

PANEL 3**A CORRECTIVE JUSTICE ARGUMENT FOR INTELLECTUAL PROPERTY RIGHTS IN
TRADITIONAL KNOWLEDGE**

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Abstract: Traditional knowledge (TK) is understanding or skill, which is typically possessed by indigenous peoples and whose existence in some form usually predates colonial contact, that relates to medicinal remedies, plant and animal products, technologies, and cultural expressions. The term “cultural expressions” includes religious rituals, songs, dances, myths, the use of sacred objects, and folklore generally. At present, it is hotly disputed whether domestic and international law do, or should, protect TK. There are four main classes of arguments for intellectual property (IP) rights in TK: property arguments, human rights arguments, arguments of distributive justice, and arguments of corrective justice. Here I am concerned only with the last of these, which subdivides into arguments of compensatory justice (roughly associated with damages at law) and restorative justice (roughly associated with equitable relief, especially injunctions and restitution). Such remedies are, in the context of litigation, usually issued by courts. In contrast, reparations can be a matter of both compensatory and restorative justice to rectify past wrongs and are usually provided by treaty or the legislative or executive branches of governments.

This paper contends that corrective justice arguments for IP rights in TK are sometimes sound. They are sound if (1) wrongs have been committed, (2) the wrongdoers are identifiable as a group or as individual members of a group or both, (3) the wrongs unjustifiably caused harm to an indigenous people or some of its members or both, (4) the indigenous people is identifiable either as a group or as individual members of the group who were harmed or both, (5) the wrongdoers have a moral duty to correct their wrongs and the harm caused, and (6) recognizing IP rights in TK would be an effective and reasonably efficient means of compensating or restoring justice to the indigenous people.

When such arguments are unsound, they are defective for various reasons. These reasons include a failure of any of the six conditions just enumerated. Reasons having to do with condition (6) include excessive variation in the value of IP rights in TK, excessive

variation in their content, the remedies available offer “untargeted” payments or reparations to “pools” of indigenous groups, and difficulties stemming from transgenerational harms and the non-identity problem. A quite different reason is that indigenous peoples may need or want other remedies (e.g. land, health care, education, access to material resources) more than they need or want IP rights in TK.