nor have any new machines been developed by the ministry.¹⁵

In reflecting on why his invention has not been further developed, and why there have been so few similar innovations, Mr Lal cited a general shortage of skilled and qualified personnel in the public sector, and a lack of awareness of the importance of innovation and technology generally. This lack of skill and knowledge in the public sector is an important issue, because in Fiji (and elsewhere in the region) research and development is primarily the role of state institutions, which are then meant to disseminate new technology to small-scale farmers and so on through extension programs. However, political changes and the structural set-up of many public sector departments means that there is a high staff turnover and little chance of people being able to build up their expertise through length of experience or adequate training. There are very few local manufacturers with interest in developing local technology, as the unchallenged *modus operandi* is to import. In such circumstances, Mr Lal's concerns about someone else developing his invention seem to have been sadly misplaced.

Although Mr Lal is one of only a few Fijians who have got to the stage of registering a patent, there is considerable anecdotal evidence of innovation at the local level, for example amongst small-scale farmers. What is lacking, however, are systems for taking these ideas and developing them further so they can benefit a broad section of the population, and, in turn, stimulate more innovation. Although a patent system can be useful as part of this process, in terms of guaranteeing an inventor the right to stop others exploiting his or her invention, it alone is unlikely to serve the primary purpose of patent law, namely to stimulate new and useful inventions. Further, experiences in developed countries such as Australia suggest that the difficulties of enforcement of patent rights mean that 'a patent right is akin to a "very expensive lottery ticket" that gives rise to uncertainty'

(Sanderson 2007:704). These difficulties are likely to be even more pronounced in the Pacific islands region where patent law is such a new area. Fiji is currently reviewing its Patents Act to modernise it and to make it compliant with its obligations under the WTO. However, if this is to make a meaningful difference, it should not be done in isolation, but in the context of a whole-of-systems analysis of how innovation can be better promoted in Fiji.

Copyright in Samoa and Fiji: The Cinema Owners

Of the 16 substantive copyright cases that have occurred in Pacific island countries, one has concerned the writing of a Samoan alphabet, one the artwork on Christmas cake boxes, one re-broadcasting of Australian television and there have been five cases involving musicians. However, the majority have concerned the selling of copied foreign DVDs. In the past two years, there have been a significant number of state prosecutions instigated by complaints from the two local cinemas in Fiji and Samoa respectively. In both cases, their market in new release films was being undermined by local stores selling or renting pirated versions of the films, for which they had the sole distribution licence, before the official release date and, consequently, before the cinemas could show the films and profit from them. In both cases, the cinema owners used the fact that there are criminal provisions in the Copyright Acts of both countries to shift enforcement to the state, rather than bringing civil actions for breach of copyright themselves.

In Samoa, this led to the police raiding shops renting unauthorised DVDs in 2010 and two prosecutions in the Supreme Court of Samoa. In *Police v Island Rock Co Ltd* [2011] WSSC 3, the defendant pleaded guilty to six charges of breaching copyright by renting unauthorised copies of foreign movies and was fined WST2,500 (AUD\$1,044). In *Police v Ah Chong* [2011] WSSC 1 the defendant pleaded guilty to 43 similar charges and was given the same fine. As part of the prosecution case, a witness had to be brought over from New Zealand to establish ownership of copyright (by Paramount Pictures NZ Ltd and Twentieth Century Fox Corporation) — an expense borne by the state. There is no doubt

that these prosecutions must have been very costly exercises for the state, significantly outweighing the revenue generated by the fines, and also using considerable personnel resources.

In Fiji, complaints by the cinema owners led to over 12 raids on shops selling allegedly pirated DVDs in 2009. The background to these raids is that, to date, there has never been a successful prosecution for copyright infringement. In part, this has been due to problematic provisions concerning proof of copyright ownership in the Copyright Act, which essentially required the owner of copyright to be present in the Fiji court. In an attempt to rectify this problem, the Fiji Audiovisual Industry Association (FAVIA) engaged a consultant to draft an amendment. In 2009, the government duly passed this as an amendment decree to the Copyright Act. The amendment reversed the onus of proof in issues of copyright infringement; essentially, the seller has to prove that he or she has the right to sell the work, rather than the burden being on the prosecution. Subsequently, in September 2009, the police launched a series of raids, and this led to 10 cases going to court from June 2010. However, each has proceeded slowly and with a degree of difficulty, owing in part to the overcrowded nature of the Fijian court system and the lack of experience of police officers in preparing copyright cases for prosecution. In the two cases that have reached the verdict stage, both defendants were found not guilty, despite one of them pleading guilty.¹⁶ It will remain to be seen whether any of the other cases are any more successful. In the meantime, the raids have ceased, police are currently prioritising other matters, and business seems to be returning to usual in the pirate DVD market in Fiji: in 2010 there were 22 million units of blank recording devices imported into Fiji. However, the government is apparently considering setting up a copyright enforcement unit within the newly established Fiji Intellectual Property Office to try to guarantee a more successful record of copyright prosecution. The government is also said to be considering a proposal by FAVIA to introduce a levy on blank DVDs to try to increase the price of illegal copies and hence break the point at which consumers will opt for a pirated product.

Both of these cases raise the issue of state resources being used for the benefit of private businesses. The reasons given by state officials for state involvement are that the criminal sanctions are there in the Act and that they have international obligations to enforce those laws. Another reason is that the state is needed to take action in copyright on behalf of local artists who do not have the means to do so themselves, but are deprived of a livelihood by piracy. However, all these factors need to be weighed up with other demands on state financial resources, and also the capacity of the police and the prosecution, neither of which are comfortably on top of their workloads in either country.

Copyright Enforcement by the Music Industry of Vanuatu

A final case study is the push by Vanuatu's local music industry to secure the gazettal of Vanuatu's Copyright Act and attempts at its enforcement. The Musik Federesen Blong Vanuatu (Music Federation of Vanuatu) was set up and is dynamised largely by the actions of one man, Joe Bong, who is also the owner of one of Vanuatu's major recording studios. The federation has been campaigning for many years for the government to gazette, and hence bring into operation, Vanuatu's Copyright Act 2002. This Act, together with five other intellectual property related laws, was passed by parliament in 2002 and 2003 in the context of the first stages of Vanuatu's accession to the WTO. This process is now in its final stage, although there is still considerable public and political opposition to the accession and so the final outcome is not certain. In 2010/ 2011, Mr Bong finally succeeded in getting two government ministers to sympathise with his arguments that local musicians were losing out on major royalty payments because their music was being copied and sold cheaply in local stores, and also was played on radio and television without any benefits being paid to the artists. Largely as a result of these arguments, not only was the Copyright Act gazetted in February 2011, so too were all of the other pieces of intellectual property legislation, some of which, such as the Patents Act, have a potentially significant affect on crucial develop-

ment issues such as access to medicines. Although the government's current determination to complete the accession process was also undoubtedly behind the gazettal, it is hard to say that this was an overwhelming factor as Vanuatu's succession package does not require full WTO intellectual property compliance until December 2012 (World Trade Organization 2011).

No research has been done into the extent to which the music industry in Vanuatu is actually harmed by unauthorised copying.¹⁷ Rather, it appears to have been assumed that unauthorised copying is the reason that musicians find it hard to earn a living for their music in Vanuatu. It is by no means clear, however, that the loss of sales of CDs through unauthorised copying outweighs the benefits to musicians of relatively free access to foreign music (upon which much of their music is based), free publicity and the increased opportunities for live performances. Other factors stimulating the production of music should also be taken into account when performing a cost-benefit analysis of the effects of copyright laws on the music industry. For example, Hayward (2009) argues that most artists in Vanuatu produce music videos with very low expectations of financial returns. Rather, the primary motivations are 'public expression and prestige for the artists and the specific families, communities, localities and/or language groups concerned' (Hayward 2009:60). Such prestige is enhanced by the widespread publicity that comes with unauthorised copying.

Once the law was gazetted, Mr Bong set out on a mission to enforce it, by delivering letters to shops threatening legal consequences if they continued to sell pirated DVDs. After some confrontations with shop owners reluctant to accept delivery of the letter, Mr Bong found it necessary to complete his rounds with a police escort. However, despite his efforts, Mr Bong said that within a number of days the pirated CDs were back on the shelves. He observed that although the law has been gazetted, there is no funding to enforce it, and so the only action he can take is to try to educate the public. He is reluctant to go to court personally as he said that just this year he finally got a judgement in a case he

had brought using the laws of passing off where he was awarded an amount one tenth less than the cost of bringing the case. This problem was highlighted recently in parliament by the opposition whip who observed that although the Copyright Act had been passed string bands could not take up their case to a court of law when the Chinese duplicate their songs because they do not have the money, stating '[t]here is no competition with the Chinese when most of the time our local string band musicians barely have the funds to come into town to do their recording' (Joshua 2011).

This example, combined with the previous one, demonstrates how much of the intellectual property agenda in the region to date has been pushed by strong audiovisual and music industry lobby groups. As a result, many of the important policy implications of intellectual property laws, such as their effects on access to educational materials, medicines and food security, have not been publicly debated or even, for the most part, acknowledged. As the South Pacific region, along with the rest of the world, moves more and more into a knowledge-based economy where barriers to access are increasingly problematic, this is an issue that needs closer attention.

Conclusion

This review of recent uses of intellectual property laws by citizens and residents in the Pacific islands region demonstrates a number of systemic problems with their current implementation. First, the state is currently playing a very significant role in enforcement. Although this may arguably be justified while the intellectual property system is developing, it is not appropriate in the long run as these are essentially private disputes; the state criminal justice systems in the region are already greatly overburdened; and state bureaucracies often poorly resourced, especially compared to some private businesses. A further potential problem with such heavy state involvement is the creation of a perception in the community that intellectual property infringement is a problem the state should solve, rather than a matter for private business. To an extent, this attitude is already evident, as shown in the copyright cases discussed above. Civil enforce-

ment should, therefore, be promoted as the primary approach, but the issue of cost of litigation will, of course, remain a major hurdle for many small businesses. The costs and difficulties of enforcement of intellectual property rights against overseas infringers may also be a considerable curtailment on the ability of Pacific islanders to enforce their rights, as is demonstrated in the Tagiilima Handicraft example. This difficulty must, however, be taken into consideration at the policy formation stage, rather than compensated for in an ad hoc manner at the state's expense.

Second, the lack of accessibility, knowledge of, and expense of systems of registration of trademarks, patents and industrial designs are currently proving to be significant barriers for local users. At present, these registers are all overwhelmingly serving the interests of foreigners, with only handfuls of local businesses using them (with the exception of trademarks in Fiji), and of those locals the vast majority are expatriates or locals with significant international connections. The region as a whole faces significant problems in dealing with the high cost of establishing and running such registers, and the lack of technical capacity to staff them adequately. The de facto solution is to rely on overseas registers, but while this may satisfy a country's international obligations, it does not facilitate use by locals. An alternative proposal is for a regional register, although this is certainly not a panacea for all the issues. The best solution, if such rights are to be protected, is probably a two-level system with some processing done by a local register, which can also serve as an interface between locals and the registration process, and the more technical processing being carried out in a third country.

These observations suggest that considerable *increased* state expenditure in terms of administration, awareness-raising and enforcement is needed if intellectual property regimes are to be able to be used in a meaningful fashion by the local population. However, detailed consideration should be given to determining whether such costs are justified given the particular context of the region, particularly its relative lack of research and development institutions and commercial manu-

facturing, small populations, and the fact that all the countries are overwhelmingly net intellectual property importers. The case studies presented above help to inform any such consideration, demonstrating both that intellectual property laws in themselves are not enough to stimulate innovation and creativity — in part because the opportunities for exploitation of the monopoly rights are limited by a range of other factors, such as lack of financial support — and also by the problems of enforcement, as shown by the copyright examples. They also show that significant other stimuli to creation and innovation currently exist, such as public recognition, creative inspiration, commercial success and state funding. The danger of introducing half-baked intellectual property regimes is that the utility of the existing stimuli is undermined by the new intellectual rights discourse, leading to reduced creativity and innovation and increased levels of dissatisfaction with the state.

In determining whether an expansion or creation of intellectual property laws is helpful for the region, there also needs to be a much more profound discussion of the policy implications of intellectual property laws across a whole range of sectors, including education, health and agriculture. To date, decisions about intellectual property laws have tended to be pushed by small interest groups, such as the audiovisual industry, or else agreed to in the context of trade negotiations, with very little consideration given to, or consultation held with, these other sectors. However, as greater intellectual property laws have a potentially significant impact on factors essential for development — for example, access to educational materials, medicines and genetic materials — cross-sectoral policy development is essential.

An alternative to the introduction of intellectual property regimes that merely replicate those in developed, technologically advanced countries, is the creation of a new strategy to stimulation, creativity and access to knowledge that takes account of the particular context of Pacific island countries. This strategy could include incentives such as national competitions

and prizes for new products or inventions, national and regional trade and agricultural shows to showcase developments in agricultural technology, training and capacity building in basic agricultural technology, increased national and regional spending on research and development, government programs to encourage the manufacturing of agricultural technology, and the development of stronger branding schemes, both individually and nationally, such as the ‘Made in Fiji’ scheme introduced in Fiji in 2011.¹⁸ Intellectual property rights may also be part of this policy, but should not be the sole focus. As Gervais (2007:46) argues, ‘intellectual property is but one train in a comprehensive knowledge and innovation policy, and the trains of surrounding norms and policies must also make it to the station if the objective is to be attained’.

Author Notes

Miranda Forsyth is a postdoctoral fellow at RegNet, College of Asia and the Pacific, The Australian National University. She is currently working on a three-year ARC Discovery-funded project to investigate the impact of intellectual laws on development in Pacific island countries. Prior to this, Miranda was working as a senior lecturer in criminal law at the law school of the University of the South Pacific, based in Port Vila, Vanuatu.

Endnotes

This paper was first published in March 2012. Some text in the Tanna Coffee case study has been revised.

- 1 These numbers are based on records of the Pacific Islands Information Institute (PacLII), available at <<http://www.paclii.org>>. However, as PacLII relies on courts to send their judgements to it, these records may be incomplete.
- 2 See, for example, the numerous publications from the UNCTAD-ICTSD Project on Intellectual Property Rights and Sustainable Development, available at <<http://www.iprsonline.org/>>; Chon 2006; Drahos 2005; Gervais 2007; Hassan, Yaqub and Diepeveen 2010.

- 3 The data in this paper is based on two months of fieldwork in 2011 in Samoa, Vanuatu and Fiji. One hundred and ten loosely structured interviews were conducted with a range of stakeholders including government ministries in the areas of trade, health, education and agriculture, development partners, customary leaders, local businesses, educational institutions and research stations. This research was made possible by a three-year ARC Discovery Grant (2011–2014). The findings presented in this paper are part of a larger enquiry into intellectual property rights and development in Pacific island countries. See <<http://www.ippacificislands.org>> for a full description of the project and its outputs.
- 4 The World Bank estimated that a comprehensive upgrade of the IPR regime in developing countries could require capital expenditure of USD\$1.5–2 million (Blakeney and Mangistie 2011:68).
- 5 WST325 (AUD\$160) for a two-piece, and the minimum wage in Samoa is WST2 per hour.
- 6 The issue of the protection of traditional knowledge, and who benefits from such protection and how it can be achieved in the region is a complex one. For a discussion of some of the many issues involved and a summary of the relevant international literature see: Forsyth 2011, 2012a, 2012b and 2012c.
- 7 This point is developed in Forsyth 2012c.
- 8 It should be noted that some of these facts are disputed.
- 9 As many countries in the region face problems of lack of capacity to examine trademark applications, the Pacific Islands Forum Secretariat is currently formulating a proposal to establish a regional trademark facility based in Papua New Guinea.
- 10 Interview with director, Tagiilima Handicrafts Association, 7 April 2011, Apria, Samoa.
- 11 Interview with clerk in charge of the patent register, Suva, Fiji, September 2011.
- 12 When the patent is sent to Australia for examination the standards of the Australian Patents Act are used, rather than those of the Fiji Patents Act, raising issues about the practical relevance of Fiji's Patent Act.
- 13 The patent register is not available for public inspection in Vanuatu or Samoa but this was the advice given by officials in charge of the register.
- 14 No local I questioned had ever heard of O'Connor's self-contained toothbrush, but this is not conclusive.

- 15 The same is true of the breeding of new plant varieties, all of which stopped in the 1980s as a result of lack of qualified plant breeders, and, arguably, the ease of accessing new varieties from Australia and New Zealand.
- 16 The judgement in both cases is still not publicly available so the judges' reasons cannot be further analysed.
- 17 The lack of empirical evidence about the economic effects of copying on the recording and film industries is a worldwide phenomenon. See, for example, Hargreaves 2011 and Karaganis 2011.
- 18 See the *Industry Emblem Decree 2011* (Fiji).

References

- Blakeney, M. and G. Mangistie 2011. Intellectual Property Policy Formation in LDCs in Sub-Saharan Africa. *African Journal of International and Comparative Law* 19(1):66–98.
- Chon, M. 2006. Intellectual Property and the Development Divide. *Cardoza Law Review* 27 (6):2813–904.
- Correa, C. 2000. *Intellectual Property Rights, the WTO and Developing Countries*. Penang: Jutaprint.
- Deere, C. 2009. *The Implementation Game*. Oxford: Oxford University Press.
- Drahoš, P. 2005. An Alternative Framework for the Global Regulation of Intellectual Property Rights. *Working Paper*. Canberra: Centre for Governance of Knowledge and Development, The Australian National University. <<https://www.anu.edu.au/fellows/pdrahos/articles/pdfs/2005analternativeframework.pdf>>, viewed 16/11/2011.
- Drahoš, P. and R. Mayne (eds) 2002. *Global Intellectual Property Rights: Knowledge, Access and Development*. Houndmills: Palgrave Macmillan.
- Farran, S. 2009. South Pacific, Intellectual Property. In R. Blanpain and M. Colucci (eds). *International Encyclopaedia of Laws*. The Hague: Kluwer Law International.
- Forsyth, M. 2003. Cargo Cults and Intellectual Property in the South Pacific. *Australian Intellectual Property Journal* 14(4):193–207.
- Forsyth, M. 2011. The Traditional Knowledge Movement in the Pacific Island Countries: the Challenge of Localism. *Prometheus* 29(3):269–86.

- Forsyth, M. 2012a. Do You Want it Giftwrapped? Protecting Traditional Knowledge in the Pacific Island Countries. In P. Drahos and S. Frankel (eds). *Indigenous Peoples' Innovation: Intellectual Property Pathways to Development*. Canberra: ANU E Press.
- Forsyth, M. 2012b. Lifting the Lid on 'The Community': Who has the Right to Control Access to Traditional Knowledge and Expressions of Culture? *International Journal of Cultural Property* 19(1):1–31.
- Forsyth, M. (Forthcoming 2012c). How Can Traditional Knowledge Best be Regulated? Comparing a Proprietary Rights Approach With a Regulatory Toolbox Approach. *The Contemporary Pacific* 25(1).
- Gervais, D. 2007. TRIPS and Development. In D. Gervais (ed) *Intellectual Property Law and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era*. Oxford: Oxford University Press, 3–57.
- Hargreaves, I. 2011. Digital Opportunity: A Review of Intellectual Property and Growth. Independent report commissioned by the UK Government. <<http://www.ipo.gov.uk/ipreview-finalreport.pdf>>, viewed 13/2/2012.
- Hassan, E., O. Yaqub. and S. Diepeveen 2010. *Intellectual Property and Developing Countries: A Review of the Literature*. Prepared for the UK Intellectual Property Office and the UK Department for International Development. Santa Monica: Rand Europe. <http://www.rand.org/pubs/technical_reports/2010/RAND_TR804.pdf>, viewed 5/11/2011.
- Hayward, P. 2009. Local Interpretation: Music Video, Cultural Heritage and Community in Contemporary Vanuatu. *Perfect Beat* 10:59–79.
- Hooper, A. (ed.) 2005. *Culture and Sustainable Development in the Pacific*. Canberra: ANU E Press.
- Idris, K. 2003. *Intellectual Property: A Power Tool for Economic Growth*. Geneva: World Intellectual Property Organization (WIPO).
- Joshua, J. 2011. Patents Amendment Bill Isolated from Vanuatu's Accession to WTO: Kaltongga. *Vanuatu Daily Post*, 6/12/2011. <<http://www.dailypost.vu/content/patents-amendment-bill-isolated-vanuatu%E2%80%99s-accession-wto-kaltongga>>, viewed 7/12/11.
- Karaganis, J. (ed.) 2011. *Media Piracy in Emerging Economies*. New York: Social Science Research Network. <<http://idl-bnc.idrc.ca/dspace/bitstream/10625/46491/1/133005.pdf>>, viewed 13/01/2012.
- Lall, S. 2003. Indicators of the Relative Importance of IPRs in Developing Countries. *Research Policy* 32(9):1657–80.
- Maskus K. and J. Reichman (eds) 2005. *International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime*. Cambridge: Cambridge University Press.
- Nathan Associates Inc. 2007. Pacific Regional Trade and Economic Cooperation: Joint Baseline and Gap Analysis: Final Report. Submitted to Pacific Islands Forum Secretariat. <http://www.forumsec.org/resources/uploads/attachments/documents/Pacific%20Regional%20Trade%20and%20Economic%20Cooperation_FINAL%20REPORT_December%202007.pdf>, viewed 18/12/2011.
- Pacific Islands Forum Secretariat, 2000. Forum Economic Ministers Meeting, Alofi, Niue, 25–26 July 2000. Record of Meeting Decisions. <<http://www.forumsec.org/resources/uploads/attachments/documents/FEMM%202000%20Action%20Plan.pdf>>, viewed 20 /12/2011.
- Ricketson, S. 2004. *Intellectual Property: Cases, Materials and Commentary*. Sydney: LexisNexis Butterworths.
- Sanderson, J. 2007. Back to the Future: Possible Mechanisms for the Management of Plant Varieties in Australia. *University of New South Wales Law Journal* 30(3):686–712.
- UNCTAD Secretariat 2007. *The Least Developed Countries Report 2007: Knowledge, Technological Development and Innovation for Development*. New York and Geneva: United Nations.
- The Washington Declaration on Intellectual Property and the Public Interest. 2011. Conclusions from the Global Congress on Intellectual Property and the Public Interest, Washington, 25–27 August 2011, <<http://infojustice.org/wp-content/uploads/2011/09/Washington-Declaration.pdf>>, viewed 15/3/2012.
- World Trade Organization 2011. Report of the Working Party on the Accession of Vanuatu to the World Trade Organization. <<http://www.keepandshare.com/doc/2914152/wtoaccpac-pdf-june-27-2011-4-42-pm-4-6-meg?da=y>>, viewed 31 October 2011.

- 2001/1: Peter Larmour, Westminster in the Pacific: A 'Policy Transfer' Approach
- 2001/2: Caroline Graille, From 'Primitive' to Contemporary: A Story of Kanak Art in New Caledonia
- 2002/1: Abigail Makim, Globalisation, Community Development, and Melanesia: The North New Georgia Sustainable Social Forestry and Rural Development Project
- 2002/2: Sinclair Dinnen, Building Bridges: Law and Justice Reform in Papua New Guinea
- 2002/3: John Barker, Missionaries, Environmentalists, and the Maisin, Papua New Guinea
- 2002/4: James Weiner, Abby McLeod and Charles Yala, Aspects of Conflict in the Contemporary Papua New Guinea Highlands
- 2002/5: Judith Bennett, Roots of conflict in Solomon Islands — Though Much is Taken, Much Abides: Legacies of Tradition and Colonialism
- 2003/1: Tim Curtin, Hartmut Holzknecht and Peter Larmour, Land Registration in Papua New Guinea: Competing Perspectives
- 2003/2: Alan Tidwell and Andy Carl, Perspectives on Conflict and Post Conflict
- 2003/3: R.J. May, Disorderly Democracy: Political Turbulence and Institutional Reform in Papua New Guinea
- 2003/4: Frédéric Angleviel, "The Bet on Intelligence": Politics in New Caledonia, 1988-2002
- 2003/5: Jaap Timmer, Narratives of Government and Church among the Imyan of Papua/Irian Jaya, Indonesia
- 2003/6: Laurence Sullivan, Challenges to Special Autonomy in the Province of Papua, Republic of Indonesia
- 2003/7: Penelope Schoeffel and Mark Turner, Local Level Governance in the Pacific Workshop: Small is Not Beautiful: Central Government and Service Delivery in the Pacific (Schoeffel); Issues in the Design of Decentralisation (Turner)
- 2003/8: Laurence Goldman, 'Hoo-Ha in Huli': Considerations on Commotion and Community in the Southern Highlands Province of Papua New Guinea
- 2004/1: Philip Gibbs, Nicole Haley and Abby McLeod, Politicking and Voting in the Highlands: The 2002 Papua New Guiner National Elections
- 2004/2: David Hegarty, Ron May, Anthony Regan, Sinclair Dinnen, Hank Nelson and Ron Duncan, Rebuilding State and Nation in Solomon Islands: Policy Options for the Regional Assistance Mission
- 2004/3: Michael Goddard, Women in Papua New Guinea's Village Courts
- 2004/4: Sarah Garap, Kup Women for Peace: Women Taking Action to Build Peace and Influence Community Decision-Making
- 2004/5: Sinclair Dinnen, Lending a Fist? Australia's New Interventionism in the Southwest Pacific
- 2004/6: Colin Filer, Horses for Courses: Special Purpose Authorities and Local-Level Governance in Papua New Guinea
- 2004/8: Sinclair Dinnen and Edwina Thompson, Gender and Small Arms Violence in Papua New Guinea
- 2004/7: Robert Muggah, Diagnosing Demand: Assessing the Motivations and Means for Firearms Acquisition in the Solomon Islands and Papua New Guinea
- 2005/1: Nic Maclellan, Conflict and Reconciliation in New Caledonia: Building the Mwâ Kâ
- 2005/2: Michael Morgan, Cultures of Dominance: Institutional and Cultural Influences on Parliamentary Politics in Melanesia
- 2005/3: Hank Nelson, Fighting for her Gates and Waterways: Changing Perceptions of New Guinea in Austalian Defence
- 2005/4: Allan Patience, The ECP and Australia's Middle Power Ambitions
- 2005/5: Jerry Singirok, The Use of Illegal Guns: Security Implications for Papua New Guinea
- 2005/6: Jaap Timmer, Decentralisation and Elite Politics in Papua
- 2005/7: Donovan Storey, Urban Governance in Pacific Island Countries: Advancing an Overdue Agenda
- 2005/8: Jon Fraenkel, Political Consequences of Pacific Island Electoral Laws
- 2006/1: Hank Nelson, Governments, States and Labels
- 2007/1: Peter Larmour, Evaluating International Action Against Corruption in the Pacific Islands

- 2007/2: Brij V. Lal, 'This Process of Political Readjustment': Aftermath of the 2006 Fiji Coup
- 2007/3: Hank Nelson, The Chinese in Papua New Guinea
- 2007/4: Paul D'Arcy, China in the Pacific: Some Policy Considerations for Australia and New Zealand
- 2007/5: Geoffrey White, Indigenous Governance in Melanesia
- 2008/1: Brij V. Lal, One Hand Clapping: Reflections on the First Anniversary of Fiji's December 2006 Coup
- 2008/2: Paulson Panapa and Jon Fraenkel, The Loneliness of the Pro-Government Backbencher and the Precariousness of Simple Majority Rule in Tuvalu
- 2008/3: Kate Higgins, Outside-In: A Volunteer's Reflections on a Solomon Islands Community Development Program
- 2008/4: Sarah Kernot and Lai Sakita, The Role of Chiefs in Peacebuilding in Port Vila
- 2008/5: Debra McDougall, Religious Institutions as Alternative Structures in Post-Conflict Solomon Islands? Cases from Western Province
- 2008/6: Abby McLeod, Leadership Models in the Pacific
- 2008/7: Nicole Haley, Strengthening Civil Society to Build Demand for Better Governance in the Pacific. Literature Review and Analysis of Good Practice and Lessons Learned
- 2008/8: Richard Eves, Cultivating Christian Civil Society: Fundamentalist Christianity, Politics and Governance in Papua New Guinea
- 2008/9: Into A. Goudsmit, Nation Building in Papua New Guinea: A Local Alternative
- 2008/10: George Williams, Graham Leung, Anthony J. Regan and Jon Fraenkel: Courts and Coups in Fiji: The 2008 High Court Judgement in *Qarase v Bainimarama*
- 2008/11: Keith Joseph and Charles Browne Beu, Church and State in the Solomon Islands
- 2009/1: Elizabeth Reid, Interrogating a Statistic: HIV Prevalence Rates in PNG
- 2009/2: Michael Green, Fiji's Short-lived Experiment in Executive Power-Sharing, May–December 2006
- 2009/3: Peter Coventry, The Hidden Mechanics of Solomon Islands Budget Processes — Under standing Context to Inform Reforms
- 2009/4: Hank Nelson, Mobs and Masses: Defining the Dynamic Groups in Papua New Guinea
- 2009/5: Nick Bainton and John Cox: Parallel States, Parallel Economies: Legitimacy and Prosperity in Papua New Guinea
- 2009/6: Robert Norton, The Historical Trajectory of Fijian Power
- 2009/7: Alan Rumsey, War and Peace in Highland PNG: Some Recent Developments in the Nebilyer Valley, Western Highlands Province
- 2010/1: Asenati Liki, Women Leaders in Solomon Islands Public Service: A Personal and Scholarly Reflection
- 2010/2: Nic Maclellan, Under a New Flag? Defining Citizenship in New Caledonia
- 2010/3: Polly Weissner, Youths, Elders, and the Wages of War in Enga Province, Papua New Guinea
- 2010/4: Stephanie Lawson, Postcolonialism, Neo-Colonialism and the 'Pacific Way': A Critique of (un)Critical Approaches
- 2010/5: Jon Fraenkel, Oceania's Political Institutions and Transitions
- 2011/1: Justin Haccius, The Interaction of Modern and Custom Land Tenure Systems in Vanuatu
- 2011/2: Colin Filer, The New Land Grab in Papua New Guinea: A Case Study from New Ireland Province
- 2011/3: Michelle Kopi, Rachael Hinton, Sarah Robinson, Sylvia Maiap, Yanny Guman, Insecurity in the Southern Highlands: The Nature, Triggers and Consequences of Violence in Hela Region
- 2011/4: Elizabeth Reid, Reading Generalised HIV Epidemics as a Woman
- 2011/5: Jaap Timmer, Compensation and State Avoidance in the Bugis Frontier of the Mahakam Delta, East Kalimantan
- 2011/6: Mosmi Bhim, Stifling Opposition: An Analysis of the Approach of the Fiji Government after the 2006 Coup
- 2012/1: Tobias Haque, The Influence of Culture on Economic Development in Solomon Islands
- 2012/2: Richard Eves, Christianity, Masculinity and Gender-Based Violence in Papua New Guinea



The State, Society & Governance in Melanesia Program (SSGM) is a leading centre for multidisciplinary research on contemporary Melanesia and Timor Leste. One of the most vibrant units in the ANU's College of Asia and the Pacific, an established world leader in regional studies, SSGM represents the most significant concentration of scholars conducting applied policy-relevant research and advancing analysis on social change, governance, development, politics and state-society relations in Melanesia, Timor Leste and the wider Pacific. For more information see <<http://ips.cap.anu.edu.au/ssgm/>>.

State, Society and Governance in Melanesia
School of International, Political & Strategic Studies
ANU College of Asia and the Pacific
The Australian National University
Canberra ACT 0200

Telephone: +61 2 6125 8394
Fax: +61 2 6125 9604
Email: ssgm.admin@anu.edu.au

Submission of papers
Authors should follow the Editorial Guidelines for Authors,
available from the SSGM website.

All papers are peer reviewed
unless otherwise stated.

The State, Society and Governance in Melanesia Program
acknowledges the generous support from AusAID for the
production of this Discussion Paper.