The Workshop on Traditional Knowledge and Biological Diversity called for the suspension of registering TK. The USA has also raised the issue that medical research could be impeded with the formation of such a registry, and that it may be in violation of the TRIPS agreement.[114] The latter assertion appears to be difficult to support.

From media reports, many proposed authors did not want to participate in a venture that could be damaging to their communities.[115] There is also a general reticence of some to commit an oral tradition to writing. These groups worry that after publication they will lose control of their sacred or cultural property. At first the compilers will put materials on the database that have already been printed, although perhaps originally in a number of non-European languages. Later original materials will be collected from a number of sources.[116] As is the case with much TK, it may be controlled by community members who may change the TK over time. There can thus be older static elements as well as newer elements attributable to an individual. A member of a 'traditional' community could enjoy copyright as an author on these new additions according to western standards, although under traditional law it may be the community as a whole that retains these rights.

9. *Fair Use*

The proposed TK database would cover a vast subject area. Increasing amounts of information, some of it perhaps appearing for the first time in written form, would be of interest to academics.[117] Specialist academic attention could perform useful functions. Gaps in the information could be identified and faulty data could be corrected. The danger remains that if the database were simply produced by a small group of people and used by another select group it would be a self-pollinating system.

One option would be to 'code for fair use' by allowing some users – academics for example – to view material for a certain period of time, perform a certain number of searches on the database, or to extract a certain amount of material. The main problem is simple. The program restricting access would be, by necessity, complicated. It almost certainly would not anticipate the range of needs encountered by 'fair use' research. The other option is to appoint a controlling body that would act as a gatekeeper for the database. The unique circumstances of every case could be carefully accessed and bona fide fair use research could be used to improve subsequent versions of the database. Author representatives could be involved in controlling access by dis-

114 *See* Thomas J. Krumenacher, *Protection for Indigenous Peoples and their Traditional Knowledge: Would a Registry System Reduce the Misappropriation of Traditional Knowledge?* 8 MARQ. INTELL. PROP. L. REV. 143, 158 (2004).

115 *See* Lancaster, *supra* note 113, at A22.

116 *See* Biswas, *supra* note 106.

117 There are many proposals regarding the proposed database. While some state that only patent examiners will have access, others state it will be a resource for academics as well. Some form of digital rights management system is envisaged. *See* Caroline Ryan, *Patent to protect ancient knowledge* (2002) BBC News, http://news.bbc.co.uk/1/hi/in_depth/sci_tech/2002/boston_2002/1828438.stm (last visited Sept. 5, 2006).

tributing electronic keys that would access encrypted work.[118] This would likely satisfy most contributors to the database.

10. *Is the Database Project Viable?*

A TK database could be a powerful tool for a patent office and an effective research tool for unauthorized users. Assuming the latter issue can be resolved (a complicated assumption), a fundamental issue arises in control. Local indigenous communities are not likely to have the skills required to manage a database by themselves. They would require the control and coordination of central authorities who may or may not understand their particular culture. All things considered, the project appears to be both controversial and expensive.

VI. *DISCLOSURE OF ORIGIN*

There is considerable debate about disclosure of origin (DO) requirements.[119] DO, making patent applications open to the public, is a central tenant of India's proposal to harmonize TRIPS and the CBD.[120] Both DO and public access to patent applications focus on the same goal, to prevent the misappropriation of genetic material. International agreements provide for the protection of geographical terms but do not consider DO. TRIPS article 27.1 stipulates what is patentable subject matter; it makes no mention of the origin of resources. A patent could be obtained using 'bio-pirated' genetic material. While criminal or civil law may or may not provide a remedy, the patent would still be valid. Article 27(3)(b) of TRIPS states that members may exclude plants and animals from patentability, although protection for plant varieties must be provided either by patents or a *sui generis* system or by a combination of both. Disclosure of origin was clearly not a major issue facing the framers of TRIPS, but it is an increasing interest as the norms of bio-piracy are established.

Bio-piracy is a term used to describe the practice – often by western companies – of patenting products based on TK or genetic resources without providing compensation or recognition. It is a complicated issue.[121] There are problems associated with the term itself:

> . . . an examination of specific cases in which traditional knowledge is commercialized reveals that it is not always easy to determine exactly the nature and extent of the inequity. Imprecise references to the technical language and concepts of intellectual property law

118 *See* Dan L. Burk and Julie E. Cohen, *Fair Use Infrastructure for Copyright Management Systems*, Georgetown University Law Center 2000 Working Paper Series http://papers.ssrn.com/paper.taf?abstract_id=239731 (last visited Sept. 5, 2006).

119 *See* Dominic Keating, *Access to Genetic Resources and Equitable Benefit Sharing Through a New Disclosure Requirement in the Patent System: An Issue in Search of a Forum*, 87 J. PAT. & TRADEMARK OFF. SOC'Y 525 (2005).

120 *See* Kruger, *supra* note 40.

121 *See* David Conforto, *Traditional and Modern Biopiracy: Redefining the Biopiracy Debate*, 19 ENVTL. L. & LITTIG. 357-358 (2004).