



CONSOLIDATED ANALYSIS OF THE LEGAL PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE

NOTE: This is an abridged version of the original, which can be obtained online from the WIPO website, under Publications.

Background Paper n°

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This is one of a series of Background Papers dealing with intellectual property and genetic resources, traditional knowledge and traditional cultural expressions/folklore

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I. INTRODUCTION

Traditional cultural expressions and expressions of folklore

The terms ‘traditional cultural expressions’ and ‘expressions of folklore’ are used interchangeably and synonymously in this paper. ‘Traditional cultural expressions’ (TCEs) is used as a neutral working term because some communities have expressed reservations about the negative connotations of the word ‘folklore’. Protection of TCEs/expressions of folklore is often associated with traditional knowledge (TK), but TK (when this term is used in its narrow sense to refer to technical know-how such as traditional ecological or medical knowledge) and its legal protection raise some distinct policy, legal and practical questions. The paper does not directly address the protection of TK in the narrow sense of the term as described.

The intellectual property (IP) protection of ‘expressions of folklore’ or ‘traditional cultural expressions’ has been discussed and debated for several decades. This has not been an abstract debate. Many countries have legislated specifically to protect folklore or traditional cultural expressions. There is a body of practical experience in using this legislation, and using other forms of IP, to protect folklore/TCEs against various forms of misuse. International IP law also includes several provisions intended to protect various forms of folklore, and extensive work on international standards was undertaken in the 1980s. Contemporary debate has highlighted many specific claims of misappropriation or misuse of TCEs/expressions of folklore. This has led to an extensive international policy discussion over whether, and if so how, the IP protection of this material should be enhanced or developed further; and there are calls for new international law in this area, such as a new treaty.

This debate raises important legal and policy questions, which range widely over the realm of conventional IP as well as other related areas of law and policy. The challenge in this debate is to explore new and emerging issues, while responding to the needs and expectations expressed by the holders of TCEs/folklore and building on the extensive practical experience gained by many countries in seeking to protect this material.

This background paper

This publication is part of a series of background papers prepared by the World Intellectual Property Organization (WIPO) dealing with IP issues in relation to genetic resources, TK, and TCEs/folklore. It is intended to provide a comprehensive analysis of the policy issues that arise in the debate over improved IP protection of TCEs/folklore, as an information resource for policy makers, negotiators, legislators, indigenous and traditional communities, users of TCEs/folklore, researchers and others interested in exploring these issues in detail. A more succinct introduction to the subject is provided in the WIPO booklet “Intellectual Property and Traditional Cultural Expressions/Folklore.”

WIPO’s role in the debate

WIPO has been active in the legal and policy debate over folklore for several decades: past highlights (discussed in detail below) have included working with UNESCO to conclude model provisions on the protection of folklore in the 1980s, and the inclusion of performances of expressions of folklore as protected material under the WIPO Performances and Phonograms Treaty in 1996. Most recently, WIPO’s Member States established the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge

and Folklore (the Committee), which met for the first time in April 2001 and concluded its initial mandate in July 2003. This Committee serves as a forum for discussion between Member States on the three themes identified in its title. Intergovernmental and non-governmental organizations, including many representing the interests of indigenous and other traditional communities, also participate actively in its sessions. The Committee commenced work on a renewed and revised mandate in March 2004.

Overview of this publication

This Background Paper is a distillation of the extensive materials concerning TCEs/folklore developed during the first mandate of the Committee. This first period of the Committee's work focussed on gathering and sharing practical experience, in assembling data on legal and policy choices, and in refining and clarifying key concepts and issues. This work included surveys of national experience, case studies, and extensive policy discussions; it also drew on many conversations with the holders of TCEs/folklore. This background paper is derived from a comprehensive analysis commissioned by the Committee as a capitulation of all this initial work.¹ It does not seek to promote or advance any particular outcomes or solutions.

This publication therefore builds upon, consolidates and analyses decades of previous discussions concerning the protection of TCEs/folklore (summarized in Part III of this paper), as well as more recent regional, national and community experiences. These include in particular:

- the lessons of consultations with indigenous and traditional communities in 28 countries, and the publication of a detailed report;²
- regional consultations in Africa, Asia and the Pacific, the Arab region and the Latin American and Caribbean region;³
- an extensive questionnaire on national experiences with the protection of TCEs/folklore,⁴ and a full report on the detailed responses received from 64 countries;⁵
- studies of actual experiences of indigenous communities with the protection of their traditional cultural expressions;⁶
- a panel on national experiences with *sui generis* systems during the fourth Committee session in December 2002;⁷ and
- a study of the national experiences of India, Indonesia and the Philippines.⁸

The main part of this paper consists of an integrated and comprehensive legal analysis of the protection of TCEs/folklore by conventional IP as well as by *sui generis* measures and systems (which include *sui generis* adaptations of existing IP laws and new, stand-alone *sui generis* systems). Taking practical examples of TCEs that have been appropriated as a starting point, it examines the usefulness of all branches of IP and *sui generis* measures and systems based upon them. Both 'positive' and 'defensive' approaches are covered. In so far as traditional literary and artistic works and designs are concerned, it notes that contemporary adaptations, interpretations and performances of older, pre-existing materials are generally protected by current copyright, related and designs laws - the key policy question, therefore, is whether or not such protection is adequate, or whether additional IP-type protection should be established over the older, pre-existing materials currently regarded by IP as 'public domain'. The paper highlights how a reconsideration of the role, contours and boundaries of the 'public domain' is central to this debate.

The core of this legal analysis of TCEs protection is provided in Part VII. Part IX ('Regional and International Protection'), Part X ('Cultural Heritage Collections, Databases and Registers') and Part XI ('Acquisition,

Management and Enforcement of Rights') deal with specific issues connected with this legal analysis. Part VIII ('The Model Provisions for National Laws') discusses the most extensive attempt at international harmonization of folklore protection to date.

The policy context of the legal analysis is provided in the earlier parts of the paper. Part II ('Policy Context and Policy Options') contains a discussion of the overall policy issues relevant to the protection of TCEs, including an examination of key concepts such as 'traditionality', 'protection' and the 'public domain'. More detailed background on the policy and legal context is given in Part III ('History of Intellectual Property and the Protection of Traditional Cultural Expressions'), Part IV ('What are Traditional Cultural Expressions?'), Part V ('Traditional Cultural Expressions as Economic and Cultural Assets'), and Part VI ('Examples of Appropriation and Misappropriation').

To provide a convenient overview of the main policy options in practical terms, the Annex contains a table analyzing several *sui generis* systems for the protection of TCEs/folklore.⁹

II. POLICY CONTEXT AND POLICY OPTIONS

This background paper sets out a policy framework for protection of TCEs, and surveys the available forms of IP protection for TCEs, through conventional or general IP regimes (including copyright, but also a range of other forms of IP), through adapted and extended IP regimes (such as adaptations of copyright to improve recognition of TCEs), and through new *sui generis* systems or laws especially created to give IP protection to TCEs.

A policy context

It is suggested that an appropriate context within which to view the legal protection of TCEs is provided by issues such as: (i) the preservation and safeguarding of cultural heritage; (ii) the promotion of cultural diversity; (iii) the respect for cultural rights; and (iv) the promotion of creativity and innovation as ingredients of sustainable economic development.

Cultural heritage and culture lie at the heart of contemporary concerns for individual, community and national identity, international and intra-national cultural exchange, and global creative diversity. The distinct and diverse qualities of the world's multiple cultural communities are threatened in the face of uniformity brought on by new technologies and the globalization of culture and commerce. New technologies generate unprecedented ways for cultural products to be created, replicated, exchanged and used. Challenges of multiculturalism and cultural diversity, particularly in societies with both indigenous and immigrant communities, require cultural policies that maintain a balance between the protection and preservation of cultural expressions – traditional or otherwise – and the free exchange of cultural experiences. Mediating between the preservation of cultural heritage and cultural distinctiveness on the one hand, and the nurturing and nourishing of 'living' culture as a source of creativity and development on the other, is another challenge.

As a result, the preservation and safeguarding of cultural heritage and the promotion of cultural diversity are key objectives of several international conventions and programs as well as regional and national policies, practices and processes.⁹ The respect for and protection of cultural rights and indigenous peoples' heritage are addressed in, for example, Draft Principles and Guidelines for the Protection of the Heritage of Indigenous Peoples, prepared under the auspices of the United Nations Working Group on Indigenous Populations, as well as in several human rights instruments.¹¹

How does IP, and in particular the IP protection of TCEs, interact with these issues? The relationship between IP and cultural policies relating to heritage, diversity and creativity is complex and requires balance and coordination. Enhanced appreciation of this relationship requires a clear articulation of the nature and objectives of IP protection, as well as of the range of needs and expectations of holders and practitioners of TCEs as they relate to preservation and/or legal protection of TCEs. The nature of cultural heritage as 'living' and as a source of creativity is also pertinent. Of relevance too are the role of the commerce and the market place, and the notion of the 'public domain'. A central challenge is to address the protection of TCEs in ways that balance the concerns of users, existing third-party rights and the public interest.

Some of the key questions at the core of this discussion include: if expressions and representations of cultural heritage receive any form of IP protection, does this imply a shift in the objectives of IP protection? How does IP, particularly copyright and related rights, interact with cultural policies that mediate between the preservation of cultural heritage, the promotion of multiculturalism and facilitation of the free flow of cultural experiences?

What forms of IP protection for TCEs best serve creativity and development? Where should one draw the line between the inappropriate use of TCEs and use of TCEs as a source of legitimate inspiration? How should IP policies and models ensure that TCEs that receive IP protection are those identified by cultural communities as meriting protection?

Tradition as a source of creativity

While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework. Tradition is not immutable. Cultural heritage is in a permanent process of production; it is cumulative and innovative. Culture is organic in nature and in order for it to survive, growth and development are necessary – tradition thus builds the future.¹² As the Japanese industrial designer Sori Yanagi has stated, incorporating the element of traditional folk craft into modern design can be more valuable than imitating folk craft itself: “Tradition creates value only when it progresses. It should go forward together with society”.¹³ So, as traditional artists and practitioners continually bring fresh perspectives and experiences to their work, tradition can be an important source of creativity and innovation.

In traditional music, too, there is continual reworking of available material. It has even been stated that “the folk-song is, by definition, and as far as we can tell, by reality, entirely a product of plagiarism”.¹⁴ This may be an exaggeration, but variation in traditional cultures comprises “deliberate, intentional ... changes and choices introduced by the individual folk artist whose creative genius is not content with mere imitative repetition in the process of appropriating a variant of a tale (or song) as his or her own personal version. Far from being at odds with each other, creativity and tradition, individual and community, together produce vital variability thus keeping alive the very item that their integrated forces help to shape”.¹⁵

Manifestations of traditional culture and cultural heritage are therefore often a source of creativity for indigenous, local and other cultural communities. The unalloyed re-creation and replication of past traditions is not necessarily the best way of preserving identity and improving the economic situation of indigenous, local and cultural communities. In recognizing this, the link between cultural heritage, culture and economic development is now being more appreciated. International and regional financial institutions, such as the World Bank, have begun to support cultural development projects that treat culture as an economic resource that is able to contribute to poverty alleviation, local job creation and foreign exchange earning.

Handicrafts, a form of tangible cultural expression, exemplify the benefits of combining tradition with creativity. Handicrafts are viewed as both traditional and contemporary, in keeping with the view that traditional cultural expressions reflect a living culture and evolve despite being based on traditional forms and know-how. This reflects the ability of many tradition-bearing communities to combine tradition with the influences and cultural exchanges characteristic of modernity for the purpose of maintaining their identity and improving their social and economic circumstances.¹⁶

Forms or manifestations of cultural heritage are also a source of inspiration and creativity for the cultural industries, acting as powerful engines of economic growth, generating considerable income and employment fuelled by growing demand for cultural goods and services in an expanding marketplace. Many businesses today, small, medium and large, create wealth using the forms and materials of traditional cultures – local cooperatives that produce and market handmade crafts, industrial textile manufacturers that employ traditional designs, producers of audio recordings of traditional music, pharmaceutical manufacturers that use indigenous

knowledge of healing plants, promoters of tourism, and entertainment conglomerates that employ various forms of traditional representations for motion pictures, amusement theme parks and children's toys.¹⁷

Tradition, modernity and the market-place

However, the relationship between tradition, modernity and the market place is not always perceived to be a happy one. What is creativity from one perspective may erode traditional culture from another viewpoint. And the imitation or marketing of cultural forms and culturally specific artistic works by the commercial sector might be counterproductive to the welfare of the source community. The creation or use of TCEs outside the context of the cultural community may have a negative impact on that community in subtle yet destructive ways. Many cultural products deeply rooted in the cultural heritage of developing countries have crossed borders and established significant market niches in industrialized countries. However, the commercialization of these cultural transfers has often not benefited the countries of origin. It has been suggested that a serious consequence of this is a gradual impoverishment of the cultural heritage of countries.¹⁸

IP-related questions are raised too. Communities who are the bearers and custodians of their cultural heritage argue that while they are unable to acquire IP protection over their cultural heritage and traditional cultures, others from outside the community context are able to acquire IP protection for creations and innovations derived from and inspired by their cultural heritage. Thus, the communities regard themselves as both negatively and positively excluded. Indigenous, local and other cultural communities have complained that their cultural expressions and representations are used without authority in disrespectful and inappropriate ways, causing cultural offense and harm. It is suggested too that the acquisition of IP protection over derivative works threaten the modes of creativity and transmission practiced by cultural communities, or even the very existence of source communities whose relationships are expressed through and maintained by creative expressions and resources. Whether this and other arguments are valid requires a detailed examination of the nature of IP protection, particularly copyright and related rights, and its interaction with the preservation and promotion of cultural heritage and creative diversity. It is important too not to make artificial distinctions between traditional communities and the market place, as many traditional communities engage in marketing aspects of their culture.

Intellectual property and the meaning of 'protection'

Most forms of IP, such as copyright, related rights, patents and industrial design rights, establish private property rights in creations and innovations in order to grant control over their exploitation, particularly commercial exploitation, and to provide incentives for the further creation and dissemination of the products of human creativity. In addition, IP protection: (i) facilitates the orderly functioning of markets through the avoidance of confusion and deception (the policy basis of the protection of trademarks and geographical indications, and the prevention of unfair competition); (ii) safeguards the integrity of and rights of attribution to certain works and creations (the policy basis of moral rights protection in copyright, for example); and/or (iii) protects undisclosed information from bad faith use or appropriation. IP protection also helps to monetize IP assets. IP protection generates revenue when used strategically in a market context. Its value lies not so much in the right to prevent others from exercising rights but rather in enabling the licensing of IP assets. It can particularly help small businesses in raising venture capital and other forms of equity, and in accessing finance and credit. IP assets can be used as security or collateral for debt finance, or it can provide an additional or alternative basis for seeking investor equity.

IP protection must be distinguished from the concepts of 'preservation' and 'safeguarding'. Copyright, for example, protects original literary and artistic works, against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. The holder of copyright in a work has the exclusive right to prevent or authorize others from undertaking any of those acts, subject to certain exceptions and limitations. The goals of copyright protection are largely to encourage further creativity, encourage public dissemination and enable the holder to control the commercial exploitation of the work. It can also provide protection against demeaning or degrading use of a work, an issue that is often of concern in relation to traditional cultural materials.

By contrast, preservation and safeguarding in the context of cultural heritage refer generally to the identification, documentation, transmission, revitalization and promotion of (tangible or intangible) cultural heritage in order to ensure its maintenance or viability.¹⁹

As has been pointed out by Canada, in discussing the legal protection of TCEs, it is worthwhile to recall that the term 'protection' may have several different meanings, such as preserving, promoting wider use, controlling use, preventing misuse, or channeling a proper share of benefits to TCE holders. These various forms of protection may be realized through a variety of legal and policy measures aside from IP law. By way of illustration, it may be useful to have an IP right in relation to a legend that was recorded centuries ago on a piece of cloth. Such an IP right could be helpful in preventing others from using the legend in a manner considered inappropriate by a community, such as reproducing the legend on a T-shirt. However, if only a few people know the legend and the language that should be used to recite the legend, 'protection' may take the form of measures that would assist people to pass on their knowledge of the legend and the language to the next generation. If the cloth begins to decay, 'protection' may take the form of measures to ensure that the cloth is preserved for future generations. In other instances, 'protection' could take the form of promoting the legend outside the community in order that others may learn about it and gain a greater understanding and respect for the culture of the originating community.

Clarity on what is meant by 'protection' is key, because the needs and expectations of TCE holders and practitioners can in some cases be addressed more appropriately by measures for preservation and safeguarding rather than protection in the IP sense. It may be necessary to combine both approaches in a comprehensive strategy: for instance, in projects for the preservation of traditional cultures, that may involve writing down oral works, and scanning or digitizing graphic or written works, there may be sensitive issues relating to ownership and exercise of copyright ensuing from these activities. The exercise of IP rights is also important when TCE holders and practitioners wish to control the commercialization of their TCEs. It is also important that measures for preservation/safeguarding and for IP protection are complementary and mutually supportive.

Traditional cultures and IP protection

IP laws, particularly in this context copyright law, draw a distinction between (i) pre-existing, underlying cultural heritage and traditional culture (which may be referred to as traditional culture or folklore *stricto sensu*) and (ii) contemporary literary and artistic productions created by current generations of society and based upon or derived from pre-existing cultural heritage and traditional culture.

- (i) Pre-existing traditional culture is generally trans-generational (i.e., old) and collectively 'owned' by one or more groups or communities. It is likely to be of anonymous origin, inasmuch as the notion of

authorship is relevant at all. Pre-existing traditional culture as such and particular expressions thereof are generally not protected by current copyright.

- (ii) On the other hand, a contemporary literary and artistic production based upon, derived from or inspired by traditional culture that incorporates new elements or expression is a 'new' work. Such a contemporary production may include a new interpretation, arrangement, adaptation or collection of public domain pre-existing cultural heritage and expressions, or even their 're-packaging' in the form of digital enhancement, colorization and the like. Contemporary, tradition-based expressions and representations of traditional cultures are generally protected by existing copyright (and industrial design law) for which they are sufficiently 'original' and 'new' respectively. The law makes no distinction based on 'authenticity' or the identity of the author – i.e., the originality requirement of copyright could be met by an author or inventor who is not a member of the relevant cultural community in which the tradition originated.

The public domain

An integral part of developing an appropriate policy framework within which to view IP protection and TCEs is a clearer understanding of the role, contours and boundaries of the public domain.

The 'public domain' is used here in the sense in which the term is used in the copyright context and it refers to elements of IP that are ineligible for private ownership and the contents of which are available for use by any member of the public.²⁰ The 'public domain' in this context means something other than 'publicly available' – for example, content on the Internet may be publicly available but not in the public domain from a copyright perspective. Similarly, an IP asset such as a collaborative work or a collective mark may be owned by a community but it would not for this reason be part of the public domain.

This paper is fully aware that the public domain is a construct of the IP system, and that it does not take into account private domains established by customary and indigenous laws.

In common in some ways with plant genetic resources and biological diversity, cultural heritage was previously considered as common property (as part of the 'universal heritage of humanity', as is referred to for example in some cultural instruments and declarations²¹), and therefore as public domain.

Cultural heritage also shares with plant genetic resources and biological diversity growing calls for a re-evaluation of its public domain status, particularly by indigenous and local communities concerned by the cumulative failure of IP to provide protection to pre-existing cultural heritage coupled with the availability of IP protection for contemporary tradition-based cultural expressions with no corresponding mechanisms to compensate those who preserved and developed the cultural resources (in the case of plant genetic resources and biological diversity, these perceived imbalances were addressed in the form of the Food and Agriculture Organization's (FAO) International Undertaking and more recently the International Treaty, and the Convention on Biological Diversity, respectively).²²

TCE holders and practitioners question whether the public domain status of cultural heritage offers the greatest opportunities for creation and development. Should all historic materials be in the public domain, and be denied protection because they are not recent enough? Merely providing IP protection for contemporary,

tradition-based cultural expressions is an inappropriate 'survival of the fittest' approach that does not best serve cultural diversity and cultural preservation, it is argued. Almost everything created has cultural and historic antecedents, and systems should be established that yield benefits to cultural communities from all creations and innovations that draw upon tradition.

On the other hand, it is argued by others that the public domain character of cultural heritage is valuable. It serves several of the objectives associated with the safeguarding and preservation of cultural heritage, and it is argued that the public domain character of cultural heritage is essential for its renewal and survival. Preservation should nourish living cultural practices and nurture cultural revitalization, such as through national folk life programs. The public domain status of cultural heritage is also tied to its role as a source of creativity and innovation, and it is argued that it is through sharing and contemporary adaptation and arrangement that cultural heritage is kept alive and transmitted to future generations.²³ As the European Community and its Member States have stated, "the fact that folklore for the most part is in the public domain does not hamper its development - to the contrary, it allows for new creations derived from or inspired by it at the hands of contemporary artists." Canada has expressed the view that "copyright encourages members of a community to keep alive "pre-existing cultural heritage" by providing individuals of the community with copyright protection when they use various expressions of "pre-existing cultural heritage" in their present-day creations or works."

It is suggested by some that neither members of the relevant cultural communities nor the cultural industries would be able to create and innovate based on cultural heritage if strict private property rights were to be established over it. By overprotecting TCEs, the public domain diminishes, leaving fewer works to build on. Therefore, according to this view, indigenous artists wishing to develop their artistic traditions by reinterpreting traditional motifs in non-traditional ways, and wanting to compete in the arts and crafts markets, may be inhibited by these regimes. The consequence is that these laws may 'freeze' the culture in a historic moment, and deny traditional peoples a contemporary voice, it has been argued.²⁴

Some have therefore suggested that any protection for TCEs should strike a proper balance between protection against abuses of TCEs and the encouragement of their further development and dissemination, as well as individual creativity inspired by TCEs.²⁵ They tend to believe that existing IP strikes this balance. Therefore, the principal means of protecting TCEs should be conventional IP, supplemented, as required by the conditions/needs of local communities, by specific laws that address specific problems. As the European Community and its Member States have stated:

"However, those who advocate IP protection for their own expressions of folklore would create monopolies of exploitation and would naturally then be faced with monopoly claims from other regions. Exchange or interaction could thus be made more difficult, if not impossible. Indeed, IP protection should only be used where appropriate and beneficial to society in that it stimulates creativity and investment while respecting the interests of others and of society at large. If expressions of folklore were fully protected, this could almost have the effect of casting it in concrete. Folklore may thus not be able to evolve and may risk its very existence as it would lose one of its main features: its dynamics. There is a point where a line must be drawn between the public domain and protected IP. ... the realm of IP protection should not be extended to a point where it becomes diffuse and legal certainty diluted".²⁶

Certainly, cultural exchanges and communal flows have long marked music and other cultural forms. Musical traditions such as jazz emerged in the early twentieth century in cultural crossroads such as New Orleans,

combining elements of African American, Afro-Caribbean and European cultures.²⁷ Rock music evolved from blues, valuing or rewarding imitation, revision and improvisation. In this context, copyright does not prevent artists taking from the 'commons'. On the contrary it supports the idea that new artists build upon the works of others and it rewards improvisation within a tradition.²⁸

Needs and expectations of TCE custodians

In regard to the needs and expectations of the custodians of TCEs, more than one IP strategy can be identified. During the fact-finding missions and consultations conducted by WIPO since 1998, three approaches have been encountered:

- (a) *IP protection to support economic development*: some communities wish to claim and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development;
- (b) *IP protection to prevent unwanted use by others*: communities may wish to claim IP in order to be able to actively exercise IP rights that prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally offensive or demeaning use. Uses which may wish to be prevented could include, for example: (i) uses that falsely suggest a connection with a community; (ii) derogatory, libelous, defamatory or fallacious uses; and (iii) uses of sacred and secret TCEs. The Saami Council has cited the Saami traditional dress as an example of a cultural expression misused by the tourism industry in an inappropriate way. The Saami people have no interest in trading with this part of their cultural heritage. Their sole interest is to ensure that the dress is not used in inappropriate ways by unauthorized persons.²⁹

In both of the above approaches, owners and custodians of TCEs wish to protect their TCEs by actively asserting IP rights. This could be termed 'positive protection'. There are two aspects of such positive protection – TCEs holders may use IP protection to stop unauthorized or inappropriate acts by third parties, or they may use it as the basis for commercial and other relations in their dealings with other partners. For instance, a community may use IP protection to stop the use of a traditional design by a manufacturer, but the community can also use the same protection as the basis of their own commercial enterprise, or to license and control appropriate use of the TCEs by others and to structure and define the financial or other benefits from this authorized use.

- (c) *Defensive strategies to protect TCEs*: A third approach is to employ defensive protection strategies aimed at preventing others from gaining or maintaining IP over derivations and adaptations of TCEs and representations. Those adopting this approach are not themselves interested in acquiring IP protection. They are, however, interested in safeguarding their cultural heritage and cultural expressions, and, to that end, believe that no IP should be obtained by anyone over them.

It is important to be clear to what extent and in which cases IP protection can meet these needs, as some of them are perhaps more concerned with preservation and safeguarding than IP protection. Unfair competition law and other consumer protection laws may be useful, especially since concerns about commercial misuse of TCEs often arise from the perception that they are being used to create a misleading impression that a product is produced or endorsed by a traditional community.

Generally speaking, one single form of protection for TCEs is unlikely to meet all the needs of traditional communities, and they may need to use a range of positive and defensive legal tools to achieve their chosen objectives in protecting and preserving their traditional cultures.

Key policy questions and concluding remarks

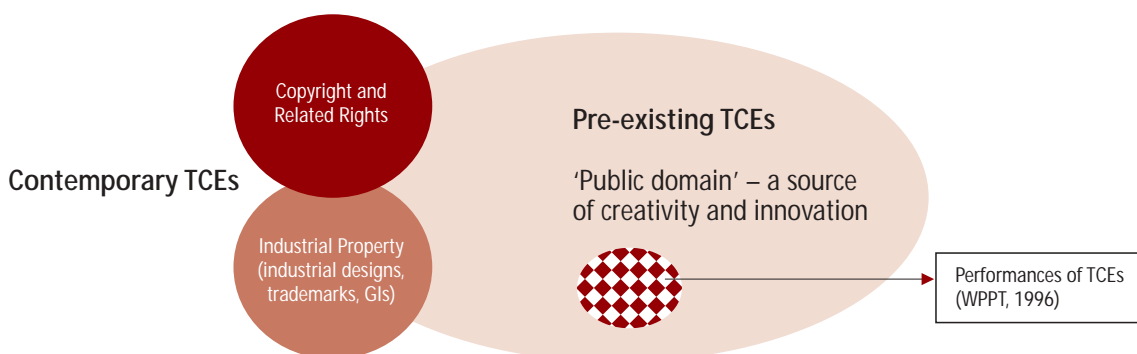
A key question perhaps is whether limiting IP protection to contemporary, tradition-based cultural expressions, and leaving pre-existing cultural heritage as part of an unregulated public domain, adequately meets cultural as well as IP policies and objectives. Does it offer the greatest opportunities for creativity and economic development? Does it best serve cultural diversity and cultural preservation? Does it address the concerns of the custodians of traditional cultures? In this regard there are various views.

No IP protection for public domain TCEs: Existing IP adequate/Adapted IP standards and Special IP measures

There have been some arguments that existing and conventional IP laws are adequate for the protection of TCEs, if their full potential is explored. There are many examples of traditional communities successfully protecting songs, graphic works and other literary and artistic works through copyright and performers’ rights. The current balance of interests in the IP system mean that members of cultural communities as well as others are free to create and innovate on the basis of their cultural traditions, and acquire and benefit from any IP that may subsist in the creations and innovations. This contributes to their economic development, as well as meeting certain objectives of cultural heritage and cultural exchange policies. IP protection provides incentives for the creation and dissemination of new intellectual creations. Some proponents of this view consider that some adaptations to existing rights and/or some special measures within the IP system may be necessary and desirable to meet specific needs – for instance, copyright protection for works that have not been fixed (e.g. works that have been passed only in oral form) and special remedies for copyright infringement that is also culturally offensive.

Within the copyright and related rights system, international protection has recently been extended to certain TCEs formerly considered to fall in the public domain: under the WIPO Performances and Phonograms Treaty of 1996, performers of TCEs (or expressions of folklore) receive protection for the aural aspect of their performances: for instance, a performer of a traditional song or chant has the right to set the conditions for the recording (‘fixation’) of the performance, and for the way in which the recording is distributed and commercialized, even if the song or chant is not itself eligible for copyright protection. Hence, a part of the public domain is already subject to private rights, albeit indirectly.

Diagram 1 illustrates this approach.



Property rights over public domain TCEs – sui generis systems

On the other hand, indigenous communities and other stakeholders call for the establishment of legal protection for pre-existing TCEs which are presently in the public domain. This situation arises in two general ways: TCEs that might once have been eligible for copyright protection, but the time-period for its effect has long lapsed (raising the question of retrospective protection); and, TCEs which inherently lack the qualities required for copyright protection (e.g. lack of sufficient originality and well-defined authorship). Such material is, in legal terms, in the public domain, although the communities concerned often challenge the public domain status of such material (especially when it has been recorded or written down without their informed consent).

Whether it is desirable to extend new forms of IP protection to this material is the threshold policy question: should TCEs currently in the public domain receive positive IP protection? Should this take the form of rights to prevent or authorize others' use, or should it be limited to rights to equitable remuneration (such as a royalty on use by others), or should there be a system of 'moral rights' concerning attribution and integrity when TCEs are used? While there are *sui generis* systems that do create such rights, such approaches raise several policy challenges and questions. These include:

- (a) how should the needs for recognition of collective ownership and for indefinite terms of protection be addressed? Collective marks and geographical indications are examples of IP rights that are collectively owned; many copyright works (such as multimedia works) have multiple authors and rights associated with them that require a collective approach to managing and enforcing rights. Trademarks and geographical indications can be protected indefinitely, but the claims for indefinite protection concern mechanisms closer to copyright, related rights and industrial designs, which have traditionally had limited terms of protection, with protected material passing into the public domain;
- (b) who would 'own' and/or manage the rights in 'public domain' TCEs? This could be the State or a State-appointed authority, but it need not be. As the United States of America (U.S.A) has pointed out, it may be problematic for the State to hold or decide who holds rights in TCEs: "Governments are contemporary and ephemeral political entities, not the tradition-bearers. In some cases, the State may be hostile to traditional communities within their borders". The U.S.A. also noted that while the question of 'competent authority' might be a decision that should be taken within the community, individuals in communities do not always agree on who should hold the authority. In general, however, the objective should probably be to ensure that any benefits flow to the appropriate cultural communities, if they can be identified. Existing or new collective management organizations could play a role in managing the rights for the direct benefit of the relevant communities;
- (c) what about 'non-traditional' creations that are also in the public domain (such as the works of Shakespeare, Greek, Egyptian, Roman and Babylonian historical events and stories which have long been used as the subjects of operas, books and plays, and more recent works that have fallen into the public domain)? Should 'traditional' creations enjoy a privileged legal status *vis-à-vis* other public domain 'non-traditional' creations? Here one needs particular clarity on what is meant by 'traditional'. Separate IP rules for traditional and non-traditional creations may be difficult to sustain, but this is a policy matter for decision by States. Special systems for public domain materials of a 'traditional' nature may have to apply also to other materials that are also in the public domain;

- (d) this last point is closely related to the need to define the ‘communities’ that would be entitled to special protection. Are we speaking specifically about ‘indigenous peoples’ and ‘local communities’ as those terms are understood today? Is the creation of a *sui generis* IP regime for certain communities (such as indigenous or local peoples, as against all other ‘non-indigenous’ or ‘non-local’ persons) acceptable as a matter of policy? National treatment principles under international treaties on IP may have implications for a specialized domestic regime for the protection of TCEs: if the TCE regime was considered to be an IP right that fell within the scope of such international obligations, this could require extending protection beyond local indigenous populations to certain foreign nationals. National treatment need not always apply, either because international protection may be determined on other points of attachment, such as reciprocity, or because the TCE regime would fall outside the scope of IP law covered by treaty obligations. Nonetheless, this may become a substantive policy and legal question. In addition, as the U.S.A. has pointed out, if protection for identifiable communities was established, it would be necessary to consider how to treat individuals who continue to practice their traditions but who live outside their communities;
- (e) should TCEs in the public domain, if not receiving positive protection, receive some form of defensive protection against certain uses, such as: (i) uses that falsely suggest a connection with a community; (ii) derogatory, libelous, defamatory or fallacious uses; (iii) uses of sacred and secret TCEs. Some States and regional organizations have already adopted measures with this as their objective, such as measures that seek to prevent the unauthorized incorporation of indigenous or traditional signs and symbols in trademarks. Consumer protection laws are useful and relevant in this context;
- (f) should only certain uses of TCEs require consent? (existing *sui generis* systems distinguish between customary/non-customary uses, and commercial and non-commercial uses, for example);
- (g) should the documentation of public domain TCEs form part of an IP strategy?
- (h) should protection be of a ‘blanket’ nature or should prior registration of distinct and specified TCEs be a requirement? If so, can existing registries, lists and inventories established in cultural heritage programs play a role?
- (i) how should prior and continuing uses of TCEs be dealt with by a new *sui generis* system?
- (j) how would such systems line up with existing IP rights and obligations under international, regional and bilateral conventions, treaties and trade agreements?

Subsidiary questions

Subsidiary questions are fragments of these larger key policy questions and they include:

- (a) how does IP law interact with non-IP legal systems, such as cultural heritage, consumer protection, marketing and labeling laws and instruments?
- (b) how should relevant customary and indigenous laws and protocols be recognized and respected, whether using existing IP or in establishing *sui generis* IP systems?

- (c) in addition to the legal availability or creation of rights in TCEs, what supporting institutional structures, programs and measures are needed to turn legal systems of protection into truly effective and working systems which benefit the custodians of TCEs?
- (d) as anthropologists, other fieldworkers, museums and archives lie at the junction between communities and the market place, how do their activities affect efforts to legally protect TCEs?

Possible approaches to protection

It is suggested that if States choose to establish positive protection of TCEs, and drawing upon the example of the South Pacific Model Law, 2002, a system of positive protection could:

- (i) enable and facilitate access to and use of TCEs as a basis for further creativity and innovation, whether by members of the relevant cultural community or not;
- (ii) in such cases, respect any resulting IP of the creators and innovators;
- (iii) ensure, however, that such uses of TCEs, particularly commercial uses, are coupled with obligations by the user to acknowledge the source, share equitably in any benefits derived from the use of the TCEs and not to make derogatory,³⁰ libelous, defamatory or fallacious uses of TCEs under any circumstances; and,
- (iv) notwithstanding the above, protect sacred and secret expressions against all forms of use and commercial exploitation.

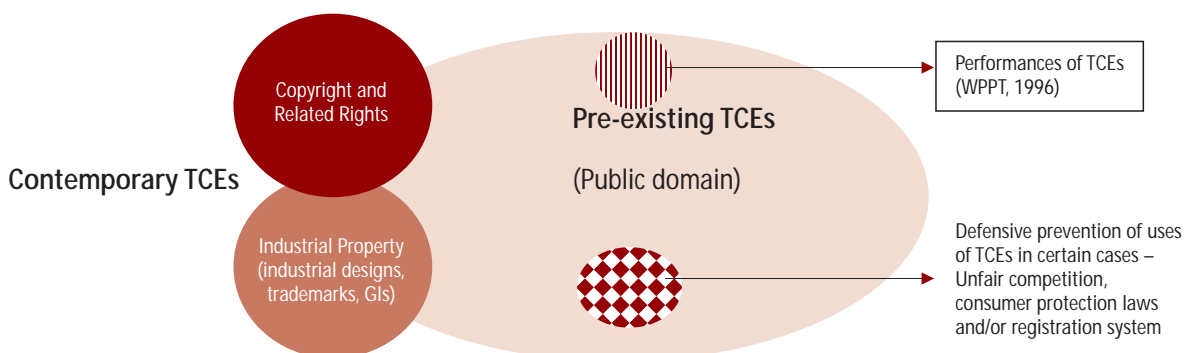
Another approach, which may be complementary, could take the following principles and 'building blocks' into account:

- (a) pre-existing cultural heritage is *inter alia* a basis for further creativity and innovation. This is linked with its public domain character and corresponds with a robust public domain as a source of exchange and creativity. Copyright and industrial designs law are generally adequate to protect contemporary, tradition-based cultural expressions. IP can be used by the creators either to commercialize their works in furtherance of their economic development, prevent others from doing so and/or prevent others from acquiring IP protection over the cultural expressions. Trademarks (including certification and collective marks) and geographical indications, unfair competition, and the protection of undisclosed information (for secret TCEs) are other forms of IP that seem particularly useful;
- (b) it appears then that the establishment, in a general way, of property rights over all forms of TCEs currently in the public domain is not appropriate, neither as a matter of IP policy nor cultural policy. Property rights over public domain TCEs may stifle the ability of indigenous and traditional persons, as well as non-indigenous and non-traditional persons, from creating and innovating based upon tradition. It appears too that, based upon views expressed by several States, not all States are persuaded of the desirability and need for the creation of property rights over public domain TCEs;
- (c) however, an absolutely free and unregulated public domain does not meet all needs of indigenous and local communities, particularly in respect of inappropriate uses of their TCEs. In particular:
 - (i) first, it should be possible for States and indigenous and traditional communities to prevent particular uses of public domain TCEs taking place outside the context of the cultural community, such as: (i) uses that falsely suggest a connection with a cultural community; (ii) derogatory, libelous, defamatory, offensive and fallacious uses; and/or (iii) uses of sacred and secret TCEs;

- (ii) unfair competition law and other consumer protection and marketing laws seem to respond to many of the needs in this respect of indigenous and local communities. A relevant example of a 'truth-in-marketing' law is the Indian Arts and Crafts Act of the U.S.A., described later in this paper. An advantage of unfair competition is its flexibility. It is also a concept already understood by courts improving the likelihood of effective enforcement. The nature of unfair competition protection is explained elsewhere;
- (iii) perhaps for cases where unfair competition law is not applicable, national registers, or even perhaps an international register, could be established for the registration, by communities, of those TCEs whose uses should not be permitted. Registration would have the advantages of focussing protection on discrete TCEs and those that communities deem worthy of protection and therefore proactively register. Prior registration affords some precision and certainty absent in more general protection systems;
- (iv) tensions and conflicts between copyright and other IP in contemporary, tradition-based cultural expressions and indigenous/customary responsibilities require further study, the results of which may lead to suggestions for certain measures for managing those tensions and conflicts.

See diagram 2, which attempts to depict a system comprising these building blocks.

Diagram 2



These are not the only possible models, and there are a diverse range of possible approaches. It seems that neither existing IP standards, nor the 1982 Model Provisions, alone are sufficient in meeting the needs and expectations of indigenous and local communities, and that the testing of alternative models, using a combination of IP and non-IP measures, is desirable. In this respect, States and others have called for the development of new model provisions, guidelines or recommendations to assist States and regional organizations in developing effective systems and to provide coherence to emerging national systems representing a diversity of approaches. The involvement of affected communities and TCE holders is key to this policy development.

Eventually, the protection afforded to TCEs could be found in a multi-faceted set of options, using a combination of some of the IP and *sui generis* options mentioned above. Which options are the most suitable, viewed from the perspective of IP and relevant cultural policies, is explored more fully in the remainder of this paper.

IV. WHAT ARE 'TRADITIONAL CULTURAL EXPRESSIONS'?

Introduction

The meaning and scope of the term 'traditional cultural expressions' and other terms referring to more or less the same subject matter, such as 'expressions of folklore', 'indigenous culture and intellectual property' and 'intangible and tangible cultural heritage', continue to be discussed in various intergovernmental, regional and national and non-governmental fora. They cover potentially an enormous variety of customs, traditions, forms of artistic expression, knowledge, beliefs, products, processes of production and spaces that originate in many communities throughout the world.⁴⁴

The context in which cultural heritage is generated and preserved is important to its meaning, and the terminology varies depending on the region and the cultural community from which the term and its definition emanates. It also depends on the purpose for which the term and definition is developed. Therefore, what is and what is not considered part of 'cultural heritage' or 'traditional cultural expressions' is a complex and subjective question, and there are no widely accepted definitions of these terms.⁴⁵

Tangible and intangible expressions of culture

'Expressions of' traditional culture (or 'expressions of' folklore) may be either intangible, tangible or, most usually, a combination of the two. The U.S.A. has given a number of examples of TCEs that combined tangible and intangible elements: African American quilts depicting Bible stories in appliquéd designs; the practice of 'mumming' in Newfoundland, Canada, during Christmas season where villagers act out elaborate charades, play music, eat, drink, dance and make disguising costumes; and the Mardi Gras 'Indians' of New Orleans who exhibit a true example of tangible (costumes, instruments, floats) and intangible (music, song, dance, chant) elements of folklore that cannot be separated. On the other hand, the underlying traditional culture or folkloric knowledge from which the expression is derived is generally intangible. For example, a painting may depict an old myth or legend – the myth and legend are part of the underlying intangible 'folklore', as are the knowledge and skill used to produce the painting, while the painting itself is a tangible expression of that folklore.⁴⁶

TCEs for IP purposes include both tangible and intangible components. A separation between the two is artificial, as it may be said that tangible expressions are the 'body' and intangible expressions the 'soul' which together form a whole. That said, tangible and intangible expressions of culture may require different measures for their legal protection.

Use of the term "traditional"

As already discussed, culture is in a permanent process of production; it is cumulative and innovative. Culture is organic in nature and in order for it to survive, growth and development are necessary – tradition thus builds the future. While it is often thought that tradition is only about imitation and reproduction, it is also about innovation and creation within the traditional framework.⁴⁷ Thus, the term 'traditional' does not mean 'old' but rather that the cultural expressions derive from or are based upon tradition, identify or are associated with an indigenous or traditional people and may be made or practiced in traditional ways.

Hence, as already discussed, IP laws distinguish between ‘pre-existing’ cultural heritage and modern, evolving cultural expressions. Put another way, laws draw a distinction between (i) pre-existing, underlying traditional culture (which may be referred to as traditional culture or folklore *stricto sensu*) and, (ii) literary and artistic productions created by current generations of society and based upon or derived from pre-existing traditional culture or folklore.

In summary, therefore, and looking also at how they are defined in many national and regional laws, it seems that TCEs/expressions of folklore in general (i) are handed down from one generation to another, either orally or by imitation, (ii) reflect a community's cultural and social identity, (iii) consist of characteristic elements of a community's heritage, (iv) are made by ‘authors unknown’ and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so, (v) and often not made for commercial purposes but as vehicles for religious and cultural expression, and (vi) are constantly evolving, developing and being recreated within the community.

This distinction is reflected, for example, in some national laws, such as of Tunisia (which refers to both ‘folklore’ and ‘works inspired by folklore’).⁴⁸ The Hungarian Copyright Act of 1999 excludes expressions of folklore from protection under copyright law, but, under Article 1, par.(7), “this may not prejudice copyright protection due to the author of a folk-art-inspired work of individual and original nature.” In addition, the Tunis Model Law on Copyright, 1976 protects, as original copyright works, derivative works which include “works derived from national folklore,” whereas folklore itself, described as “works of national folklore,” is accorded a special (*sui generis*) type of copyright protection.

While this distinction is not necessarily always a clear one because of the ‘living’ and cumulative nature of cultural heritage, it is relevant to an IP analysis. This is because new arrangements, adaptations and interpretations of pre-existing folklore are more susceptible of protection by current IP laws. On the contrary, pre-existing folklore is not as well protected by current laws – and, it is a threshold policy question whether or not the pre-existing folklore ought to receive legal protection. If that question were to be answered in the affirmative, it is in this area that some modifications to existing rights, specific measures to complement existing rights and/or *sui generis* mechanisms or systems may be necessary.

Just as tradition can be a source of innovation by members of the relevant cultural community or outsiders, one can also identify other uses of tradition relevant to an IP analysis. Aside from tradition-based innovation, tradition can be ‘imitated’ by outsiders, or ‘recreated’ by members of the cultural community. Tradition can also be ‘revitalized’ (in cases where the tradition has disappeared) or ‘revived’ (in cases where it has fallen into disuse). While tradition-based innovation is more likely the subject of IP protection, imitations, recreations, revitalization and revivals of traditional cultural expressions may not be.

The relationship between “traditional cultural expressions” and “traditional knowledge”

The legal protection of TCEs/expressions of folklore has been the subject of discussion for many decades. As far back as 1967, a modification was made to the Berne Convention to provide protection for unpublished works of unknown authors, including expressions of folklore, and in 1982 Model Provisions for national laws were developed under the auspices of WIPO and UNESCO. Since then, several national IP laws have incorporated these provisions, and certain new *sui generis* systems have also emerged. There is therefore considerable experience to date with the legal protection of TCEs, although more is needed. Intergovernmental discussions concerning TCEs have generally involved representatives of copyright offices and ministries and

departments dealing with culture, heritage, tourism, justice and education. At the international level, extensive work on the safeguarding and preservation of cultural heritage and the promotion of cultural diversity has been and is being undertaken mainly by UNESCO. As noted earlier, the legal protection of TCEs is appropriately viewed and considered in relation to IP and cultural policies and objectives addressing *inter alia* cultural heritage preservation, the promotion of creativity and cultural diversity.

The concept of ‘traditional knowledge’ has emerged more recently in IP policy circles. The concept is used in the IP context in two senses. It is sometimes used in a narrow sense to refer to ‘technical’ know-how and knowledge related to or associated with biodiversity conservation, agriculture, medicine and genetic resources, amongst other similar areas. In this case, the nature of the discourse is different to that which has taken place over decades in respect of cultural expressions, as it involves principally the laws of patents and trade secrets, a distinct range of stakeholders and a particular policy context related *inter alia* to the environment, agriculture, biodiversity and health. The term ‘traditional knowledge’ is, however, also sometimes used in a broader sense to refer to both technical know-how, knowledge and also traditional expressions and manifestations of cultures in the form of music, stories, paintings, handicrafts, languages and symbols, performances and the like, i.e. TCEs.

There is often a close relation between ‘technical’ TK and traditional artistic expressions. Some Committee participants have pointed to the holistic nature of traditional cultural and knowledge systems, and the need to recognize the complex interrelations between a community’s social and cultural identity, and the specific components of its knowledge base, where traditional technical know-how, cultural expressions and traditional narrative forms, traditional ecological practices, and aspects of lifestyle and spiritual systems may all interact, so that attempts to isolate and separately define particular elements of knowledge or culture may create unease or concern. One approach to dealing with this concern is to distinguish clearly between the holistic and interconnected nature of the underlying TK and culture as the protected subject matter, and the legal mechanisms that are defined to give specific forms of legal protection to this material.

However, concerns have been expressed about subsuming cultural expressions entirely under the general concept of ‘traditional knowledge’ in its broader sense. Given the uncertain scope of TK, this may lead to a loss of context for the protection of cultural expressions, since it can involve a different set of stakeholders, legal tools and legal principles, and could lead to a loss of extensive previous work on cultural expressions and folklore. Protection of TCEs also needs to take account of a different range of cultural and IP policies, and it often involves different national authorities apart from industrial property offices or environmental or agricultural authorities with an interest in genetic resources and technical TK, namely those concerned with copyright, culture, tourism and education.

Several Member States and other stakeholders have argued that, while recognizing the links between them, TCEs and technical TK should be dealt with in two parallel and complementary tracks, at least as a methodological device. For example, at the third session of the Intergovernmental Committee, many of the Member States agreed that “the Committee should continue to work to establish a dividing line between TK and folklore ... and that the different legal tracks be explored which may be complementary in analyzing these two facets. ...it [is] necessary to define the scope of traditional TK with regard to biodiversity and leave folklore and handicrafts to be covered by other measures”.⁴⁹

A useful way of explaining the relationship between technical TK and TCEs is to articulate the distinctions between them using the language and logic of different forms of IP protection. So, for example, as some forms

of IP protection cover the content of knowledge (notably patents and trade secrets), the protection of 'traditional knowledge' may be said to refer to the protection of the content or substance of traditional know-how, skills, practices and learning. On the other hand, copyright, related rights and design rights protect specific forms or expressions of TK. Therefore, the protection of TCEs may be said to refer to the protection of expressions of TK. Similarly, trademarks, geographical indications and certification and collective marks protect distinctive signs, symbols and indications, thus creating a third category of TK subject-matter, namely traditional reputation, signs, indications and symbols. These categories are general and the boundaries between them are indistinct. Just as different forms of IP overlap and intersect in relation to the same creation, distinct forms of IP protection may be applied simultaneously to the various elements of the same underlying traditional creation or innovation. For instance, many handicrafts have technical as well as aesthetic qualities, and may be protected by a combination of the law of industrial property, copyright or both. This is of course to be expected, and does not only apply to 'traditional' creations and innovations (software, for example, can be protected by both patents and copyright).

A WORKING DESCRIPTION OF TRADITIONAL CULTURAL EXPRESSIONS

While not constituting a definition as such, a working description of traditional cultural expressions may be said to be (using the description in the Model Provisions, 1982 as a useful starting point):

"Traditional cultural expressions" means productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:

- (a) verbal expressions, such as folk tales, folk poetry and riddles, signs, words, names, symbols and indications;
- (b) musical expressions, such as folk songs and instrumental music;
- (c) expressions by actions, such as folk dances, plays and artistic forms or rituals; whether or not reduced to a material form; and
- (d) tangible expressions, such as:
 - (i) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes;
 - (ii) crafts;
 - (iii) musical instruments;
 - (iv) architectural forms."

The renewed identification of TCEs as worthy of distinct consideration in parallel with related discussions about technical knowledge is desirable in order that the legal protection of TCEs be viewed within the context of relevant policies and objectives, and that it draws appropriately upon previous work in this area, takes into account the relevant IP systems (notably copyright, related rights and trademarks) and involves relevant stakeholders.

V. TRADITIONAL CULTURAL EXPRESSIONS AS ECONOMIC AND CULTURAL ASSETS

The preservation and protection of cultural heritage and TCEs are important to peoples everywhere, as this fundamentally concerns the protection of the world's intangible heritage and culture so that they may be passed down to future generations. The loss of cultural heritage is a tragedy for those peoples and communities that depend upon the integrity of their knowledge and cultural systems for their survival. Thus, a great deal of cultural heritage may have no commercial potential whatsoever but this does not make it any less worthy of respect or protection.

However, cultural heritage is often a source of creativity and innovation, and the adequate and appropriate protection of expressions and manifestations of traditional cultures can contribute to a traditional creator's prosperity or a community's economic development. These types of knowledge assets have been largely overlooked in the IP community until quite recently, and in this sense, they are traditional but new intellectual assets.

Tradition-based innovations and creations, which are important parts of a community's heritage and cultural patrimony, can also act as inputs into other markets, such as entertainment, art, tourism, architecture, and fashion.⁵⁰

The commercial value of TCEs in relation to cultural industries tends to be concentrated in the arts and crafts, cultural tourism, music, multi-media and publishing, architecture, and fashion. Unfortunately, very little economic data exists on the value of the contribution of TCEs to these industries. Nevertheless, here are a few examples:

- (a) According to an Australian report, published by the Department of Communications, Information Technology and the Arts, visual arts and crafts are an important source of income for indigenous artists and communities, and the level of copyright and other IP protection they enjoy is of utmost importance to them. It has been estimated that the indigenous visual arts and crafts industry has a turnover of approximately US\$130 million in Australia, of which indigenous people receive approximately US\$30 million in returns;⁵¹
- (b) A governmental poverty alleviation program "Investing in Culture" for the Khomani San people in South Africa is revitalizing the community's craft-making and enabling the community for the first time to generate its own income from their crafts. The older community members teach their skills to the younger members, revitalizing traditional skills that were in danger of disappearing. Through their traditional craft-making, members of the community are experiencing a growing sense of cultural identity, social cohesion and pride in their culture. While previously they were entirely dependent on government grants, each crafts-maker now earns in the region of US\$ 600 per year. The community is considering entering the more sophisticated local and foreign markets where items can be sold for higher prices.⁵² The community is becoming interested in exploring the use of IPRs to protect its crafts;
- (c) A South African company, Buy Africa, is helping local craftsmen and women pursue their trade over the internet, by aiding them to enter the export market and supply the world with South African crafts and curios. Orders for such crafts are placed online through the aid of Buy Africa;⁵³

(d) Traditional music has in recent years captured the public's imagination, evidenced by the successful emergence of world music. Technological breakthroughs in recording techniques, the rise of the music industry and the thirst for world music, are combining to create an immense market for new, diverse sounds. Paul Simon's *Graceland*, in 1986, and *Rhythm of the Saints*, in 1990, using African and Latin American music, respectively, exposed the formidable profits available when Western musicians incorporate non-western music into their songs. *Graceland* spent 31 weeks on the *Billboard* top album list and has sold over 3.5 million copies world-wide.⁵⁴ *Rhythm of the Saints* sold 1.3 million copies in the first four weeks of its release alone.⁵⁵

VI. EXAMPLES OF APPROPRIATION AND MISAPPROPRIATION

Based on WIPO's work in the past this section sets out concrete and specific examples of TCEs for which legal protection has been sought or is desired by some States and other stakeholders.⁵⁶

- (i) Paintings made by indigenous persons have been reproduced by non-indigenous persons on carpets, printed clothing fabric, T-shirts, dresses and other garments, and greeting cards, and subsequently distributed and offered for sale by the non-indigenous persons.⁵⁷ Body paintings have also been photographed, and rock paintings (petroglyphs) have been reproduced (*inter alia* in photographs) by non-indigenous persons and subsequently distributed and offered for sale. In another example, the Olympic Museum in Lausanne posted three Australian Aboriginal artworks on its web site, to coincide with the Sydney Olympic Games in 2000, without seeking consent of the artists and encouraged people to download the artworks as wallpaper. The act was offensive to the artists, two senior Balgo artists, whose work were important cultural works and also related to their land knowledge. The artworks were removed from the web site and after certain negotiations regarding the copyright and moral rights infringements, a settlement was reached which saw the artists receive an amount of money for the infringement, a written letter of apology signed by President of the Olympic Museum Foundation, acknowledging the infringement of copyright and moral rights and apologizing for cultural harm. The apology is also reproduced on the Olympic Museum's web site.⁵⁸
- (ii) Traditional songs and music have been recorded, adapted and arranged, publicly performed and communicated to the public, including over the Internet. In the present digital age, musicians need not go any further than their computer and home studio to encounter and engage music from all over the world. Traditional music can be downloaded from any number of free music archives onto one's home computer and stored as digital information that can then be transferred into other sound files (that is, new compositions) where it can be manipulated in whatever manner one creatively sees fit.⁵⁹ A major concern in this regard is that music originally recorded for ethnographic purposes is now being sampled and used in new compositions for which copyright protection is claimed. Sometimes this is done under negotiated agreements (such as popular techno artist Moby's 1999 album "Play" which sampled musicologist Alan Lomax's "Sounds of the South" CD). However, in other cases, the sampling is done without agreement. Much of this music was recorded from live performances of indigenous and traditional music, often without the knowledge of the performers. Perhaps the most publicized example of this is the successful "Deep Forest" CD produced in 1992, which fused digital samples of music from Ghana, the Solomon Islands and African 'pygmy' communities with 'techno-house' dance rhythms.⁶⁰ A second album "Boehme" was produced in 1995, similarly fusing music from Eastern Europe, Mongolia, East Asia and Native Americans. Rights to the well-known "The Lion Sleeps Tonight", which is based upon the 1930s composition "Mbube" by the late South African composer Solomon Linda, continue to be disputed in a complex matter.⁶¹ Another example reported on is the European group Enigma's "Return to Innocence" hit of 1993.⁶² A related issue is the composition by non-indigenous persons of songs and music that are pseudo-indigenous because they, for example, treat indigenous subject matter, and/or are accompanied by a rhythmic pattern which is associated with indigenous music.⁶³
- (iii) Oral indigenous and traditional stories and poetry have been written down, translated and published by non-indigenous or non-traditional persons, raising issues about the rights and interests of the

communities providing this material as against copyright owned and exercised by those recording, translating and publishing it.

- (iv) Traditional musical instruments have been transformed into modern instruments, renamed and commercialized, used by non-traditional persons active in the world music community or the New Age movement, or for purposes of tourism (such as the steel pan of the Caribbean region and the didgeridoo of indigenous Australians).⁶⁴ Musical instruments, such as drums and the didgeridoo, are also subject to unauthentic mass-production as souvenir items. Janke gives examples of didgeridoos and other objects made outside of Australia, and then imported into Australia and passed off as if locally made.⁶⁵
- (v) Indigenous peoples and traditional communities have expressed the need to be able to protect designs embodied in hand-woven or hand-made textiles, weavings and garments have been copied and commercialized by non-indigenous persons. Examples would include: the *amauti* in Canada, *saris* in South Asia, the “tie and dye” cloth in Nigeria and Mali, kente cloth in Ghana and certain other countries in West Africa, traditional caps in Tunisia, the Mayan *huipil* in Guatemala; the Kuna *mola* in Panama and the wari woven tapestries and textile bands from Peru; carpets (of Egypt, Oman, Iran (Islamic Republic of) and other countries); tents (such as the traditional tipi designs in North America); shoes (such as traditional moccasin designs in North America); and, counterfeit “traditional Appalachian” quilts made outside the U.S.A. and sold in discount stores for a fraction of the cost of the handmade quilts. Bhutan, for example, reported on the copying and use of their traditional textile designs and patterns on machine-made fabrics which diluted the intrinsic value of their textile designs and at the same time stifling the local weaving practice which is mostly prevalent among the women folk in their villages.⁶⁶ The imitation of traditional textile designs causes not only economic prejudice but also threatens to destroy traditional textiles and weaving crafts. Such reproductions occurs when outsiders visit traditional communities to ‘learn’ techniques of traditional weaving and subsequently leave with the knowledge and without prior informed consent.
- (vi) The recording or adaptation and public performance of indigenous stories, plays, and dances (such as *sierra* dance of Peru and the *haka* dance of Maori people of New Zealand) has raised questions about protection of the rights of the indigenous communities in these expressions of their culture.
- (vii) The photographing of live performances of songs and dances by indigenous persons, and the subsequent reproduction and publication of the photographs on CDs, tape cassettes, postcards and on the Internet has raised similar concerns.
- (viii) To service the souvenir market, arts and crafts (such as woven baskets, small paintings and carved figures) employing generic traditional art styles have been reproduced, imitated, and mass-produced on such non-traditional items as t-shirts, tea-towels, place mats, playing cards, postcards, drink coasters and coolers, calendars and computer mouse pads. There are many examples of craft items that have been commercialized by other parties in this way, such as the *chiva* from Colombia.
- (ix) The collection, recordal and dissemination of and research on indigenous peoples’ cultures raises multiple concerns for indigenous and traditional peoples. First, there is the possibility of breaches of confidentiality between ethnographers and informants (although this is unlikely to happen with professional ethnographers bound by professional codes of ethics). Second, the possibility of the

misrepresentation of indigenous and traditional cultures. Then, there can be the lack of access to documentary materials by the people about whom the research was conducted. And, finally, there is concern that much of the documentation of indigenous and traditional cultures is made, owned and commercialized by non-indigenous and non-traditional persons.⁶⁷

- (x) In order to pass off an item (such as art or a craft item) as “indigenous,” the style or method of manufacture of indigenous and traditional productions has been used by non-indigenous or non-traditional enterprises. Examples would include carvings, weavings and other visual art forms incorporating indigenous or traditional motifs or designs, or music and dance forms incorporating indigenous or traditional melodic material, rhythmic patterns, tempos, meters and so forth.⁶⁸ As the Group of Countries of Latin America and the Caribbean (GRULAC) stated, the method of manufacture and “style” of traditional products were often vulnerable to imitation:

“... various representative sectors of communities and groups that produce traditional manifestations of textile art and handicraft (pottery, sculptures, etc) have reported that their works and industrial designs are being subjected to more subtle copying than the imitation or plagiarizing of the style of the original art would be, but nonetheless equally prejudicial to their economies. Some works and designs of textile goods are produced using traditional methods of considerable antiquity. There have been situations in which persons alien to the place of origin of the art or the design have come to that place in order to learn traditional methods, but then reproduced them abroad, using handicraft or even industrial methods. In such cases, original designs are stylized in such a way that, although it is not possible to allege that any design or specific work has been copied, the style aspect of the product directly evokes the original products of the community or region that originally created them” .⁶⁹

- (xi) Sacred/secret material has been subject to unauthorized use, disclosure and reproduction. For example, the sacred Coroma textiles of Bolivia,⁷⁰ as well as sacred songs which can only be performed in a particular place and for a specified purpose.⁷¹ Another example is the protesting by Maori elders in New Zealand of the filming of a Hollywood movie near Mount Taranaki, a dormant volcano regarded as god-like in Maori mythology, and considered sacred.⁷²
- (xii) Cultural concerns and legal questions have been raised by the commercial use of originally indigenous words by non-indigenous entities, such as ‘tohunga’, ‘mata nui’, ‘pontiac’, ‘cherokee’, ‘billabong’, ‘tomahawk’, ‘boomerang’, ‘tairona’, ‘vastu’,⁷³ ‘ayurveda’, ‘gayatri’, ‘siddhi’, ‘yoga’, and ‘rooibos’.⁷⁴ The recent ‘tohunga’ case concerned Lego, a Danish toy company, and the Maori people of New Zealand. Within a new range of toys, several were given Maori and Polynesian names, in particular ‘tohunga,’ the name of a traditional spiritual healer. Since the issue did not concern the registration of trademarks, there was no direct application of trademark law, even though the Maoris considered this particular use of their language to be inappropriate and offensive. Following approaches from Maori groups claiming expropriation of cultural heritage rights, it was reported that Lego, while noting that it hadn’t done anything illegal, had acknowledged the need to take account of such cultural concerns in its future activities.⁷⁵ Representatives of Maori groups and Lego have reportedly met to discuss the development of an international self-regulating code of conduct for toy manufacturing companies, although no code has as yet been developed.⁷⁶ Complaints have recently been made by Maori in respect of a video game that, Maori believe, uses Maori imagery and heritage. Another example is that

of Moana Maniapoto, a New Zealand singer, who argues that she cannot use her own name on a CD and at concert tours in Germany as the name "Moana" has been registered as a trademark by someone who now has the exclusive rights to that name in Germany.⁷⁷

VII. LEGAL ANALYSIS OF THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS BY CONVENTIONAL INTELLECTUAL PROPERTY RIGHTS AND *SUI GENERIS* MEASURES AND SYSTEMS

Introduction

In broad summary, there are two general approaches among States to the legal protection of TCEs. Some believe that TCEs are adequately protected by existing IP systems, and that no additional measures or systems of protection are necessary or appropriate. Others believe that the establishment of new, specific measures and/or statutory systems is necessary either to complement existing IP rights or act as a substitute for them because they are regarded as inadequate and/or inappropriate. The latter are referred to in this paper as “*sui generis*” measures and systems. Among those who believe that conventional IP systems are adequate, a third approach may also be detected which supports adapted, extended or modified use of existing IP to meet specific needs.

These lines of enquiry should be undertaken in parallel, without privileging one over the other, as several States have pointed out. The two main approaches are not necessarily mutually exclusive. A dual-track approach could be formulated as follows: it is understood that TCEs have already some of their main aspects covered by existing IP mechanisms, but other measures may be necessary to complement the existing legal system and to deal with perceived gaps in protection. Eventually, the protection afforded to TCEs could be found in a multi-faceted menu of options, using both IP and some *sui generis* options.⁷⁸ In some cases, adapted, extended or modified usage of the IP system has acted as a bridge between these two approaches. In line with this perspective, this paper addresses both existing rights and *sui generis* approaches.

The categories of IP analyzed are copyright; trademarks, including certification and collective marks; geographical indications; industrial designs; patents; unfair competition, including passing off; and, undisclosed information (trade secrets).

Copyright

Traditional cultural expressions as “productions in the literary and artistic domain”

Copyright protection is available for “literary and artistic works” as referred to in the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the Berne Convention).⁷⁹ The Convention makes clear that all productions in the literary, scientific and artistic domains are covered, and no limitation by reason of the mode or form of their expression is permitted. The Convention gives an enumeration of the works protected; the list illustrates works included in the definition, and is not limitative.

Many TCEs for which protection is desired are “productions in the literary, scientific and artistic domain”, and therefore, in principle, constitute the actual or potential subject matter of copyright protection. Examples would include: music and songs, dances, plays, stories, ceremonies and rituals, drawings, paintings, carvings, pottery, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes, musical instruments, architecture, sculptures, engravings, handicrafts, poetry, and designs.

The protection provided by copyright (the economic rights to prevent or authorize, *inter alia*, the reproduction, adaptation, communication to the public and others, and the moral rights of attribution and integrity) seems well suited to meeting many of the needs and objectives of indigenous peoples and traditional communities. The possibility under copyright to be compensated for use of TCEs either through receiving royalties or through damages for infringement also meets certain needs and objectives.

Limitations on the use of copyright

However, does copyright adequately protect TCEs? Some have suggested that copyright law is limited in its potential for protecting TCEs.⁸⁰ The following have been suggested as the limitations of copyright law:

- (a) Copyright protects only original works, and many traditional literary and artistic productions are not original. Hungary, for example, stated: "... an expression of folklore can never be a work of authorship, since its main characteristic is not the reflection of the unique personality of an author, but the unchanged representation of the features of cultural public domain";⁸¹
- (b) Copyright requires the identification of a known individual creator or creators. It is difficult, if not impossible, to identify the creators of traditional cultural expressions because they are communally created and held and/or because the creators are simply unknown. As the European Community and its Member States have stated": "copyright is based on the identification of the person originating the work, whereas folklore is distinguished by the anonymity of the originator of the tradition or by the fact that the tradition is the attribute of a community";⁸²
- (c) The conception of 'ownership' in copyright law is incompatible with customary laws and systems. While copyright confers exclusive, private property rights in individuals, indigenous authors are subject to complex rules, regulations and responsibilities, more akin to usage or management rights, which are communal in nature.⁸³ The complex of rights regulating the production of indigenous cultural materials has been described by an indigenous artist in the Australian case *M*, Payunka, Marika and Others v Indofurn Pty Ltd*⁸⁴ as follows:

"As an artist, while I may own the copyright in a particular artwork under western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other *Yolngu* (her clan) who have an interest whether direct or indirect in it. In this way I hold the image in trust for all the other *Yolngu* with an interest in the story."⁸⁵

McDonald quotes a useful illustration of the nature of ownership of cultural rights under customary law: customary 'ownership' is analogous to the rights of an employee in a work created in the course and scope of employment (this illustration references those jurisdictions in which copyright in employee's works is held by the employer). In a broad sense, an employee is 'empowered' to create a work 'owned' by the employer; the employee is then only able to use or develop the work in accordance with the authority vested by the employer.⁸⁶

This divergence between 'ownership' in the copyright sense and communal 'usage' rights and responsibilities has practical meaning in licensing cases for example. An indigenous copyright owner would be entitled under copyright law to license or assign his or her rights to a third party, but under customary rules and regulations this may not be permissible. The Australian case of *Yumbulul v Reserve Bank of Australia*⁸⁷ is relevant here.

- (d) It is argued that the fixation requirement in copyright prevents intangible and oral expressions of culture, such as tales, dances or songs, from being protected unless and until they are fixed in some form or media. Even certain 'fixed' expressions may not meet the fixation requirement, such as face painting and body painting;⁸⁸
- (e) The limited term of protection in copyright is claimed to be inappropriate for expressions of folklore and traditional cultures. First, it fails to meet the need to protect expressions of folklore in perpetuity. And, the limited term of protection requires certainty as to the date of a work's creation or first publication, which is unknown in the case of pre-existing TCEs.⁸⁹

The originality requirement

Although the Berne Convention does not say so explicitly, it is apparent from Article 2.1 that protected works must be intellectual creations, and this is reinforced by the use of these words in Article 2.5. For this reason, many national laws provide that works must be 'original'. And, as noted above, several States and others argue that this requirement prevents the protection of TCEs by copyright.

But, what does 'originality' really mean? The term is not defined in the relevant international treaties, nor is it generally defined in national laws. It is left for determination by the courts in relation to particular cases. But it seems that it does not, for example, mean the same as 'novelty' as understood in patent law. Although some differences may exist between the civil law and common law legal systems on this point, it may be said that in both legal systems a work is 'original' if there is some degree of intellectual effort involved and has not been copied.⁹⁰

At least in the common law jurisdictions, a relatively low level of creativity is required in order to meet the originality requirement. As a result, the originality requirement may not pose an insurmountable hurdle in relation to contemporary forms of expressions of traditional culture, being new productions made by current generations of society and inspired by or based upon pre-existing indigenous or traditional designs. The cases referred to by Australia are good examples of this. For example *M*, Payunka, Marika and Others v Indofurn Pty Ltd*,⁹¹ where the Court had no difficulty in holding that the artworks before it were original:

" Although the artworks follow traditional Aboriginal form and are based on dreaming themes, each artwork is one of intricate detail and complexity reflecting great skill and originality" .⁹²

Although the relevant Australian cases all concerned the visual arts, there seems to be no reason why the results would be different in other areas. It seems to make no difference that the author of such a work may have been subject to customary rules and regulations concerning how, when and for what purpose the work could be created – viewed independently, and from within the copyright paradigm, the work can be 'original'.

Therefore, at least in so far as common law jurisdictions are concerned, contemporary tradition-based TCEs are sufficiently original to be protected as copyright works provided that some new expression, beyond merely reproducing the traditional form or expression, is added.

The law makes no distinction based on the identity of the author, i.e., - the originality requirement could be met even by an author of a contemporary expression of folklore who is not a member of the relevant cultural community in which the tradition originated. This may trouble indigenous, traditional and other cultural

communities, who may wish to deny or at least restrict the ability of persons not from the relevant cultural community from enjoying copyright in creations derived from that cultural community. It may be preferable to develop means of placing upon such a person certain obligations towards that community attached to his or her copyright (such as to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying traditions used).

However, the position is more complex with unoriginal imitations or mere recreations of pre-existing folklore, which are unlikely to meet the 'originality' requirement. They remain in the public domain from the perspective of the copyright system. For example, Hungary gave an example from the jurisprudence of the Supreme Court, regarding the nature of the protection afforded to expressions of folklore in Hungary:

"In 1977, the Supreme Court had decided on the issue whether the known "author" of a "folk tale" had created an individual and original work. The Court held that as regards folk tales, originality and authorship must be judged taking into account the special rules of folk poetry. In this respect, first of all the variability of folk tales is important: folk tales are handed down and maintained orally, therefore they are exposed to continuous changes. A tale-teller is not entitled to copyright protection if his role in the formation of tales does not go beyond the traditional frames of telling tales".⁹³

Similarly, Kutty reports on a case in Indonesia involving a decorated wooden mask of Indonesian dancers, of folk creation, being manufactured and marketed in a foreign market for commercial gain. In fact, two different commercial groups indulged in the marketing of these artistic items. The aggressive competition between the two firms motivated one of the parties to claim copyright over the mask in question. The affected party objected to the claim of the first firm. Copyright in the mask was not recognized on the grounds that the artistic creation belonged to the people of Indonesia.⁹⁴

As noted earlier, whether or not States wish to provide some form of protection for this public domain material is first and foremost a policy question.

States wishing to provide some form of protection for public domain material could look at how existing *sui generis* systems have dealt with the originality issue. Generally, these *sui generis* systems are not conceived as part of copyright *strictu sensu* and they do not require originality. For example, the Model Provisions, 1982 make no reference to an originality requirement; consequently, nor do many of the national copyright laws which have implemented them. Similarly, the law of Panama makes no reference to an originality requirement, and nor does the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture developed by Pacific Island countries.

The identifiable author requirement

Copyright does not only protect individual creators but can also protect groups of creators as joint authors or employees. It is quite common for more than one person to create a single copyright work, however, in each case it is necessary that the creator or creators be identifiable. Where more than one author contributes original expression with the intention of merging their contributions into a unitary whole, they may be deemed 'joint authors' in many jurisdictions and each is considered a copyright owner. In other cases, where there are separable works combined in a single production, each of the different creators may hold a separable copyright in their contribution. Different forms or rights of copyright, owned by different parties, can inhere in the one

production. In each of these cases, the individual authors retain their own copyright, unless the authors affirmatively assign them to another legally organized entity or person (in the case of TCEs, this could be an association, company, trust or other legal entity representing a tribe or relevant cultural community). In jurisdictions in which copyright inures to the employer, if the individuals contributing the work are employees working within the scope of their employment, the employer will hold the copyright in the first instance instead of the individuals. Accordingly, to the extent that a legal entity representing the relevant social community employed the authors, that legal entity (association, trust or the like) would be the copyright owner.

In respect of contemporary tradition-based cultural expressions, there is almost always an identifiable creator, or creators, and this requirement is generally met. The Australian cases are once again good examples of this. Where there is no identifiable creator, such as in the case of pre-existing folklore, this is more difficult and copyright protection is unlikely. However, copyright law has been reasonably creative in overcoming the 'identifiable author' requirement in certain other cases. For example, copyright provides protection for anonymous and pseudonymous works in Article 7.3 of the Berne Convention. But, the last sentence of the Article renders that form of protection less relevant for pre-existing folklore:

“The countries of the Union shall not be required to protect anonymous or pseudonymous works in respect of which it is reasonable to presume that their author has been dead for fifty years”.

These means for dealing with the identifiable author requirement presupposes the existence of an 'author'. Although one could argue that some pre-existing TCEs must have had an 'author' at some stage, it is likely that for most pre-existing TCEs, there was and is no 'author' in the copyright sense. In the case therefore of pre-existing TCEs, one is not generally dealing with truly anonymous works, in the sense that there is an author but his or her identity is unknown. In the case of many TCEs, the whole context of authorship may not be sufficiently determinate to be anchored in copyright law. Nonetheless, there is the possibility of using Article 15.4 of the Berne Convention for protection of works where the identity of the author is unknown.

Whether or not States wish to provide for general groups of unknown individuals authors to be able to acquire and exercise copyright or similar rights in TCEs is a matter for policy discussion and choice. Doing so in a general IP law context may be possible, as existing *sui generis* systems suggest:

- (a) The 1982 Model Provisions recognize the possibility of collective or community rights. Being a *sui generis* system and not a copyright system, they do not refer to 'authors' of expressions of folklore. They do not even refer directly to the 'owners' of expressions of folklore. Rather, they state that authorizations for using expressions of folklore should be obtained either from an entity (a 'competent authority') established by the State (this option creates a fiction that the State is the 'author' and/or the 'owner' of the rights in the expressions) or from the 'community concerned' (Section 10);
- (b) Similarly, the Tunis Model Law on Copyright, in so far as it addresses works of national folklore (as opposed to works derived from folklore), states that the rights granted by it in folklore shall be exercised by a Government appointed authority (section 6);
- (c) The Panama law provides for the protection of the "collective rights of the indigenous communities", and applications for registration of these rights shall be made by "the respective general congresses or indigenous traditional authorities";

- (d) The South Pacific Model Law vests 'traditional cultural rights' in 'traditional owners', defined as the group, clan or community of people, or an individual who is recognized by a group, clan or community of people as the individual, in whom the custody or protection of the expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community. These rights are in addition to and do not affect any IP that may subsist in TCEs.

However, while it seems possible in law to establish mechanisms that vest rights in communities or in the State (obviating the need to identify an 'author'), the effectiveness of such provisions depends upon practical considerations, such as the organizational capital of communities, their knowledge of and access to the law, the resources they have to manage and enforce their rights, and so on. It is here that collective management may be able to play a role.

Different conceptions of "ownership"

This alludes to the relationship between an individual artist/author as a copyright holder, and the individual artist as a member of an indigenous community. Different conceptions of 'ownership' within copyright law, on the one hand, and customary laws and protocols, on the other, find practical meaning particularly in those cases where an indigenous artist is entitled to and subject to copyright rules and simultaneously subject to parallel customary rules and regulations. While IP confers private rights of ownership, in customary discourse to 'own' does not necessarily or only mean 'ownership' in the Western non-indigenous sense. It can convey a sense of stewardship or responsibility for the traditional culture, rather than the right merely to exclude others from certain uses of expressions of the traditional culture, which is more akin to the nature of many IP systems.⁹⁵

This tension between private rights of ownership under copyright and communal ownership held by artists and their communities has received judicial attention. In the Australian *Yumbulul* case referred to earlier, the court concluded that " the question of statutory recognition of Aboriginal community interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators" .⁹⁶

It was directly addressed in one of the cases Australia referred to *John Bulun Bulun v R and T Textiles*.⁹⁷ The pertinent aspect of this case related to a claim by the clan group to which the individual artist belonged that it in effect controlled the copyright in the artwork, and that the clan members were the beneficiaries of the creation of the artwork by the artist acting as a trustee on their behalf. Accordingly, they claimed to be entitled to a form of collective right with respect to the copyright in the work, over and above any issue as to authorship. The court, in a comprehensive *obiter dictum*, found that the artist had a fiduciary duty towards his clan group. While the artist was entitled to pursue the exploitation of the artwork for his own benefit, he was still required by reason of this fiduciary duty to not take any steps which might harm the communal interests of the clans in the artwork. Golvan continues:

" [The court] noted that, while the artist had availed himself of the appropriate remedies, had he not been in a position to do so equitable remedies would have been available to the clan. Thus, had the artist failed to take necessary action, a remedy might be extended in equity to the beneficiaries by allowing them to bring an action in their own names against the infringer and the copyright owner. In such circumstances equity would impose a constructive trust on the legal owner of the copyright in favor of the clan as beneficiaries" .⁹⁸

This question requires further consideration. Many argue that ways have to be found to manage the relationship between copyright protection and the customary responsibilities. Divergences between IP law and customary laws and protocols have been one of the motivations behind the development of *sui generis* systems. The laws of Panama and the Indigenous Peoples Rights Act (Republic Act No. 8371) of October 1997 of the Philippines make direct references to customary law.

It is also however pointed out by some that this question is relevant largely in relation to indigenous peoples and communities which acknowledge customary law, and that it does not apply to other traditional communities. In addition, to assume that there is a generic form of collective/community custom-based proprietary systems would be misleading, since it would ignore the tremendous diversity of traditional proprietary systems, many of which are highly complex.⁹⁹

It could perhaps be argued that customary rules should be treated no differently to the rules of other non-IP laws with which IP rules may appear to conflict. For example, morality laws may prohibit the publication of pornographic photographs, yet copyright law grants the author rights over the reproduction and publication of the photographs. However, there is no conflict - copyright law does not grant a right holder the positive entitlement to exercise rights; rather, it enables the rightholder to prevent others from exercising the rights (or to authorize them to do so). Whether or not a rightholder is entitled to exercise his or rights may depend upon other laws, as Article 17 of the Berne Convention makes clear:

“The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, to control, or to prohibit, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right”.

Therefore, it could be argued by analogy that there is no ‘conflict’ between copyright and customary laws, because, in the event that customary laws were to be recognized for this purpose by a country’s laws, copyright does not entitle or oblige a traditional artist to act contrary to his or her customary responsibilities.

The fixation requirement

According to general international principles, copyright protection is available for both oral and written works. Article 2.1 of the Berne Convention provides that among the kinds of productions protected as copyright are included “lectures, addresses, sermons and other works of the same nature”. Although the words ‘of the same nature’ may restrict the range of oral works that may be protected to those similar to lectures, addresses and sermons, Article 2.2 of the Convention makes it clear national laws need not provide that fixation in some material form is a general condition for protection.

Yet, many national laws, particularly the common law countries, do so because fixation proves the existence of the work, and provides for a clearer and more definite basis for rights. However, this is not a treaty requirement, and in fact, many countries do not require fixation.

Thus, a mandatory international requirement for fixation is not a necessary element of copyright law, and States are free to provide that works in general or traditional cultural expressions in particular do not need to be fixed in some material form in order to be protected. This has been done - for example, the Tunis Model Law, 1976

rules out any possibility of demanding fixation for a work of folklore. The drafters felt that works of folklore are often by their very nature in oral form and never recorded, and to demand that they be fixed in order to enjoy protection puts any such protection in jeopardy and even, according to the commentary to the Tunis Model Law, risks giving the copyright to those who fix them. Fixation is not a requirement of the 1982 Model Provisions, the law of Panama nor the South Pacific Model Law. In any event, where the fixation requirement exists, it poses a problem only for intangible expressions of folklore. On the other hand, without fixation in some form, there may be a greater danger that TCEs might be co-opted by others (however, it is argued elsewhere in this document that the mere documentation of TCEs may not be appropriate as an IP strategy aimed at vesting copyright in the TCEs).

Limited term

The duration of copyright protection generally extends to 50 years after the death of the author, or 70 years in some jurisdictions. The Berne Convention stipulates 50 years as a minimum period for protection, and countries are free to protect copyright for longer periods. However, it is generally seen as integral to the copyright system that the term of protection not be indefinite; the system is based on the notion that the term of protection be limited, so that works ultimately enter the public domain. However, many indigenous peoples and traditional communities desire indefinite protection for at least some aspects of expressions of their traditional cultures, and in this respect the copyright system does not meet their needs.

Indefinite protection is not a new concept in IP law,¹⁰⁰ and States may choose to establish systems that provide for some form of indefinite protection for literary and artistic productions, although this would create some tension with general policy and legal assumptions about the copyright system. The Model Provisions, 1982 themselves do not provide for any time limit, and nor do the laws of Panama or the model law of the Pacific Island countries. Whether or not a State wishes to follow this approach is a question of policy.

Concerns that copyright fails to provide defensive protection

While the arguments discussed so far deal more with the inability of copyright to provide positive protection, there are claims that current copyright law has shortcomings that limit the capacity of indigenous and traditional persons to prevent the use of their literary and artistic productions by others (i.e., copyright law fails to provide 'defensive' protection in the sense described earlier).

- (a) While the copyright system treats TCEs as part of the public domain, non-indigenous and non-traditional persons (as well as indigenous and traditional persons) are able to acquire copyright over 'new' folkloric expressions or folkloric expressions incorporated in derivative works, such as adaptations and arrangements of music;
- (b) Even in respect of those contemporary, tradition-based TCEs that are subject to copyright protection, the exceptions typically allowed under copyright can undermine customary rights under customary laws and protocols - for example, national copyright laws typically provide that a sculpture or work of artistic craftsmanship which is permanently displayed in a public place may be reproduced in photographs, drawings and in other ways without permission. It has been pointed out that the effect of public display upon certain works may not be well-known among indigenous and traditional artists.¹⁰¹ Similarly, national copyright laws often allow public archives and libraries and the like to make

reproductions of literary and artistic works and keep them available for the public. However, doing so in respect of copyrighted traditional cultural expressions may raise parallel cultural and indigenous rights issues. On the other hand, why should contemporary, tradition-based TCEs that are protected by copyright not be subject to the same limitations and exceptions as other copyright works;

- (c) Copyright protection does generally not extend to 'style' or method of manufacture, yet the method of manufacture and 'style' of traditional products are vulnerable to imitation;¹⁰²
- (d) The remedies available under current law may not be appropriate to deter infringing use of the works of an indigenous artist-copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use.

Further consideration may be necessary to clarify and examine practical options for those aspects of current copyright law and practice that are seen to clash with or undermine indigenous or other customary rights, responsibilities and practices.

In so far as 'style' and method of manufacture, copyright protection does not extend to utilitarian aspects, concepts, formulaic or other non-original elements, colors, subject matter and techniques used to create a work. This is a fundamental and long-standing principle reflected in copyright laws worldwide. There are limits to that which can be protected by copyright, as Article 9.2 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement) makes clear: "Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such". Copyright therefore permits the imitation of the non-original elements or underlying ideas and concepts of works, which is a widespread practice as creativity is nourished and inspired by other works. The U.S.A. has pointed out, that under U.S.A. law, elements of style may be protected to the extent that a style incorporates original expression.

Therefore, even if copyright were to vest in a new tradition-based cultural expression, copyright protection would not *per se* prevent the traditional 'style' of the protected work from being appropriated. Other branches of IP law may be more useful, however, such as the law of unfair competition, and the common-law tort of passing off, although there is little experience reported in the application of these concepts to imitation of indigenous styles. This may relate to protection of a style *per se*, as an object of protection, or to protection of a misleading connotation or representation that is based on the use of a style or distinctive imagery or symbols.

These type of questions could also be addressed in *sui generis* systems, should a State choose to establish such a system. Or they could form the subject of specific amendments to national copyright laws, although why special protection of the 'style' of traditional cultural expressions would be justified while the style of (other) copyright works is not protected would raise certain legal and policy questions.

As these issues are linked to larger divergences between customary forms of 'ownership' and IP rights, they will also be addressed in the study that the WIPO Secretariat will commission on this subject as already mentioned.

Conclusions

The originality and identifiable author requirements of copyright do not seem to prevent the protection of tradition-based cultural expressions made by current generations of society (referred to as contemporary, tradition-

based cultural expressions), whether or not made by indigenous and traditional persons. The fixation requirement, in so far as it exists in certain national laws, prevents however the protection of intangible contemporary cultural expressions (such as music, dance and rituals) unless and until they are fixed in some form or medium.

So, as a conclusion, it may be stated that copyright protection is available for tangible, contemporary tradition-based TCEs. Cases in Australia and Canada are examples of this.¹⁰³ In addition, intangible expressions are also protected in countries not requiring fixation unless and until they are fixed. Such copyright would vest in the author or authors of the new work, who would generally be identifiable.

However, the limited term of protection and the certain other features of copyright (such as that it does not protect style or method of manufacture, or invocation of a particular cultural heritage) may make copyright protection less attractive to indigenous peoples and traditional communities. In addition, divergences between the rights of a copyright holder and parallel customary responsibilities can cause difficulties for indigenous authors.

Therefore, while copyright protection is possible in certain cases, it may not meet all the needs and objectives of indigenous peoples and traditional communities.

For those States that do not wish to provide any further protection for TCEs beyond that already provided by copyright, further efforts could be directed towards enabling and facilitating access to and use of the copyright system by indigenous peoples and traditional communities. Various suggestions have been made in this connection, such as improved awareness-raising, training, legal aid, assistance with enforcement of rights, and use of collective management.

In so far as pre-existing TCEs are concerned, and mere imitations and recreations thereof, they are unlikely to meet the originality and identifiable author requirements and remain for copyright purposes in the public domain.

States which wish to provide fuller protection for traditional cultural expressions beyond current copyright could either consider whether certain amendments to copyright law and practice are necessary and justified, and/or they may consider establishing *sui generis* systems, as some have already done.

While it may be possible to improve upon the protection already provided by copyright to contemporary tradition-based cultural expressions by means of amendments to copyright law and practice, it seems that a more thorough evolution of existing standards in the form of a *sui generis* system may be necessary in order to protect pre-existing folklore. As the U.S.A. commented, "it is virtually impossible to provide 'full' protection for TCEs simply by amending copyright laws, as copyright law by its nature is not appropriate to protect TCEs. Copyright law protects only original expressions, leaving works that have become an intrinsic part of our history and culture to the public domain".

Performers' rights

Performers' rights, as recognized in the WPPT, 1996, protect performances of "literary and artistic works or expressions of folklore". Therefore, in principle at least, the kind of performances for which protection is sought are protected by international law, whether because they are literary and artistic works or expressions of folklore (it is notable that the protection for performances of literary and artistic works which is provided by the Rome Convention, 1961 and the TRIPS Agreement is not limited to works protected by copyright). As at

April 15, 2003, 41 States had ratified the WPPT. It follows that performers of expressions of folklore in those Contracting States can expect to receive protection in the other Contracting States – an international system of protection for performances of expressions of folklore is therefore already in place. The WPPT grants performers both moral and economic rights, and these are set out in Articles 5 to 10 of the Convention.

It has often been suggested that the protection of performances of expressions of folklore might, indirectly, provide adequate protection for the expressions of folklore themselves. This is probably a fair expectation, provided the performer is from the same cultural community that is the ‘holder’ of the expression of folklore. If not, the expression may still receive indirect protection, but any benefits will not accrue to the relevant community.

There are however some aspects of the protection of performers’ rights that are less advantageous from the perspective of indigenous peoples and traditional communities. Certain of these are drawn out in the illustrative example in the section below on “Collection, recordal and dissemination of traditional cultural expressions – copyright and related rights”. Perhaps chief among them may be that the WPPT does not extend to the visual part of performances. Only the aural parts are protected, that is, parts that may be perceived by the human ear. This would appear to seriously limit the usefulness of the WPPT in so far as expressions of folklore are concerned. Work continues on the development of an instrument for the protection of audiovisual performances.

Trademarks, including certification and collective marks

Introduction

Indigenous peoples and traditional communities are concerned with non-indigenous companies and persons using their words, names, designs, symbols, and other distinctive signs in the course of trade, and registering them as trademarks. As shown earlier, there are several publicized examples of the unauthorized use of indigenous and traditional words, names, designs, symbols and other distinctive signs and of their registration as trademarks. At the same time, they argue that they themselves cannot protect their words and symbols using existing trademark laws as they are not sufficiently adapted to their needs. In distinguishing the various forms of protection that may be applied to TK/TCE subject matter, protection can also potentially apply to misleading or deceptive use of TK or TCE material or any related signs or symbols, and any use that falsely suggested an association with or endorsement by an indigenous or local community. This suggests that laws or specific IP rights may be developed that define or give notice of the distinctive reputation, signs and symbols of traditional communities and indigenous cultures (for instance, authenticity labels and certification marks, and prohibitions on the use of certain terms and symbols).

Trademarks are signs used to distinguish the goods and services of one business from that of another in the marketplace. Such signs may consist of, among others, words, drawings, devices and shapes of products.

Registration by third parties of indigenous words, names and marks as trademarks

It has been suggested that the main reason for the appropriation of indigenous and traditional words and other marks is for marketing ‘indigeneity’ for commercial gain.¹⁰⁴ But, as trademarks serve to indicate the commercial

origin of products and to distinguish one product from another, the unauthorized use of distinctive indigenous words and symbols by non-indigenous entities could potentially cause confusion in the minds of consumers as to the true origin of the products concerned. Use of indigenous signs as trademarks may give consumers the impression that such products are genuinely indigenous-made or have certain traits and qualities that are inherent to the indigenous cultures when they do not. Through use by others of their symbols, words and so on as trademarks, indigenous peoples and traditional communities become associated with products that may be inferior, stereotyped or associated with a certain lifestyle.¹⁰⁵

Aside from trademark considerations, of course unfair competition law (including passing off) and the laws of misleading and false advertising and labeling are also relevant here. The Indian Arts and Crafts Act, 1990 (the IACA) protects Native American artisans by assuring them the authenticity of Indian artifacts under the authority of an Indian Arts and Crafts Board. The IACA, a 'truth-in-marketing' law, prevents the marketing of products as 'Indian made' when the products are not made by Indians as they are defined by the Act.¹⁰⁶ The law of unfair competition is dealt with separately in this document.

Measures to prevent the registration of indigenous words, names and other marks as trademarks

Certain regional organizations and States have already taken steps to prevent as far as possible the unauthorized registration of indigenous marks as trademarks (these seek to achieve one of the forms of what was referred to as 'defensive protection'). Three examples are the Andean Community, the U.S.A and New Zealand:

- (a) Article 136(g) of Decision 486 of the Commission of the Andean Community provides that "signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their culture or practice, except where the application is filed by the community itself or with its express consent". In Colombia, a case has been presented in which the mark has been rejected as a result of the exception mentioned above. The case concerned an application for registration as a mark of the expression "Tairona", which coincides with an indigenous culture that inhabited Colombian territory. It was decided that the expression "Tairona" was protected as part of the culture's heritage and of the country as such. In that regard, only representatives of this culture or persons with the authorization of those representatives would be entitled to request consent to use the expression as a distinctive sign and, in this particular case, as a mark;
- (b) The United States Patent and Trademark Office (the USPTO) has established a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes.¹⁰⁷ Under Section 2(a) of the Trademark Act, 1946, as amended, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. Such provision provides not only protection for folklore aspects of Native American tribes, but also "those of other indigenous peoples worldwide". The Trademark Law Treaty (TLT) Implementation Act, 1998, required the USPTO to complete a study on the protection of the official insignia of federally and state-recognized Native American tribes. As a direct result of this study,¹⁰⁸ on August 31, 2001, the USPTO

established a Database of Official Insignia of Native American Tribes. The Database of Official Insignia of Native American Tribes may be searched and thus prevent the registration of a mark confusingly similar to an official insignia. 'Insignia' refers to "the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe" and does not include words;¹⁰⁹

(c) In New Zealand, the Trade Marks Act now contains a provision which allows the Commissioner of Trade Marks to refuse to register a trademark if it is considered by the Commissioner that, on reasonable grounds, the use or registration is likely to offend a significant section of the community, including the indigenous people of that country, Maori. Under the section which lists grounds for not registering trademarks the Act states:

"(1) The Commissioner must not do any of the following things:

(b) register a trademark or part of a trade mark if –

(i) the Commissioner considers that its use or registration would be likely to offend a significant section of the community, including Maori".¹¹⁰

Opposition and cancellation procedures

If an indigenous or traditional word or other mark has been registered as a trademark by a person or entity not authorized by the relevant community to do so, the relevant community could launch cancellation proceedings (or the community could oppose a mark for which application is sought). The grounds for doing so would include, for example, that the proposed mark lacks distinctiveness, that the registration of the mark is or would be 'contrary to law' or 'scandalous', or that the proposed mark is deceptive and confusing as to the applicant's good and services. Trademark law also allows for relative grounds of opposition on the basis of third party rights, such as prior rights held by a community in the sign to the extent that the sign denotes the community's identity or origin.

However, on the basis of available reports, it seems that there are very few cases in which indigenous peoples or communities have opposed the registration of a mark or applied to cancel a registered mark. Janke, in case study 2 of the "Minding Culture" study "The Use of Trademarks to Protect Traditional Cultural Expressions,"¹¹¹ states that indigenous peoples have limited access to legal advice and the relevant official gazettes and journals in which trademark applications are notified. She suggests that information and training be provided to indigenous peoples on how opposition and cancellation and/or invalidation proceedings work.¹¹²

Registration of trademarks by indigenous peoples and traditional communities

Several examples have been provided by States of uses of trademarks by indigenous peoples and traditional communities, such as the indigenous Label of Authenticity in Australia.¹¹³ These are examples of the positive assertion of IP rights over TCEs.

In Canada, trademarks, including certification marks, are often used by Aboriginal people to identify a wide range of traditional goods and services. These range from traditional art and artwork to food products, clothing, tourist services and enterprises run by First Nations. Further, the Snuneymuxw First Nation of Canada in 1999 used the Trademarks Act to protect ten petroglyph (ancient rock painting images). Because the petroglyphs have special religious significance to the members of the First Nation, the unauthorized reproduction and commodification of the images was considered to be contrary to the cultural interests of the community, and

the petroglyph images were registered in order to stop the sale of commercial items, such as T-shirts, jewelry and postcards, which bore those images. Members of the Snuneymuxw First Nation subsequently indicated that local merchants and commercial artisans had indeed stopped using the petroglyph images, and that the use of trademark protection, accompanied by an education campaign to make others aware of the significance of the petroglyphs to the Snuneymuxw First Nation, had been very successful. Many Aboriginal businesses and organizations in Australia have registered trademarks relating to traditional symbols and names. The number of unregistered trademarks used by Aboriginal businesses and organizations is considerably greater than those that are registered. Some trademarks are registered in order to prevent improper utilization of symbols or names.

Another example is provided by Mexico. The creations of the *Seri* people include numerous articles of adornment for craft markets and they constitute an important source of income for families and communities. In the middle of 1993, a meeting was held to discuss the difficult circumstances of the *Seri* craftsmen who produced ironwood pieces but were faced with mass production by *mestizo* workers. In view of the fact that not just one process and one product were involved, the appellation of origin concept was eventually not adopted, and the trademark route was taken instead. In order to secure protection for a wide range of *Seri* products (baskets, necklaces, carvings in wood and stone, dolls, etc.), the Cooperative Consumer Society “*Artesanos Los Seris*” S.C.L. registered the trademark “*Arte Seri*” with the Mexican National Institute of Industrial Property in five different classes between 1994 and 1995. Although the trademark is still in force in the various categories, the *Seri* are not making use constant use of it.

In Portugal, *Arraiolos* carpets, North Alentejo handicraft, striped cheese and *Minho fiancées*’ handkerchief are registered as collective marks as well as shoes from Portugal, *Caldas da Rainha* embroidery, *Açores* pineapple, cheese of *Évora*, and *Açores* handicraft.

In New Zealand, the Maori Arts Board, *Te Waka Toi*, is making use of trademark protection through the development of the *Toi Iho*™ Maori Made Mark.¹¹⁴ The mark is a certification trademark denoting authenticity and quality as it indicates to consumers that the creator of goods is of Maori descent and produces work of a particular quality.¹¹⁵ The *Toi Iho* Maori Made Mark is a registered trademark created in response to concerns raised by Maori regarding the protection of cultural and IP rights, the misuse and abuse of Maori concepts, styles and imagery and the lack of commercial benefits accruing back to Maori. The mark is regarded by many as an interim means of providing limited protection to Maori cultural property. The mechanism will not prevent the actual misuse of Maori concepts, styles and imagery but may decrease the market for ‘copycat’ products.¹¹⁶ The *Toi Iho* Maori Made Mark was designed and created by Maori artists and has two companion marks namely, the Mainly Maori Mark and the Maori Co-production Mark. The *Toi Iho* Mainly Maori Mark is for groups of artists, most of Maori descent, who work together to produce, present or perform works across art forms whereas the *Toi Iho* Maori Co-production Mark is for Maori artists who create works with persons not of Maori descent to produce, present or perform works across art forms. The *Toi Iho* Maori Co-production Mark acknowledges the growth of innovation and collaborative ventures between Maori and non-Maori.¹¹⁷ This form of trademark provides protection for the reputation associated with the TCE (in essence, providing assurance that the TCE it is applied to is legitimate), rather than a direct form of protection for the TCE itself, unlike the Snuneymuxw petroglyphs cited above, in which case the TCEs are themselves the direct subject of protection.

Indigenous and traditional peoples have, despite these examples, raised concerns that the trademark system does not meet their needs. For example, trademarks are marks used in the course of trade. For indigenous peoples and traditional communities to register an indigenous word or mark as a trademark they are required to

use the trademark in the course of trade or have the genuine intention to do so. This does not assist traditional cultural communities who wish only to protect their words and other marks against exploitation by others. However, the rights of a community to its own name and identity may be useful and could be explored further.

Yet Janke¹¹⁸ identifies many cases in which indigenous Australians have attempted to register or have registered indigenous words and designs as trademarks, as well as English words that have a particular meaning or significance for indigenous Australians. An example of the latter is the word 'dreaming', for which some 90 applications have been lodged, 15 of which have been registered and nine pending.

Janke reports that trademarks have been registered or at least applied for by indigenous Australians in respect of cultural festivals, soaps, perfumery, essential oils, body lotions and other natural resource products, arts centers, clothing and textiles, music, film and broadcasting, publications, and Internet-related services.

However, many such applications do not proceed to registration. Janke concludes as follows:

" There has been an increase in the number of Indigenous businesses and organizations attempting to make use of trade mark laws in an effort to register their own trade marks for the protection of their artistic works and other Indigenous knowledge, particularly proposed Indigenous commercial use. In most cases, the trade marks have not proceeded to registration. It is hypothesized that this is because often the proposed trade mark consists entirely of words that are purely descriptive ... on receipt of an adverse report, the Indigenous application often does not reply to clarify the application. The number of unregistered trade marks used by Aboriginal businesses and organizations is considerably greater than those that are registered ... Although, there is strong evidence that Indigenous use of the trade marks system is increasing, it would appear that Indigenous people need to know much more about the system, namely how to apply and overcome descriptiveness of marks and other issues raised in adverse reports"

Conclusions

At this stage, laws protecting distinctive signs, in particular marks and geographical indications, offer opportunities for the protection of indigenous and traditional marks that are intended to be used in the course of trade as with any other signs. The potentially permanent duration of trademark protection and the use of collective and certification marks are particularly advantageous as has been explained.

States are also establishing mechanisms to prevent the registration by third parties of indigenous and traditional marks and symbols as trademarks, and are moving towards meeting the need for "defensive" protection.

However, practical obstacles remain, such as the application and renewal fees, and a general lack of awareness of the law and its possibilities among indigenous and traditional communities, especially as regards opposition and invalidation proceedings.

Geographical indications

Geographical indications are potentially useful in this area as a number of participants in the Committee's work have pointed out.

In respect of geographical indications,¹¹⁹ States must, according to Article 22.2 of the TRIPS Agreement, provide legal means for 'interested parties' to prevent the use of any means in the designation or presentation of a good that indicates or suggests that the good originates in a geographical area other than its true place of origin in a manner that misleads the public and any use which constitutes an act of unfair competition within the meaning of Article 10bis of the Paris Convention. Under Article 22.3, States may refuse or invalidate the registration of trademarks which contain or consist of a geographical indication with respect to goods not originating in the territory indicated, if such use of the indication would mislead the public.

The term “**geographical indication**” is defined in Article 22.1 of the TRIPS Agreement as an indication which identifies a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin.

Some TCEs, such as handicrafts made using natural resources, may qualify as 'goods' which could be protected by geographical indications. In addition, some TCEs may themselves be geographical indications, such as indigenous and traditional names, signs and other indications.

Some States have provided relevant examples of the registration of geographical indications with respect to TCEs and related TK:

- (a) **Portugal** referred to the wines of *Porto, Madeira, Redondo, Dão*; the cheeses of *Serpa, Azeitão, S. Jorge, Serra da Estrela, Nisa, Madeira* embroidery, and, honey of *Alentejo, Açores*;
- (b) In **Mexico**, the appellation of origin OLINALÁ relates to wooden articles made in the municipality of *Olinalá* in the state of Guerrero. This tradition has to do with Mexican lacquers which use natural raw materials, and the product is clearly an example of the connection between the environment and culture, which makes it eligible for the appellation. The applicant for recognition of the denomination was the *Unión de Artesanos Olinca, A.C.*, although in fact the declaration was made by, and the appellation belongs to, the State as a whole, which rules out the possibility of the arbitrary exclusion of other interested parties. That fact indicates the importance of appellations of origin as elements of the national heritage which should be protected by the State. The articles in question are chests and crates made of wood from the Aloe tree (*Bursera aeloxylon*), a tree endemic to the Upper Balsas region. The lacquering process involves additional raw materials such as fats of insect origin and mineral powders. The manufacture of *Olinalá* craft products is a local tradition that makes use of wood from a shrub that is a biological resource specific to the region. A further Mexican example is the TEQUILA appellation of origin. Tequila is a spirit produced in various regions of Mexico by distillation of the fermented must derived from the heart of a plant known as the 'blue agave', the '*Azul*' variety of the *Agave tequilana* Weber. The name 'Tequila' comes from the eponymous region in Jalisco, but the traditional production takes place in a number of municipalities in the states of Jalisco, Nayarit, Tamaulipas, Guanajuato and Michoacán. The making of tequila involves knowledge that is traditional in the region and dates back to the middle of the sixteenth century, and it evolved into a full-scale industry at the end of the nineteenth. Tequila is considered the Mexican alcoholic beverage *par excellence*;
- (c) In the **Russian Federation**, a number of ancient industries are registered, the articles for which are connected with designations claiming to protect as appellations of origin: *Velikiy-Ustyug niello, Gorodets* painting, *Rostov* enamel, *Kargopol* clay toy, and a *Filimonov* toy.

Industrial designs

There are several examples of TCEs that appear relevant to industrial design protection, such as textiles (fabrics, costumes, garments, carpets and so on) and other tangible expressions of culture, such as carvings, sculptures, pottery, woodwork, metalware, jewelry, basket weaving and other forms of handicraft.

As shown by the fact-finding and subsequent activities of WIPO, indigenous peoples and traditional communities claim that under current designs law they are unable to protect their designs as industrial designs, even though design protection appears well suited to protecting the design, shape and visual characteristics of craft products especially where the “crafts products are of utilitarian nature and cannot be considered works of art and therefore eligible for copyright protection ...”¹²⁰ In addition, they argue that third parties exploit their designs without authority, acknowledgement or benefit-sharing, and, in some cases, even obtain IP rights over their ‘new’ or ‘original’ designs. One of the claims most frequently heard is that the ‘style’ of an indigenous design has been misappropriated.

Industrial design law protects the external appearance of independently created functional items that are new or original. Design rights can be based on creation or on registration, and confer exclusive rights to the owner of the design. The duration of protection available for design rights amounts to at least 10 years. In some jurisdictions this period may even be longer.¹²¹ The owner of a protected design has the right to prevent third parties from reproducing, selling or importing articles which embody the same or similar design to that of the protected design.¹²²

In this section, these claims, essentially for positive protection as well as for defensive protection, will be examined.

Positive protection of traditional designs

For a design to be protected as an industrial design it needs to be ‘new or original’.¹²³ Although there is no established definition of the notion ‘new’ in international treaties, it generally means that no identical or very similar design has been made available to the public before the registration or priority date. ‘Originality’ generally means that a design does not significantly differ from known designs or combinations of known design features.¹²⁴

It would seem that some traditional designs would not meet this requirement. However, there are examples of where traditional designs have been registered under industrial design laws:

- (a) During a fact-finding mission to China conducted by WIPO in December 2002, the WIPO delegation met a designer who had obtained design protection in China for his traditionally-inspired but otherwise original tea-sets;
- (b) In Kazakhstan, industrial design protection has been granted to the outward appearance of national outer clothes, head dresses (*sakyele*), carpets (*tuskiiz*), decorations of saddles, and women’s decorations in form of bracelets (*blezik*).¹²⁵ Industrial design protection is found in that country’s patent law,¹²⁶ which defines an industrial design as “an artistic and technical solution defining the outward appearance of a manufactured article”.¹²⁷ The law states additionally that for an industrial design to be protectable, it has to be new, original and deemed industrially applicable.¹²⁸ The description of ‘new’ in the law

provides: “ an industrial design shall be deemed new if the sum of its essential features appearing on the photographs of the design and in the description of its essential features, was not known from information generally available in the world before the priority date of the design” .¹²⁹

Further such examples may be needed before being able to draw any conclusions. However, it is suggested that while contemporary forms of traditional designs may meet the ‘novelty’ requirement, recreations of designs already exploited and well known would probably not.

The designs registration procedure and its implications for indigenous peoples and traditional communities

Indigenous peoples and traditional communities reportedly find the following shortcomings in design protection under industrial design laws:

- (a) a registered design is disclosed to the public, and in the case particularly of sacred or secret designs this does not meet indigenous and traditional peoples’ needs. However, it could be pointed out that sacred and secret designs need not be registered in order to receive protection – they could be protected as undisclosed information; and, secondly, a design that is not secret or sacred and is being used by a community, is going to be publicly disclosed anyway, and registration simply provides the necessary protection (it should be noted, however, that protection under design law is generally only afforded to a design which is new or original, so that if a design has already been publicly disclosed it may not be eligible for protection);
- (b) the period of protection is limited, and the design then falls into the public domain. Indigenous peoples and traditional communities wish to protect their traditional designs against exploitation by non-indigenous persons indefinitely, particularly, again, in the case of designs of special cultural and spiritual significance where protecting their integrity may be of greater importance than exploiting their commercial value. In such cases, perhaps, it may be preferable to protect certain designs under copyright law as artistic expressions rather than as industrial designs where the term of protection is more limited than as under copyright laws;
- (c) communities encounter difficulties in protecting their collective rights. Although industrial design laws can be registered in the name of two or more persons, each with equal undivided shares in the registered design, collective rights can only be given if the body applying for protection of industrial design has legal capacity (which most communities would probably have);
- (d) the costs involved in registering an industrial design and subsequently enforcing it if the need arises.

Facilitating use of industrial design law

Various proposals have been made to modify industrial design law and practice to make it easier for indigenous peoples and traditional communities to take advantage of industrial designs protection.

In this regard, the TRIPS Agreement requires States to “ensure that requirements for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the

A practical suggestion is that it may be important for documentation initiatives to structure their documentation work in such a way as to fulfill the minimum documentation requirements for the acquisition, exercise and enforcement of design rights. See further below in section on “Cultural Heritage Collections, Databases and Registries”.

Defensive protection

As noted earlier, it is often the appropriation of the ‘style’ of traditional designs that is complained of. This question is also discussed in the section above on “Copyright” and the points made there are relevant too to designs. The use of unfair competition law and the law of passing off is also relevant and is discussed below.

Another way in which expressions of folklore can be protected defensively could be through the process of documentation. This is discussed further in the section “Cultural Heritage Collections, Databases and Registers”.

Sui generis protection of designs

It can be noted that existing *sui generis* systems cover also traditional designs. In brief:

- (a) the Model Provisions, 1982 provide for the protection of designs as tangible expressions of folklore¹³¹ against their unauthorized reproduction or use;
- (b) Panama's *sui generis* law, “Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity as their Traditional Knowledge”,¹³² makes explicit reference to traditional textile and dress designs. Also relevant would be the “Provisions on the Protection, Promotion and Development of Handicraft”.¹³³ Chapter VIII of this Law establishes protection for national handicrafts by prohibiting the import of craft products or the activities of those who imitate indigenous and traditional Panamanian articles and clothing.¹³⁴

Conclusions

The requirement of ‘novelty’ or ‘originality’ can present difficulties for those traditional designs already commercialized and/or disclosed to the public. However, there are national experiences which show that traditional designs can be registered under industrial design laws. It would seem, however, that contemporary designs made by current generations of society could more easily meet the ‘novelty’ or ‘originality’ requirement than would truly old and well-known designs. Further empirical information would be helpful.

Aside from this and other more technical questions, there are other conceptual and practical disadvantages to the industrial design system from the viewpoint of indigenous peoples and traditional communities.

In respect of the conceptual issues (such as limited time period and collective rights protection), *sui generis* mechanisms have been established in some cases, and further experience is needed with them. Regarding the more practical questions (such as costs of acquisition and enforcement of rights), States could if they so wished address these in various ways.

Patents

Patents of invention are also relevant to the protection of TCEs. For example, patents may relate to the traditional methods of producing TCEs, and the grant of a patent right may be seen as impacting on the interests of traditional communities. One example with bearing on the production of TCEs was a patent obtained in respect of a process for the formation of the Caribbean steelpan musical instrument which has raised objections from persons in the Caribbean.¹³⁵ In the event that Caribbean nationals or an appropriate Caribbean entity had previously acquired patent rights in respect of the same or similar claims, they could have, though the positive assertion of those rights, prevented others from acquiring the patent rights. To the extent that a defensive interest was present within the Caribbean, the documentation of traditional processes for making the instrument and its publication as part of the prior art, could have been undertaken as an IP strategy.

In the Russian Federation, patents have been granted to national industrial enterprises for *inter alia* "Porcelain glaze" (Patent no. 2148570; Applicant: "Gzhel'" Association) and a "Method for artistic-decorative articles made of wood (variants)" (Patent no. 2156783; Applicant: "Khokhloma Painting" Association).

Unfair competition (including passing off)

As already noted, unfair competition law may respond to many of the needs expressed by indigenous and traditional communities. This was identified by GRULAC in a written submission (WIPO/GRTKF/IC/1/5) and the Delegation of Norway, at a Committee session, which raised the question:

"whether it would be possible to provide protection for TK along similar lines, using Article 10*bis* as a model when considering the framework of a *sui generis* system for TK. The idea, they said, would then be to have a general international norm that obliged the States to offer protection against unfair exploitation of TK. Such a general norm could be supplied with internationally agreed guidelines on how to apply the norm. One aspect of such an angle to the problem would be that TK would be protected as such without any requirements of prior examination or registration, and judicial decisions in concrete cases on whether there had been an infringement of the TK protection, would be taken on the basis of a flexible norm referring to fairness and equity. The Delegation indicated that such internationally agreed guidelines would favorably assist national judges when applying such a norm".¹³⁶

Article 10*bis* of the Paris Convention provides that any act of competition contrary to honest practices in industrial or commercial matters constitutes an act of unfair competition. The following in particular are prohibited:

- (a) acts which may cause confusion with the products or services, or the industrial or commercial activities, of a competitor;
- (b) false allegations which may discredit the products or services, or the industrial or commercial activities, of a competitor;
- (c) indications or allegations which may mislead the public, in particular as to the manufacturing process of a product or as to the quality, quantity or other characteristics of products or services.

In addition to these 'particular cases' certain other acts have been recognized as possibly constituting acts of unfair competition. These include violation of trade secrets and taking undue advantage of another's achievement ('free-riding'). Article 10*bis* of the Paris Convention has been incorporated into the TRIPS Agreement.¹³⁷

Unfair competition law supplements industrial property laws or grants a type of protection that no such law can provide. Therefore, to fulfill these functions, unfair competition law must be flexible and is independent of any formality such as registration. In particular, unfair competition law must be able to adapt to new forms of market behavior. Such flexibility does not necessarily entail a lack of predictability. A recent case in Australia is illustrative.

In a recent case under trade practices law, a company in Australia was prevented from continuing to describe or refer to its range of hand painted or hand carved indigenous oriented souvenirs as 'Aboriginal art' or 'authentic' unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent. Proceedings were instituted against the company because it represented that some of its hand painted Aboriginal-style souvenirs were 'authentic,' 'certified authentic' and/or 'Australian Aboriginal art,' and it was held that these representations were likely to mislead consumers because the majority of the pool of artists who produced the souvenirs were not Aboriginal or of Aboriginal descent.

Undisclosed information (trade secrets law)

Article 39 of the TRIPS Agreement provides that in the course of protecting against unfair competition under Article 10*bis* of the Paris Convention, members of the World Trade Organization must protect 'undisclosed information', as defined in the Article, against unlawful acquisition, disclosure or use in a manner contrary to honest commercial practices.

In the Australian case of **Foster v Mountford (1976) 29 FLR 233** the common law doctrine of confidential information was used to prevent the publication of a book containing culturally sensitive information. The case concerned an anthropologist, Dr. Mountford, who undertook an expedition to the Northern Territory outback in 1940. Local Aboriginal people revealed to him tribal sites and objects possessing deep religious and cultural significance for them. The defendant recorded this information some of which he published in a book in 1976. The plaintiffs successfully sought an interlocutory injunction restraining the publication of the book on the basis of breach of confidence. (The plaintiffs could not bring an action for copyright infringement because the book had not been written by them and they had not acquired the copyright in it). The Court held that the publication of the book could disclose information of deep religious and cultural significance to the Aborigines that had been supplied to the defendant in confidence and the revelation of such information amounted to a breach of confidence.

XII. CONCLUSIONS

Discussions on the protection of TCEs have at times been characterized as a debate over whether there should be *sui generis* protection for TCEs, or whether conventional or established IP systems are sufficient. However, it is difficult to draw a firm distinction between these two positions. Some existing laws already give various forms of protection to expressions of traditional culture, generally on the basis of the copyright system (e.g., through varying provisions on the requirement for fixation and on protection for anonymous works). Within the copyright and related rights system, international protection has recently been extended to certain TCEs formerly considered to fall in the ‘public domain’: under the WIPO Performances and Phonograms Treaty of 1996, performers of TCEs (or expressions of folklore) receive protection for the aural aspect of their performances. A number of similar *sui generis* elements for TCE protection could be conceived within the conventional IP system. This raises the need to clarify the distinction between an extended, adapted or simply more effectively applied IP system, on the one hand, and a distinct form of *sui generis* right on the other. As the analysis in this paper illustrates, discussion of *sui generis* systems raises fundamental policy issues. Further work may be needed to clarify and focus these policy issues, as a possible basis of international consensus on recommendations or guidelines for the protection of TCEs.

For policymakers addressing the protection of TCEs, the following series of questions may help illustrate the policy options:

- (a) the threshold question of whether the protection required is a form of IP protection at all, whether as presently available or under adapted, expanded or *sui generis* IP systems;
- (b) whether the goal of protection is essentially positive or defensive protection, or a strategy combining the two;
- (c) what options are presently available under conventional IP systems, including unfair competition, and what options exist for adapted, expanded or *sui generis* elements of existing IP to protect TCEs;
- (d) what options are presently available in contract or in non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws;
- (e) whether, in respect of unprotected TCEs, IP policy objectives as well as cultural and other policies (relating to cultural diversity, creativity and the preservation of cultural heritage, for example) lead to an interest in exploring new, specific *sui generis* systems for their IP protection;
- (f) what mechanisms exist in other local, national or regional systems, including indigenous and customary systems, and what practical or conceptual lessons can be learned from them;
- (g) what policy framework and which policy options are relevant in elaborating systems for the specific *sui generis* protection of TCEs, should this be the route chosen;
- (h) how such *sui generis* systems relate to conventional IP systems particularly in respect of overlapping subject matter; and,
- (i) how national systems interact through bilateral, regional or international legal frameworks.

1 Document WIPO/GRTKF/IC/5/3 (prepared by the WIPO Secretariat for the Committee's fifth session held from July 7
to 15, 2003). A full record of the discussion of the Committee on this document is available in the report of the
Committee's fifth session (see document WIPO/GRTKF/IC/5/15).

2 WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), WIPO
Publication No. 768.

3 The results of which are contained in Annex 5 to the above Report.

4 Document WIPO/GRTKF/IC/2/7.

5 Document WIPO/GRTKF/IC/3/10.

6 Published as Janke, Terri, "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural
Expressions", WIPO Publication No. 781.

7 The presentations were published as documents WIPO/GRTKF/IC/4/INF/2 to 4/INF/5Add.

8 Published as Kutty, Valsala P.V., "National Experiences with the Protection of Expressions of Folklore/Traditional
Cultural Expressions", WIPO Publication No. 912.

9 This is based on an information a document prepared by the Secretariat of WIPO for the Committee's fifth session
(document WIPO/GRTKF/IC/5/INF/3), as well as additional information.

10 Examples at the international level include the United Nations Educational, Scientific and Cultural Organization
(UNESCO) Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972, Unesco's
Program on Masterpieces of the Oral and Intangible Heritage of Humanity of 1998, a draft Convention for the
Safeguarding of Intangible Cultural Heritage being discussed at Unesco, Unesco's Declaration on Cultural Diversity,
2001, and emerging interest in an international instrument on cultural diversity within the International Network
on Cultural Policy (INCP) and Unesco.

11 Such as the Universal Declaration of Human Rights, 1948 and the International Covenant on Economic, Social and
Cultural Rights, 1966.

12 See Bergey, Barry "A Multi-faceted Approach to the Support and Conservation of Folk and Traditional Culture,"
paper delivered at International Symposium on Protection and Legislation of Folk/Traditional Culture, Beijing,
December 18 to 20, 2001.

13 *Japan Times*, June 30, 2002.

14 Seeger, P., *The Incomplete Folksinger*, 1992, quoted in McCann, Anthony, "Traditional Music and Copyright – the
Issues", 1999, p. 5.

15 Bronner, S.J., *Creativity and Tradition in Folklore: New Directions*, 1992, quoted in McCann, *op. cit.*, p. 6.

16 Blake, Janet "Developing a New Standard-setting Instrument for the Safeguarding of Intangible Cultural Heritage
(UNESCO), 2002, page 4.

17 "Safeguarding Traditional Cultures: A Global Assessment" (UNESCO and the Smithsonian), quoted in Bergey, Barry
"Cultural Diversity, Cultural Equity and Commerce", address delivered at Expert Seminar on Cultural Diversity, OAS,
March 19, 2002.

18 "Cultural Diversity in Developing Countries – the Challenges of Globalization", International Network on Cultural
Policy, 2002.

19 See Glossary: Intangible Cultural Heritage, Netherlands Commission for UNESCO, 2002.

20 Litman, J., *The Public Domain*, quoted in Bragdon, Susan, "Rights and Responsibilities for Plant Genetic Resources:
Understanding the role of the public domain and private rights in the production of public goods", draft paper
delivered at First Meeting of the Advisory Committee for IPGRI project on the public domain, Portland, Oregon,
November 14-15, 2002.

21 The Convention Concerning the Protection of the World Cultural and Natural Heritage (1972), the Recommendation
on the Safeguarding of Traditional Culture and Folklore (1989) and more recently in the Unesco Universal
Declaration on Cultural Diversity.

22 Bragdon, Susan, "Rights and Responsibilities for Plant Genetic Resources: Understanding the role of the public domain and private rights in the production of public goods", draft paper delivered at First Meeting of the Advisory Committee for IPGRI project on the public domain, Portland, Oregon, November 14-15, 2002.

23 See Uchtenhagen, Ulrich, "Protection of Adaptations and Collections of Expressions of Folklore", National Symposium on the Legal Protection of Expressions of Folklore, Beijing, September 13 to 15, 1993.

24 See Farley Haight, Christine, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" Connecticut Law Review, Fall, 1997.

25 For example responses to WIPO questionnaire of 2001 of Canada; China; Ecuador; Kyrgystan; Malaysia; Mexico; Republic of Korea; Romania; Switzerland; United States of America.

26 See document WIPO/GRTKF/IC/3/11.

27 Bergey, *op. cit.*

28 Vaidhyanathan, Siva "Copyrights and Copywrongs," 2001 (New York University Press), 125.

29 Statement by Saami Council, Fourth Session of the Intergovernmental Committee, December 9 to 17, 2002.

30 As the U.S.A. has pointed out, however, restrictions on derogatory uses may be impermissible limitations on free speech in the U.S.A.

31 See Ficsor, M., "Attempts to Provide International Protection for Folklore by Intellectual Property Rights", paper presented at the WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 1997, p.17; Ricketson, S., The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (London, 1987) pp. 313-315. Only one country, India, has made the designation referred to in the Article.

32 See particularly section 1 ^(5bis) and section 6, Tunis Model Law.

33 See document WIPO/GRTKF/IC/1/13 (Report of first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore), paras. 156 to 175. See also generally Ficsor, M., *op. cit.*

34 For the purpose of WPPT performers who are accorded protection include "'performers' who are actors, singers, musicians, dancers, and other persons who act, sing, deliver, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore."

35 See BCP/CE/VI/16-INR/CE/V/14, par. 269.

36 See WIPO Publication Number 758 (E/F/S).

37 The Plan of Action records that "(t)he participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with the plan of action."

38 See chapter on "Terminology" in the FFM Report.

39 WIPO Publication 768E/F/S. The Report is also available at <<http://www.wipo.int/tk/en/tk/ffm/report/final/index.html>>

40 The regional consultations were held for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). The four regional consultations were attended by 63 Governments of WIPO's Member States, 11 intergovernmental organizations, and five non-governmental organizations.

41 WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB /99/1; WIPO-UNESCO/FOLK/LAC/99/1.

42 <<http://www.wipo.int/tk/en/igc/documents/index.html>>

43 WIPO Publication Number 781 E. Also available at <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/finalstudy.pdf>>. In addition, WIPO has also published a study of practical experiences in India, Indonesia, and the Philippines. The Committee has received detailed briefings by New Zealand, Nigeria, Panama, the Russian Federation, Tunisia and the Secretariat of the Pacific Community on their recent legislative experiences with the legal protection of TCEs.

44 A detailed discussion on questions of terminology is provided in document WIPO/GRTKF/IC/3/9.

45 See Palethorpe and Verhulst, "Report on the International Protection of Expressions of Folklore Under Intellectual Property Law" (Study Commissioned by the European Commission), October 2000, pp. 6 to 13.

46 *Idem.*

47 See Bergey, Barry "A Multi-faceted Approach to the Support and Conservation of Folk and Traditional Culture," paper delivered at International Symposium on Protection and Legislation of Folk/Traditional Culture, Beijing, December 18 to 20, 2001.

48 Law 94-36 of February 24, 1994 on Literary and Artistic Property.

49 WIPO/GRTKF/IC/3/17 at para. 218. The Delegations of Canada (Para. 235.), China (Para. 242), Venezuela (Para. 286) and the United States of America (Para. 254) expressed roughly similar views

50 For example see also UNESCO "Study on International Flows of Cultural Goods", 1980-98, Paris, 2000, <http://www.unesco.org/culture/industries/trade/html_eng/question3.shtml>.

51 Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, pages 116 and 135.

52 Information received from the Department of Sports, Arts and Culture, Northern Cape Provincial Government, South Africa.

53 Matlou, Jubie "*Rural arts and crafts go global*" Mail and Guardian, <<http://archive.mg.co.za>>; See also <www.buyafrica.com>.

54 Sherylle Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation," Yearbook for Traditional Knowledge Music, 1996, p. 57.

55 *Idem.*

56 The removal of sacred and ceremonial objects (movable cultural properties) is not included here. These issues are perhaps less relevant to IP and more to laws directly concerning cultural heritage, as well as the fields of archaeology and anthropology. The examples given are intended to illuminate the many different types of TCEs for which protection is sought. Not all States may agree that each of the TCEs should or can be provided with IP protection.

57 See WIPO/GRTKF/IC/3/10, para. 126.

58 See the apology on line at the following web address: <http://www.olympic.org/uk/passion/museum/home_uk.asp>

59 See Sandler, Felicia, "Music of the Village in the Global Marketplace – Self-Expression, Inspiration, Appropriation, or Exploitation?," Ph.D. Dissertation, University of Michigan, 2001, pp. 58 and 59.

60 *Idem*, pp. 58 to 63; Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation" 1996 Yearbook for Traditional Music, 28 (1996), 57 to 85.

61 Discussion with Dr. Owen Dean, Spoor and Fisher Attorneys, Pretoria, South Africa, October 23, 2002. See also Malan, Rian "Where does the Lion Sleep Tonight", at <<http://www.3rdearmusic.com/forum/mbube2.html>> (October 23, 2002).

62 See "Taiwanese singer found a global audience," *Financial Times*, April 2, 2002. Available at <<http://news.ft.com/ft/gx.cgi/ftc?pagename=View&c=Article&cid=FT3DDC52KZC&liv>> (August 12, 2002).

63 Sandler, *op. cit.*, pp. 39 and 40.

64 Sandler, Felicia, *op. cit.*, pp. 35 to 38.

65 Janke, *op. cit.*, pp. 37 to 40.

66 See response of Bhutan to the folklore questionnaire.

67 Janke, Terri, "Our Culture, Our Future" (Report prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission (ATSIC), 1999), pp. 30 to 32; Sandler, *op. cit.*, pp. 53 to 56.

68 Sandler, *op. cit.*, pp. 46 to 48.

69 See document WIPO/GRTKF/IC/1/5, Annex II, pp. 7 and 8.

70 Lobo, Susan, The Fabric of Life: Repatriating the Sacred Coroma Textiles, Cultural Survival Quarterly, Summer 1991, pp. 40 and 41

71 Sandler, *op. cit.*, pp. 41 to 44.

72 See "Maori elders try to scupper Cruise movie", Telegraph, January 15, 2003.

73 See "War of words: Whose Vastu is it, anyway?", Times News Network, December 28, 2002.

74 See Silver, Bradley "Tempest brews over tea trademark", The National Law Journal, October 14, 2002 at <www.nlj.com>.

75 "We have been impressed by the willingness of Lego to recognise a hurt was inadvertently made and show that in their actions," in Osborn, Andrew "Maoris win Lego battle," The Guardian, October 31, 2001 at <<http://www.guardian.co.uk/Archive/Article/0,4273,4288446,00.html>>

76 See response to Folklore Questionnaire by New Zealand, and <<http://news.bbc.co.uk/1/hi/world/asia-pacific/1619406.stm>>

77 See for example <<http://www.law.auckland.ac.nz/learn/legalsys/daviddocs/Class11.doc>>

78 See document WIPO/GRTKF/IC/3/17, paras 179, 181, 189, 192, 194, 197 and 198.

79 Article 2.1 of the Berne Convention: "The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science." See also Articles 2(3), 2(4) and 2(5) where the requirement to protect certain other kinds of works is dealt with.

80 WIPO/GRTKF/IC/1/5 (Document submitted the Group of Countries of Latin America and the Caribbean (GRULAC)); WIPO/GRTKF/IC/3/11. (Document submitted by the European Community and its Member States); Responses to the folklore questionnaire (WIPO/GRTKF/IC/2/7) and/or the TK survey (WIPO/GRTKF/IC/2/5) of Australia, Bhutan, Hungary, Indonesia, New Zealand, Norway, Panama, Peru, the Philippines, Republic of Korea, Samoa, Singapore, the Solomon Islands, Viet Nam and others.

81 Response of Hungary to folklore questionnaire, page 2. All the responses are available at <<http://www.wipo.int/tk/en/questionnaires/ic-2-7/index.html>>.

82 WIPO/GRTKF/IC/3/11., p. 3.

83 See WIPO/GRTKF/IC/3/11. p. 3; McDonald, *op.cit.*, p. 45.

84 (1994) 30 IPR 209.

85 At page 215, quoted in McDonald, *ibid*.

86 McDonald, p. 46.

87 (1991) 21 IPR 481.

88 See also McDonald, p. 42 and Ellinson, Dean "Unauthorised Reproduction of Traditional Aboriginal Art," UNSW Law Journal, 1994, p. 333.

89 Responses to the folklore questionnaire (WIPO/GRTKF/IC/2/7) and the TK survey (WIPO/GRTKF/IC/2/5) of Hungary, New Zealand, Norway, and Viet Nam.; WIPO/GRTKF/IC/3/11. (Document submitted by the European Community and its Member States), p. 3.

90 Palethorpe and Verhulst, page 28; Goldstein, P., p. 161; see also Ricketson, S., The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986 (London, 1987), pp. 228 to 234.

91 (1994) 30 IPR 209. This is the so-called "Carpets Case." It is one of the subjects of the studies undertaken for WIPO by Ms. Terri Janke entitled "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions, available at <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>>.

92 (1994) 30 IPR 209 at p. 216.

93 See response of Hungary to WIPO's TCE questionnaire of 2001.

94 See WIPO Publication 912(E), Kutty, P. V., "Study on the Protection of Expressions of Folklore". Also available at:
<<http://www.wipo.int/tk/en/studies/cultural/expressions/index.html>>.

95 See Janke, *op. cit.*, p. 44.

96 (1991) 21 IPR at 492.

97 (1998) 41 IPR 513. This case is also one of the cases studied by Ms. Terri Janke in her study "Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions" commissioned by WIPO, is available at
<<http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>>. See response of Australia to Folklore Questionnaire of 2001.

98 Golvan "Aboriginal Art and Copyright: An Overview and Commentary Concerning Recent Developments", E.I.P.R., 1999, p. 602.

99 Dutfield, "Protecting Traditional Knowledge and Folklore," draft, (UNCTAD/ICTSD), p. 14.

100 Trademark and geographical protection can continue indefinitely (subject to certain conditions). The early House of Lords decision of *Millar v. Taylor* (4 Burr. (4th ed.) 2303, 98 Eng. Rep 201 (K.B. 1769)) provided for perpetual copyright, but this principle was superseded by later judgements.

101 McDonald, I., "Protecting Indigenous Intellectual Property" (Australian Copyright Council, Sydney, 1997, 1998), p. 44.

102 See document WIPO/GTRKF/IC/1/5, Annex II, pp. 7 and 8.

103 The Australian cases are discussed above and described in the WIPO "Minding Culture" case-studies. In Canada, the Copyright Act has been used by a range of Aboriginal artists, composers and writers to protect their tradition-based creations. Examples include wood carvings of Pacific coast artists, silver jewelry of Haida artists, songs and sound recordings of Aboriginal artists, and sculptures of Inuit artists.

104 Sandler, F. "Music of the Village in the Global Marketplace: Self-Expression, Inspiration, Appropriation, or Exploitation?" p. 39.

105 Cassidy, Michael (ed.) "Intellectual Property and Aboriginal People: A Working Paper," p.22.

106 See document WIPO/GTRKF/IC/3/10, para. 122 (i).

107 See "Report on the Official Insignia of Native American Tribes," September 30, 1999.

108 Available at <<http://www.uspto.gov/web/menu/current.html>> (November 30, 1999 entry).

109 *Ibid.*, pp. 24-26.

110 The Act is available at: < http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes>

111 At <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>>.

112 See Case Study 2 of Minding Culture case studies by Terri Janke, the case study "The Use of Trademarks to Protect Traditional Cultural Expressions".

113 As part of the Minding Culture case studies by Terri Janke, the case study "Indigenous Arts Certification Mark" is available at: <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/studies/index.html>>.

114 For more information on the Toi Iho™ Mark see <<http://www.toiho.com>>.

115 See Rule 5.3 in "Rules Governing the Use By Artists of the Toi Iho™ Maori Made Mark" published by the Arts Council of New Zealand Toi Aotearoa.

116 See response to Folklore Questionnaire by New Zealand.

117 <<http://www.toiho.com/about/about.htm>>.

118 At <<http://www.wipo.int/tk/en/studies/cultural/minding-culture/index.html>>.

119 In this sense, "geographical indication" encompasses the term "appellation of origin" as defined by the Lisbon Agreement for the Protection of Appellations of Origin and their International Registration, 1979 and as referred to in the Paris Convention. Another subject of IP protection is an "indication of source", which is also referred to in the Paris Convention, and which refers to any expression or sign used to indicate that a product or service originates

in a country, region, or specific place. The difference, it follows, between “geographical indication” as used in the TRIPS Agreement and “appellation of origin” as used in the Paris Convention, on the one hand, and “indication of source”, is that the former require a quality link between the product and its area of production, the latter not. The term “geographical indication” is often used to refer to both appellations of origin and indications of source. In order to take into account all existing forms of protection, this document uses the term “geographical indication” in its widest possible meaning.

- 120 See document submitted by GRULAC “Traditional Knowledge and the Need to Give it Adequate Intellectual Property Protection” (WIPO/GRTKF/IC/1/5), Annex I, par. 6.
- 121 Article 26.3 of TRIPS Agreement of 1994.
- 122 Article 26.1 of TRIPS Agreement of 1994.
- 123 Article 25.1 of TRIPS Agreement of 1994.
- 124 Article 25.1 of TRIPS Agreement of 1994.
- 125 See Report on National Experiences (WIPO/GRTKF/IC/3/10), par. 126.
- 126 See Patent Law of the Republic of Kazakhstan, No.428-I LRK, July 16, 1999, available at <http://www.kazpatent.org/english/acts/patent_law.html>.
- 127 Article 8 (1) of Patent Law of Kazakhstan.
- 128 *Ibid.*
- 129 *Ibid.*
- 130 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) of 1994, Section 4, Article 25 (2).
- 131 See Section 2 of the Model Provisions.
- 132 Established by Law No. 20, of June 26, 2000 and regulated by Executive Decree No. 12, of March 20, 2001. See also Final Report on National Experiences (WIPO/GRTKF/IC/3/10), para.121 (ii).
- 133 Panama Law No. 27 of July 24, 1997.
- 134 See response of Panama to Folklore Questionnaire at: <<http://www.wipo.int/tk/en/questionnaires/ic-2-7/panama.pdf>>
- 135 See “A Nation’s Steel Soul,” New York Times, July 7, 2002, at <<http://www.nytimes.com/2002/07/07/weekinreview/07BARA.html>>
- 136 Document WIPO/GRTKF/IC/3/17, para. 227.
- 137 Article 2.1, TRIPS Agreement.
- 138 Article 7.8, Berne Convention.
- 139 See Article 59.
- 140 Meeting with officials of the Oman Center of Traditional Music, Muscat, February 27, 1999.
See WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), (WIPO, 2001).
- 141 International Symposium on the Protection and Legislation of Folk/Traditional Culture (Beijing, December 18-20, 2001).
- 142 Response of the United States of America. See also Bulger, P., “Preserving American Folk Culture at the Library of Congress”, paper delivered at International Symposium on the Protection and Legislation of Folk/Traditional Culture (Beijing, December 18-20, 2001).
- 143 ICAMD Newsletter, September, 1998 and at meeting with Professor J.H. Kwabena Nketia, Director, ICAMD, January 25, 1999. See WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), (WIPO, 2001). On documentation of expressions of folklore in Africa, see also Mould-Idrussu, B., “The Experience of Africa”, WIPO-UNESCO World Forum, Phuket, 1997, p. 17 ff.

144 Meeting with representatives of the Ministry of Culture, Guatemala, January 18, 1999. See WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), (WIPO, 2001).

145 See also intervention of Tunisia at First Session of the Intergovernmental Committee (WIPO/GRTKF/IC/1/13, par. 36) and WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), (WIPO, 2001).

146 <<http://www.unesco.org/culture/heritage/intangible/index.shtml>>

147 Dournon, Geneviève. Handbook for the Study of Traditional Music and Musical Instruments. Paris: UNESCO, 1999.

148 31 C/Resolution 30. 17 Member States formally expressed in written form their reservations in relation to the adoption of the resolution on this item: Argentina, Barbados, Denmark, Finland, France, Germany, Grenada, Greece, Mexico, Netherlands, Norway, Portugal, Saint Lucia, Spain, St. Vincent and the Grenadines, Sweden, Switzerland.

149 UNESCO/ICA, Crafts: methodological guide to the collection of data (by Jocelyn Etienne-Nugue) Paris: UNESCO/ICA, 1990.

150 CLT-96/WS/5, 1996.

151 ITC/UNESCO. *op.cit.*.

152 *Ibid.*

153 ITC/AG(XXXIV)/185, February 27, 2001.

154 WIPO-ITC/DA/HAV/01/03, January 30- February 1, 2001.

155 Chaudhuri, S., "The Experience of Asia," paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002, page 34.

156 WIPO/GRTKF/IC/3/17, par. 271.

157 WIPO/GRTKF/IC/4/15, and comments of the European Community and its Member States on WIPO/GRTKF/IC/4/3.

158 Seeger, A., *op. cit.*, Chaudhuri, S., "The Experience of Asia," paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002; Peters, M., "Protection of the collection of expressions of folklore; the role of libraries and archives," paper given at WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8 to 10, 2002; Seeger, A., "Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property," 1996 Yearbook for Traditional Music, p. 87; Toelken, Barre "The Yellowman Tapes, 1996-1997," Journal of American Folklore 111 (442) 381-391, 1998.

159 See Report of the Contemporary Visual Arts and Craft Inquiry, Australia, 2002, page 139.

160 Chaudhuri, *op. cit.*, page 36.

161 Personal communication with Ms. Peggy Bulger, Director and Mr. Michael Taft, Folklife Specialist, American Folklife Center, October 15, 2002.

162 Paper by Dr. Jaber Bin Marhoun Flaifil Al Wahaiby, Director General, International Organizations Department, Ministry of Commerce and Industry, Oman, delivered at WIPO International Conference on Intellectual Property, the Internet, Electronic Commerce and Traditional Knowledge, Bulgaria, May 29 to 31, 2001.

163 See <<http://www.folkways.si.edu/licenserequests.htm>>. See also Seeger, A., "Ethnomusicologists, Archives, Professional Organizations, and the Shifting Ethics of Intellectual Property," 1996 Yearbook for Traditional Music, p. 87.

164 See Vinson, Isabelle, Museum International, 215, September 2002, pages 4 to 7.

165 Hunter, Jane; Koopman, Bevan; Sledge, Jane, "Software Tools for Indigenous Knowledge Management", September 2002. See also Hunter, Jane "Rights Markup Extensions for the Protection of Indigenous Knowledge", May 2002, and Wells, Kathryn, "A Model and Pilot Options for a Digital Image and Text Archive of Indigenous Arts and Knowledge; A Progress Report", 1997.

- 166 This is one of the 50 WIPO Standards, Recommendations and Guidelines related to industrial property information and documentation. They aim to harmonize practices by all industrial property offices and to facilitate the international transmission, exchange and dissemination of industrial property information (for both text and images).
- 167 "Intellectual Property Needs and Expectations of Traditional Knowledge Holders" WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), p. 110.
- 168 The Cuban Copyright Law, Law No. 14, in effect since 1977, provides specific protection for folklore including handicrafts. By Resolution No. 2, of 1993, the National Copyright Centre (CENDA) makes provision for the registration and optional legal deposit of protected works. A document received upon registering a work may be used as proof in dealing with third parties in the event of violation of copyright. See Dolores Isabel Agüero Boza, "Artisanal Works and Copyright", paper presented at WIPO/ITC Workshop on Legal Protection of Original Craft Items, Havana, January 30 to February 1, 2001, WIPO-ITC/DA/HAV/01/6.
- 169 Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), p.4.
- 170 Position Paper of the Asian Group and China (WIPO/GRTKF/IC/2/10), p.4.