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

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.<sup>1</sup> 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;<sup>2</sup>
- regional consultations in Africa, Asia and the Pacific, the Arab region and the Latin American and Caribbean region;<sup>3</sup>
- an extensive questionnaire on national experiences with the protection of TCEs/folklore,<sup>4</sup> and a full report on the detailed responses received from 64 countries;<sup>5</sup>
- studies of actual experiences of indigenous communities with the protection of their traditional cultural expressions;<sup>6</sup>
- a panel on national experiences with *sui generis* systems during the fourth Committee session in December 2002;<sup>7</sup> and
- a study of the national experiences of India, Indonesia and the Philippines.<sup>8</sup>

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.<sup>9</sup>

## 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.<sup>9</sup> 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.<sup>11</sup>

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.<sup>12</sup> 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”.<sup>13</sup> 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”.<sup>14</sup> 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”.<sup>15</sup>

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.<sup>16</sup>

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.<sup>17</sup>

### **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.<sup>18</sup>

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.<sup>19</sup>

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.<sup>20</sup> 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 declarations<sup>21</sup>), 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).<sup>22</sup>

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.<sup>23</sup> 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.<sup>24</sup>

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.<sup>25</sup> 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".<sup>26</sup>

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.<sup>27</sup> 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.<sup>28</sup>

### 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.<sup>29</sup>

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**

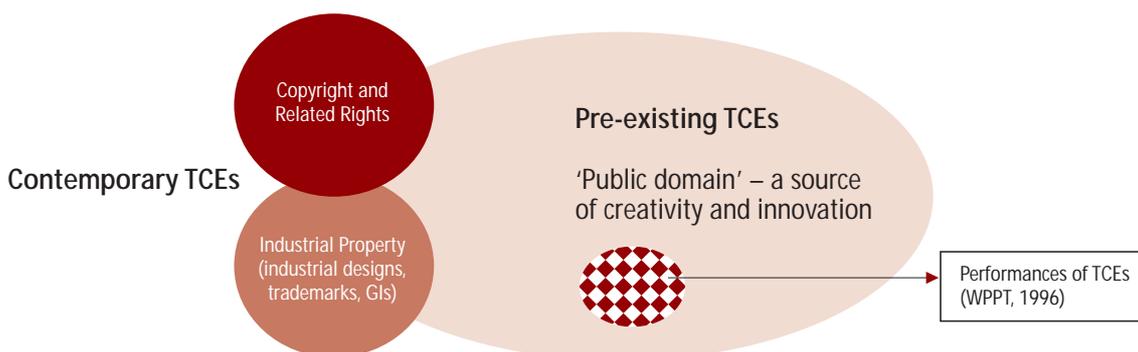
A key question perhaps is whether limiting IP protection to contemporary, tradition-based cultural expressions, and leaving pre-existing cultural heritage as part of an unregulated public domain, adequately meets cultural as well as IP policies and objectives. Does it offer the greatest opportunities 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,<sup>30</sup> 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.

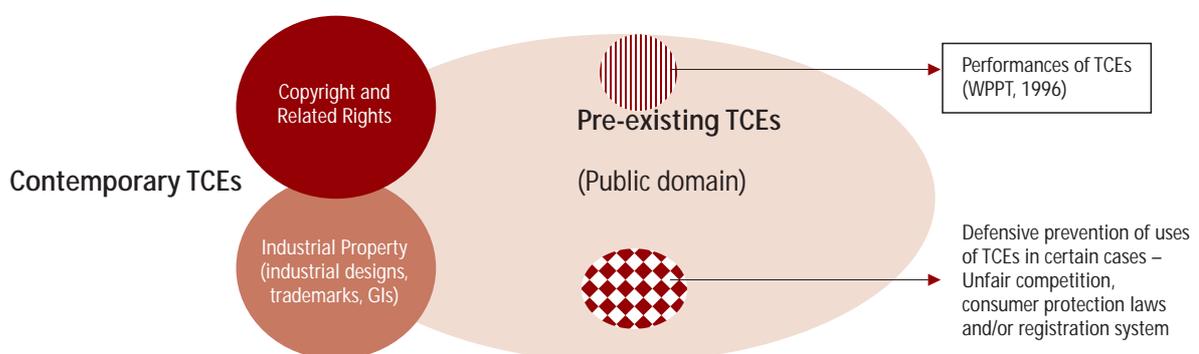
Another approach, which may be complementary, could take the following principles and 'building blocks' into account:

- (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.

### III. HISTORY OF INTELLECTUAL PROPERTY AND THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

Previous activities of WIPO in the field of IP and TCEs, several of which were undertaken in cooperation with UNESCO, have over a period of more than 30 years, identified and sought to address several legal, conceptual, operational and administrative needs and issues related to IP and TCEs.

#### **Provision of international protection for ‘unpublished works’ in the Berne Convention for the Protection of Literary and Artistic Works in 1967**

The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works (the “Berne Convention”) made an attempt to introduce copyright protection for folklore at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contains the following provision:

“ (4)(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”

“ (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.”

This Article of the Berne Convention, according to the intentions of the revision Conference, implies the possibility of granting protection for TCEs. Its inclusion in the Berne Convention responds to calls made at that time for specific international protection of TCEs.<sup>31</sup>

#### **Adoption of the Tunis Model Law on Copyright for Developing Countries, 1976**

To cater for the specific needs of developing countries and to facilitate the access of those countries to foreign works protected by copyright while ensuring appropriate international protection of their own works, the Berne Convention was revised in 1971. It was deemed appropriate to provide States with a text of a model law to assist States in conforming to the Convention’s rules in their national laws.

Thus, in 1976, the Tunis Model Law on Copyright for Developing Countries was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23 to March 2, 1976, with the assistance of WIPO and UNESCO. The Tunis Model Law provides specific protection for works of national folklore. Such works need not be fixed in material form in order to receive protection, and their protection is without limitation in time.<sup>32</sup>

## The Model Provisions, 1982

Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions were adopted in 1982 under the auspices of WIPO and UNESCO ("the Model Provisions").<sup>33</sup>

During the course of the development of the Model Provisions, it had been agreed by a Working Group convened by WIPO and UNESCO that: (i) adequate legal protection of folklore was desirable; (ii) such legal protection could be promoted at the national level by model provisions for legislation; (iii) such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; (iv) the said model provisions should also allow for protection by means of copyright and neighboring rights where such forms of protection could apply; and, (v) the model provisions for national laws should pave the way for sub-regional, regional and international protection of creations of folklore.

The Model Provisions were developed in response to concerns that expressions of folklore, which represent an important part of the living cultural heritage of nations, were susceptible to various forms of illicit exploitation and prejudicial actions. More specifically, as stated in the Preamble to the Model Provisions, the Expert Committee believed that the dissemination of folklore might lead to improper exploitation of the cultural heritage of a nation, that any abuse of a commercial or other nature or any distortion of expressions of folklore was prejudicial to the cultural and economic interests of the nation, that expressions of folklore constituting manifestations of intellectual creativity deserved to be protected in a manner inspired by the protection provided for intellectual productions, and that the protection of folklore had become indispensable as a means of promoting its further development, maintenance and dissemination.

Regarding implementation of the Model Provisions, several countries have used the Model Provisions as a basis for national legal regimes for the protection of folklore. Many of these countries have enacted provisions for the protection of folklore within the framework of their copyright laws.

## Attempts to establish an international treaty, 1982 to 1985

A number of participants stressed at the meeting of the Committee of Governmental Experts which adopted the Model Provisions that international measures would be indispensable for extending the protection of expressions of folklore of a given country beyond the borders of the country concerned. WIPO and UNESCO followed such suggestions when they jointly convened a Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, which met in Paris from December 10 to 14, 1984. The Group of Experts was asked to consider the need for a specific international regulation on the international protection of expressions of folklore by IP and the contents of an appropriate draft. The discussions at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, in particular, with regard to the rapidly increasing and uncontrolled use of such expressions by means of modern technology, beyond the limits of the country of the communities in which they originate.

However, the great majority of the participants considered it premature to establish an international treaty since there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions. Two main problems were identified

by the Group of Experts: the lack of appropriate sources for the identification of the expressions of folklore to be protected and the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region. The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the report of the Group of Experts and, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a treaty for the protection of expressions of folklore was premature. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.

### **The adoption of the WIPO Performances and Phonograms Treaty (the WPPT), 1996**

Folk tales, poetry, songs, instrumental music, dances, plays and similar expressions of folklore actually live in the form of regular performances. Thus, if the protection of performers is extended to the performers of such expressions of folklore, which is the case in many countries, the performances of such expressions of folklore also enjoy protection. However, there was a slight problem in respect of the key notion of 'performers' (and the notion of 'performances' following indirectly from the notion of 'performers') as determined in the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the "Rome Convention"). Under Article 3(a) of the Rome Convention, " 'performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise *perform literary or artistic works*" (emphasis added). As expressions of folklore do not correspond to the concept of literary and artistic works proper, the definition of 'performers' in the Rome Convention does not seem to extend to performers who perform expressions of folklore.

However, the WIPO Performances and Phonograms Treaty (the WPPT), which was adopted in December 1996, provides that the definition of 'performer' for purposes of the Treaty includes the performer of an expression of folklore.<sup>34</sup> As at April 15, 2003, 41 States had ratified the WPPT. The WPPT came into force on May 20, 2002.

At the Diplomatic Conference at which the WPPT, as well as the WIPO Copyright Treaty (the WCT) were adopted in December 1996, the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms recommended that "provision should be made for the organization of an international forum in order to explore issues concerning the preservation and protection of expressions of folklore, IP aspects of folklore, and the harmonization of the different regional interests".<sup>35</sup>

### **WIPO-UNESCO World Forum on the Protection of Folklore, 1997**

Pursuant to the recommendation made during the 1996 Diplomatic Conference, the WIPO-UNESCO World Forum on the Protection of Folklore was held in Phuket, Thailand, in April 1997. Many needs and issues related to IP and folklore were discussed during this meeting.<sup>36</sup> The meeting also adopted a "Plan of Action" which identified *inter alia* the following needs and issues:

- (a) the need for a new international standard for the legal protection of folklore; and
- (b) the importance of striking a balance between the community owning the folklore and the users of expressions of folklore.

In order to make progress towards addressing these needs and issues, the Plan of Action suggested *inter alia* that “(r)egional consultative fora should take place...”<sup>37</sup>

### **WIPO fact-finding missions, 1998-1999**

During 1998 and 1999, WIPO conducted fact-finding missions to identify as far as possible the IP-related needs and expectations of TK holders (the “FFMs”). Indigenous and local communities, non-governmental organizations, governmental representatives, academics, researchers and private sector representatives were among the groups of persons consulted on these missions. For purposes of these missions, ‘traditional knowledge’ included TCEs as a sub-set.<sup>38</sup> ‘Traditional cultural expressions’ included handicrafts and other tangible cultural expressions. Much of the information obtained on these missions related either directly or indirectly to TCEs.

The FFM were conducted in 28 countries between May 1998 and November 1999. The results of the missions have been published by WIPO in a report entitled “Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)” (the “FFM Report”).<sup>39</sup>

### **WIPO-UNESCO Regional Consultations on the Protection of Expressions of Folklore, 1999**

Pursuant to the suggestion included in the Plan of Action adopted at the WIPO-UNESCO World Forum on the Protection of Folklore, 1997, WIPO and UNESCO organized four Regional Consultations on the Protection of Expressions of Folklore in 1999.<sup>40</sup> Each of the Regional Consultations adopted resolutions or recommendations which identify IP needs and issues, as well as proposals for future work, related to expressions of folklore.<sup>41</sup>

### **The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore**

In late 2000, the Member States of WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the Committee) for the purpose of Member State discussions on these subjects.<sup>42</sup>

The Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns and needs of holders of TK and custodians of traditional cultures. With the guidance of the Committee, the Secretariat has undertaken a series of detailed analytical studies, based on extensive surveys of national experience in this area, to form the basis for international policy debate, and also developed practical tools aimed at enhancing the IP interests of holders of TK, traditional cultural expressions (TCEs) and genetic resources. The Committee's sessions are attended by over 400 representatives consisting of Member States, IGOs and NGOs.

In so far as TCEs are concerned, the Committee has considered detailed Secretariat analysis of the use of existing IP and *sui generis* approaches for the legal protection of TCEs. This analysis was based on the national experiences of 66 Member States, surveyed through a questionnaire issued by WIPO in 2001, and a set of case studies. One of these comprises practical studies of actual cases in which indigenous Australians have sought to use IP to protect their TCEs. The latter publication is entitled “Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions”.<sup>43</sup>

## 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.<sup>44</sup>

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.<sup>45</sup>

### 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.<sup>46</sup>

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.<sup>47</sup> 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’).<sup>48</sup> 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”.<sup>49</sup>

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.<sup>50</sup>

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;<sup>51</sup>
- (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.<sup>52</sup> 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;<sup>53</sup>

(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.<sup>54</sup> *Rhythm of the Saints* sold 1.3 million copies in the first four weeks of its release alone.<sup>55</sup>

## 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.<sup>56</sup>

- (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.<sup>57</sup> 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.<sup>58</sup>
- (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.<sup>59</sup> 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.<sup>60</sup> 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.<sup>61</sup> Another example reported on is the European group Enigma's "Return to Innocence" hit of 1993.<sup>62</sup> 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.<sup>63</sup>
- (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).<sup>64</sup> 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.<sup>65</sup>
- (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.<sup>66</sup> 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.<sup>67</sup>

- (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.<sup>68</sup> 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” .<sup>69</sup>

- (xi) Sacred/secret material has been subject to unauthorized use, disclosure and reproduction. For example, the sacred Coroma textiles of Bolivia,<sup>70</sup> as well as sacred songs which can only be performed in a particular place and for a specified purpose.<sup>71</sup> 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.<sup>72</sup>
- (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’,<sup>73</sup> ‘ayurveda’, ‘gayatri’, ‘siddhi’, ‘yoga’, and ‘rooibos’.<sup>74</sup> 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.<sup>75</sup> 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.<sup>76</sup> 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.<sup>77</sup>

## 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.<sup>78</sup> 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).<sup>79</sup> 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.<sup>80</sup> 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";<sup>81</sup>
- (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";<sup>82</sup>
- (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.<sup>83</sup> 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*<sup>84</sup> 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."<sup>85</sup>

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.<sup>86</sup>

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*<sup>87</sup> 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;<sup>88</sup>
- (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.<sup>89</sup>

### ***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.<sup>90</sup>

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*,<sup>91</sup> 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" .<sup>92</sup>

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".<sup>93</sup>

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.<sup>94</sup>

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.<sup>95</sup>

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" .<sup>96</sup>

It was directly addressed in one of the cases Australia referred to *John Bulun Bulun v R and T Textiles*.<sup>97</sup> 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" .<sup>98</sup>

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.<sup>99</sup>

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,<sup>100</sup> 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.<sup>101</sup> 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;<sup>102</sup>
- (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.<sup>103</sup> 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.<sup>104</sup> 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.<sup>105</sup>

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.<sup>106</sup> 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.<sup>107</sup> 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,<sup>108</sup> 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;<sup>109</sup>

(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".<sup>110</sup>

### ***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,"<sup>111</sup> 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.<sup>112</sup>

### ***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.<sup>113</sup> 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 "*Artisanos 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.<sup>114</sup> 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.<sup>115</sup> 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.<sup>116</sup> 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.<sup>117</sup> 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 Janke<sup>118</sup> 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,<sup>119</sup> 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 ...”<sup>120</sup> 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.<sup>121</sup> 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.<sup>122</sup>

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’.<sup>123</sup> 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.<sup>124</sup>

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*).<sup>125</sup> Industrial design protection is found in that country’s patent law,<sup>126</sup> which defines an industrial design as “an artistic and technical solution defining the outward appearance of a manufactured article”.<sup>127</sup> The law states additionally that for an industrial design to be protectable, it has to be new, original and deemed industrially applicable.<sup>128</sup> 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” .<sup>129</sup>

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 folklore<sup>131</sup> 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”,<sup>132</sup> makes explicit reference to traditional textile and dress designs. Also relevant would be the “Provisions on the Protection, Promotion and Development of Handicraft”.<sup>133</sup> 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.<sup>134</sup>

### ***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.<sup>135</sup> 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".<sup>136</sup>

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.<sup>137</sup>

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.

## VIII. THE MODEL PROVISIONS FOR NATIONAL LAWS, 1982

In 2001, WIPO published a questionnaire of national experiences with implementation of the Model Provisions, and found that many countries have used them to some or other degree in establishing their legislation.

However, it appears that there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice. There appears to be little practical experience with their implementation.

It is unfortunately not possible to identify any single reason for this as there are a variety of legal, conceptual, infrastructural and other operational difficulties experienced by States in establishing and implementing workable and effective legislative provisions at the national level. The needs in this regard are diverse, and there are no single solutions or approaches.

These conclusions strongly suggest, first, the need for the strengthening and more effective implementation, at the national level, of existing systems and measures, such as the Model Provisions, for the protection of TCEs, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries. Comprehensive and integrated legal-technical cooperation is needed, utilizing, where appropriate, the full breadth of the IP system and other existing and available measures, and taking into account States' respective international IP obligations. The success of such assistance would depend upon the full and committed involvement of national governments. The need for inter-ministerial approaches is made clear by the diversity of Ministries, departments, agencies and offices with jurisdiction over the protection of TCEs. The affected peoples and communities, and other stakeholders, such as the local legal profession, should also be consulted and involved where appropriate.

It has been argued that model provisions, guidelines or recommendations could greatly assist national offices and institutions attempting to establish effective systems of protection, as well as provide coherence to emerging national and regional systems that are otherwise developing in diverse directions.

In general terms, it has been suggested that new model provisions, guidelines or recommendations for national laws should be developed in order to take into account changes to the legal, policy and technological context since the late 1970s and early 1980s when the Model Provisions were developed. These changes include: greater awareness of the range of rights and needs of indigenous and traditional peoples; growing understanding of the relationship between cultural heritage preservation, the promotion of cultural diversity and IP; the emergence of new cultural instruments addressing cultural heritage and diversity; changes to the IP landscape particularly in the form of the TRIPS Agreement, 1994 and the WPPT, 1996; and, technological developments and new forms of commercial exploitation that have arisen since the early 1980's.

More specifically, certain more fundamental and conceptual limitations of the Model Provisions have been pointed to. Earlier it was pointed out that they provide a form of 'blanket' protection for public domain TCEs, although there is a wide 'borrowing' exception. It appears therefore that there is no protection against the making of derivative works based on public domain TCEs. On the other hand, the Model Provisions provide no form of defensive protection for specific TCEs that cultural communities have deemed worthy of protection through prior registration. It may therefore be that new model provisions in the form of guidelines or recommendations could address these and other issues.

## IX. REGIONAL AND INTERNATIONAL PROTECTION

There are certain existing mechanisms and frameworks for regional and international legal protection of TCEs, such as:

- (a) Article 15.4 of the Berne Convention for the Protection of Literary and Artistic Works, 1971 (the Berne Convention) allows a designated authority of a Berne Member State to protect and enforce rights in unpublished and anonymous works, the authors of which are presumed to be nationals of the State concerned, in all other Berne Member States. As noted earlier in this document, this Article was specifically introduced with the international protection of expressions of folklore in mind. In other words, to turn this into a practical example: India, which is the only country to have formally made the designation referred to in the Article, can designate an authority to protect and enforce rights in expressions of folklore of which the authors are presumed to be Indian nationals, in any other Berne Convention country. In effect, an international system of protection appears to exist, in theory at least, for expressions of folklore that are 'works'. It does not seem as if this mechanism has ever been used, however, and there are some practical limitations in using it. The relationship with Article 7 of the Convention on the term of protection may require further analysis, particularly Articles 7.3 and 7.8. For example, under the comparison of terms provision in the Berne Convention,<sup>138</sup> the term of protection applicable in the country where protection is claimed, is the shorter of the terms applicable in that country or in the country of origin of the work. Therefore, unless the country in which protection is sought protects expressions of folklore indefinitely, the term of protection afforded to the work may have expired in that country. There may be other such limitations in applying Article 15.4. Such protection, applying as it does to anonymous works and operating for the benefit of States, is also not attractive to indigenous peoples and local communities who wish directly to exercise rights. However, it would seem that the practical workings of the Article, and its various advantages and disadvantages, deserve some further consideration, if only because it is an existing measure found in a convention to which many States are party;
- (b) for those countries that provide protection for expressions of folklore as copyright works, the Berne Convention provides that all States that have ratified the Convention must protect foreign works according to the principle of national treatment. This means in effect that those countries that protect folklore as copyright works and are signatories to the Berne Convention enjoy protection for their expressions of folklore in each other's countries. However, the comparison of terms and other provisions may again limit the practical relevance of this observation;
- (c) under the IP treaties of certain regional organizations, expressions of folklore are protected in the territories of the States signatories to those agreements according to the principle of national treatment. For example:
  - (i) in Chapter I of Annex VII of the Bangui Agreement specific protection is provided for expressions of folklore and for works inspired by expressions of folklore. The form of protection is based on copyright and the *domaine public payant* model.<sup>139</sup> The Agreement also deals with the protection for expressions of folklore in Chapter II on the Protection and Promotion of Cultural Heritage. The Agreement makes provision for national treatment. Therefore, the 15 countries that are members of the African Intellectual Property Organization

(OAPI) and have ratified the accord are bound to protect each other's expressions of folklore according to the national treatment principle. Many of the countries are neighboring. It is not known, however, if there has ever been any practical application of these provisions; and,

(ii) Decision 351 on Copyright and Neighbouring Rights of the Andean Community provides protection *inter alia* to handicrafts based on the national treatment. In other words, the five States bound by the Decision are obliged to protect each other's handicrafts in a manner no less favorable than that accorded to their own nationals. It is not known whether this possibility has been used in practice;

(d) certain national laws, such as that of Panama, provide for a form of national treatment, but as the law is new, this aspect may not yet have been tested in practice.

It is noteworthy that few, if any, States referred, to Article 15.4 of the Berne Convention, or the Bangui Agreement or the Andean Decision 351 (as relevant) in their responses to the 2001 WIPO questionnaire. These existing measures appear little used and/or known. While the majority of States desired some form of international protection for TCEs, a certain number were not ready to embark upon the development of such an agreement. Certainly, several legal and conceptual questions remain and the diversity of approaches at the national level complicates efforts to reach broad international agreement.

Most national laws provide a mechanism for the protection of foreign works, and it remains open to States in their establishment of national laws for the protection of traditional cultural expressions to provide for the protection of foreign expressions on the basis of national treatment or reciprocity. In this way, networks of national laws, each providing for reciprocal protection of foreign expressions of folklore, could eventually lead to sub-regional, regional and even inter-regional systems of protection.

## X. CULTURAL HERITAGE COLLECTIONS, DATABASES AND REGISTERS

### Introduction

This section addresses several questions lying at the points at which (i) cultural heritage and TCEs are first accessed by folklorists, ethnographers, ethnomusicologists, cultural anthropologists and other fieldworkers, and (ii) TCEs are documented, recorded, displayed and made available to the public by museums, inventories, registries, libraries, archives and the like.

The activities of collectors, fieldworkers, museums, archives etc., are important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Museums also play a valuable educational role.

However, the 'public domain' status of cultural heritage and TCEs that are not protected by IP challenges efforts to protect the interests of indigenous and local communities in their cultural heritage and TCEs. This is particularly so in view of the growing trend of museums to digitize their cultural heritage collections and make them publicly available for both museological/curatorial as well as commercial purposes.

Indigenous peoples and traditional communities have expressed certain concerns associated with the collection, recordal, and making available of their tangible and intangible cultural heritage, particularly in relation to indigenous and customary obligations, and these concerns must also be addressed. The following issues are addressed:

- (a) the possible development of IP-related *protocols, codes of conduct and guidelines* for use by fieldworkers as well as museums and other such institutions;
- (b) the possible development of an IP *check list* and *model IP contractual clauses* for use in elaborating deposit, access, release and license agreements used by ethnomusicologists and other fieldworkers, archives, museums, libraries and other institutions;
- (c) regarding specifically digitized cultural heritage, the development of model IP-related "*Rules of Use*" and "*Copyright Notices*" for use in connection with websites, CD-ROMs, specialized databases and other electronic multimedia products.

It also addresses whether or not it is advisable, from an IP standpoint, for cultural communities to undertake the recordal and documentation of public domain TCEs as a strategy for either:

- (i) establishing IP in the TCEs (for 'positive' protection purposes); or,
- (ii) preventing the acquisition of IP in the TCEs (for 'defensive' protection purposes).

Relevant issues that require exploration could include: (a) the relevance of registries, inventories and lists established under cultural heritage legislation and programs; (b) whether, for purposes of either positive or defensive IP protection of TCEs, a registration system is desirable and feasible; (c) the relevance in this regard

of *sui generis* database protection; (d) the role of digital rights management tools, referring to both usage rules and content security, and (e) whether and if so how the documentation and recordal of TCEs can also foster and promote respect for relevant indigenous and customary obligations.

## Cultural heritage museums and institutions

A few examples from different regions are cited here:

- (i) the **Canadian Museum of Civilization** is a federal Crown corporation which serves as the national museum of human history of Canada. The Museum's Cultural Studies program collects tangible folkloric art as well as tapes of songs, languages, oral histories and personal narratives. To reflect the wishes of members of some Aboriginal groups regarding authorization of access to their expressions of folklore, the Museum's Ethnology section restricts access to some collections of sacred Aboriginal materials to members of culturally affiliated groups, and does not make them available to members of the general public;
- (ii) the **Oman Center of Traditional Music, Muscat, Oman** was created in 1983 to document, conserve and promote traditional Omani music. Since then the Center has documented more than 80% of Oman's musical traditions, including more than 23, 000 photographs, 580 audiovisual recordings and a large number of sound recordings. The Center has also compiled digitized databases of these documentation materials. The Center has developed a two-step approach to documentation: first, the Center maps which traditions are still alive by speaking to traditional musicians and, second, the traditional music and dances are recorded in sound recordings, audiovisual recordings, photographs or a combination thereof. The Center takes a comprehensive approach to the documentation of musical traditions, which includes not only a recording of a particular musical work, but also of associated dances, social customs and gatherings, healing methods, planting and farming methods, fishing methods, handicrafts, etc. This comprehensive approach to documentation is necessary because "in Oman traditional music is part of traditional lifestyles," which include healing, fishing, planting and other work techniques.<sup>140</sup> In its documentation work, the Center has identified more than 130 different types of traditional music in Oman, which can be classified, however, as expressions of four main traditions of Omani song: sea and fishing songs, celebration songs, Bedouin traditional music and traditional mountain music;
- (iii) in China, national folk literature and arts are being recorded in the **Ten Collections of the Chinese National Folk Literature and Arts** (referred to as the "Great Wall of Civilization"). These Ten Collections comprise some 300 volumes of collections of Chinese songs, proverbs, operas, instrumental music, ballads, dances, and tales;<sup>141</sup>
- (iv) the **Archive of Folk Culture at the American Folklife Center**, Library of Congress, United States of America was established in 1928 and today maintains a multi-format, ethnographic collection that includes over two million photographs, manuscripts, audio recordings and moving images. The other major government repository for ethnographic material is the Center for Folklife and Cultural Heritage at the Smithsonian Institution. Established in 1967, its archive holds over 1.5 million photographs, manuscripts, audio recordings and moving images;<sup>142</sup>

- (v) in Ghana, the **International Center for African Music and Dance (ICAMD)**, based at the University of Ghana in Legon aims at the promotion of international scholarship and creativity in African music and dance. One of its main priorities is to serve as an archival, documentation and study center for African music and dance. The center's primary goal in this respect is to develop a unique library of oral texts (interviews, song texts, stories etc.), unpublished manuscripts and documentation of musical events (such as festivals, rituals and ceremonies), and the acquisition of manuscripts, books and audio-visual materials on African music, dance, drama as well as general works in the field of ethnomusicology and music education. The documented works include anthropological and historical materials on African societies and cultures, dictionaries and encyclopaedias of music, language dictionaries and a substantial collection of audio and video recordings of African music, dance and oral literature;<sup>143</sup>
- (vi) in Guatemala, efforts have been made to record and document certain expressions of traditional culture and folklore. A **Registry of Archaeological, Historical and Artistic Property** has been in operation since 1954, and its importance has grown in recent times. Its purpose is to record and thus maintain information on the historical origin, meaning and features of cultural expressions. The Registry records not only artifacts, monuments and other tangible objects of the national cultural heritage (including all pre-Hispanic, Mayan objects), but also intangible expressions of national culture such as traditional *fiestas*, oral traditions and legends. In Guatemala, the latter were being compiled and documented in particular by the *Centro de Estudios Folclóricos* of the *Universidad de San Carlos*;<sup>144</sup>
- (vii) the **Centre of Arab and Mediterranean music "Ennejma Ezzahra"**, Sidi Bou Said, Tunisia was established in 1991 with the objectives of: documentation and conservation of expressions of traditional Arabic and Mediterranean music; establishment of a database comprising an extensive and almost exhaustive set of recordings of traditional Tunisian music; publication and making available of such music to the public; publication of studies and research on traditional Tunisian, Arabic and Mediterranean music; and, organization of concerts. The Centre has compiled an impressive collection of documents through a systematic approach for such purpose. These documents are classified and made available to the public. It includes at its premises a Research Center, which offers research facilities for students and scholars in the field of musicology;<sup>145</sup>
- (viii) in Laos, *La Banque de Données Ethnographiques du Laos*, containing 6000 digitized photographs of traditional dress, musical instruments, handicrafts and textiles. Relevant international conventions and programs.

## **UNESCO**

UNESCO has undertaken several initiatives at the international, regional and national levels concerning the identification, conservation, preservation and dissemination of 'intangible cultural heritage' and/or 'traditional culture and folklore'.

A number of instruments, recommendations and programs have been adopted and established by UNESCO over the years:

- (i) the 1966 Declaration on the Principles of International Cultural Cooperation;
- (ii) the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and

Transfer of Ownership of Cultural Property, 1970 seeks to protect “cultural property” against theft, illicit export and wrongful alienation;

- (iii) the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (“the World Heritage Convention”) was adopted by the General Conference of UNESCO in 1972;
- (iv) UNESCO’s work on the protection of folklore resulted in 1989 in the Recommendation on the Safeguarding Protection of Traditional Culture and Folklore;
- (v) the Living Human Treasures program began in 1996 for the purpose of promoting the transmission of cultural expressions and skills by artists and artisans before they are lost through disuse or lack of recognition;
- (vi) in 1998, a program on Masterpieces of the Oral and Intangible Heritage of Humanity was created to honor the most remarkable examples of cultural spaces (defined as places in which popular and traditional cultural activities are concentrated or as the time usually chosen for some regularly occurring event) or forms of popular and traditional expression such as languages, oral literature, music, dance, games, mythology, rituals, costumes, craft work, architecture and other arts as well as traditional forms of communication and information;<sup>146</sup>
- (vii) the UNESCO Programme for the Preservation and Revitalization of Intangible Cultural Heritage has launched a publication series to help specialists catalogue and compile inventories of cultural forms, since they are constantly changing and may disappear forever on the death of their creators. The first volume in this series is a *Handbook for the Study of Traditional Music and Musical Instruments*.<sup>147</sup> A handbook for the study of vernacular architectural styles is in preparation.

Most recently, at UNESCO’s General Conference, 31<sup>st</sup> Session, a Resolution was adopted according to which a new standard-setting instrument on the protection of traditional culture and folklore is being developed.<sup>148</sup>

There are also several documentation initiatives at the international level. For example, UNESCO has produced, jointly with the African Cultural Institute, a guidebook entitled *Crafts: methodological guide to the collection of data*.<sup>149</sup> Using this guidebook, and following its wide distribution to UNESCO Member States in English, French, Spanish and Arabic, computerized databases will gradually be established by UNESCO, which will be accessible through international networks. This network for the worldwide collection and dissemination of data on craft forms and techniques will have its focal point in the International Centre for the Promotion of Crafts, which was established in September 1996 in Fez, Morocco. UNESCO has also published the “UNESCO Collection of Traditional Music of the World” .

### ***International Trade Centre (ITC)***

The International Trade Centre (ITC) is operated jointly by the World Trade Organization (WTO) which created the body, and the United Nations Conference on Trade and Development (UNCTAD). The ITC focuses on technical cooperation with developing countries in the promotion of trade. The main program areas of ITC include product and market development, development of trade support services, trade information, human resource development, international purchasing and supply management, and needs assessment and program design for trade promotion.

In collaboration with UNESCO, in 1996, ITC published a report entitled “Overview of Legal and Other Measures to Protect Original Craft Items” .<sup>150</sup> The Report proposed the establishment of a structure which should provide two-fold protection, namely protection of the artisans and craftspeople (the professionals) and the protection

of IP rights. The Report further stated that the protection of the professionals should be entrusted to a guild chamber, which should be set up in each country and would serve to defend the interests of its members.<sup>151</sup> In addition, the protection of IP rights in the crafts should be under the responsibility of a national society for original craft items (NSOCI). It would supervise and guide the guild chamber and provide the link between the bodies in question.<sup>152</sup> More recently, in July 2000, the ITC published a report “Legal and Other Measures to Protect Crafts”, based upon work undertaken, in collaboration with WIPO, in Bolivia, Colombia and Peru.

In respect of artisanal products (or handicrafts) in 2000 the ITC adopted a new World Customs Organization (WCO) recommendation, which requested countries to codify artisanal products in national statistical nomenclatures.<sup>153</sup>

In January 2001, a workshop organized by the ITC and WIPO took place in Havana, Cuba on the legal protection of original craft items. The development of effective national systems for the protection of craft items was advised, as well as the need to develop a relationship of trust with the members of the craft sector.<sup>154</sup>

### **The access to and making available of TCEs by fieldworkers, museums and archives**

There is a need for balance and coordination between preservation and protection, and a clearer relationship between the exercise of positive protection and the maintenance of the public domain. This arises in a practical way in the process of preservation of TCEs, because this very process can trigger concerns about lack of protection and can run the risk of unintentionally placing TCEs in the public domain or inadvertently giving third parties unrestricted capacity to use them against the originating community's own values and interests. This occurs most obviously when preservation is undertaken without the authorization of the traditional owner or custodian, for example the unauthorized recording of performances of expressions of folklore. But this tension also arises when the process of preservation is undertaken with the consent or involvement of the TCE holder, but unwittingly or incidentally undermines protection of TCEs - this can occur when material is recorded or documented without full understanding of the implications. Hence the process of preservation can be in tension with the desire to protect TCEs when disclosure, recording or documentation of this material undermines interests and precludes potential IP rights, and may place it in the public domain without the originating community's or TK holder's awareness of or consent to the full implications of preservation.

#### ***An example***

In the context of TCEs, these questions touch primarily upon copyright and related rights. For example, to take the case of a fieldworker who records the performance of a traditional song on audio tape with the consent of the performer, who for purposes of this example is a member of the cultural community from which the song originated.

- (i) There are potentially four distinct IP rights that may be relevant - copyright in the musical work; copyright in the words sung as part of the song (the lyrics); related rights of the performer of the song; and, related rights in the field recording.
- (ii) Assuming for now that the song and the words themselves are not copyright works (for one or more of the reasons discussed above in the section on literary and artistic productions), the performer of the song would have related “performer's rights” in his performance (under the WIPO Performances and Phonograms Treaty, 1996 (the WPPT), performances of “expressions of folklore” are protected).

- (iii) In addition, under IP law, the fieldworker (or the institution of which he is an employee) would be regarded as having related rights in the field recording, namely the rights of a sound recording producer, as it was he or she that made the fixation.
- (iv) In some cases, the fieldworker may deposit the recording for preservation purposes in an archive, museum, library or other such institution, to which he may transfer his or her IP rights (or the employer may transfer its rights) in the recording, in a deposit or similar agreement.
- (v) It is this physical recording of the song that is the most conveniently accessible by commercial and other users, and for this reason the rights in the recording assume a central importance. In the experience of many folklore archives and centers, the collector (fieldworker) is generally regarded as the custodian of the materials he or she collects, and not as having any rights in them. At least in the case of some public institutions, deposits of field recordings in an archive or other repository must be accompanied by release forms from the performers, the source community or other concerned tradition bearers. The donor of a collection has therefore the immediate responsibility as an intermediary between the source community or tradition bearers that he or she has collected from and the final repository of the collection.
- (vi) On the other hand, under IP laws as pointed out, IP rights in the such recordings vest normally in either the fieldworker (or employer) or the institution holding the recording, not in the performer or the community whose song was performed. It is here – in the management of the rights in and of access to the field recording - that there may be opportunities for practical action to protect the rights and interests of the performer and perhaps indirectly also the community from which the song originated.
- (vii) Museums, libraries and archives often make further copies of such recordings for preservation purposes (many national copyright laws allow the making of ‘archival copies’). They also facilitate public access to and use of their recordings and collections for teaching, research and commercial purposes, and in the case of publicly-funded institutions they may even be under a statutory duty to do so. It is at this point that there is an opportunity for the rights and interests of performers and relevant communities to be protected – for example, as is common practice at least in some countries among public archives and museums, it may be required that copies of recordings only be released upon evidence of the consent of the performers or of good faith efforts to find their heirs.
- (viii) To return to the example, another musician may legitimately access the recording of the traditional song in the museum or archive, re-arrange or re-record it, or sample the recording and create a new musical work. To the extent that he creates a new musical work, he would be entitled to copyright.
- (ix) In so doing, the musician is in a sense ensuring the onward transmission of the cultural expression and perhaps even its survival in economic terms (the recording industry, as well as the broadcasting, film and tourism industries, become the “ new patrons of oral traditions and folklore”<sup>155</sup>). It is not also bad policy to allow traditional creations to be used as a source of inspiration for the creation of new copyright works (see discussion above in section on literary and artistic productions and copyright law).
- (x) However, despite this, the indigenous or traditional community whose song was initially performed and the performer of the song whose performance was fixed, would probably be aggrieved not to receive any share of the commercial benefits and/of some form of acknowledgement. In the absence of any

copyright in the song itself, what of the sound recording rights of the fieldworker (or institution) and the rights of the performer?

- (xi) As for the first, the rights of a sound recording producer comprise *inter alia* the right to authorize the reproduction of the recording. This right may in principle be exercised in a way that takes into account the rights and interests of the original community and/or performer. The example provided by the U.S.A. regarding the monies paid to the performers of archival music use in a recent film, shows that preservation activities are relevant to and can play a part in the sharing of commercial benefits.<sup>156</sup> The possibilities in this area for making this a more common practice could be explored.
- (xii) As for the performer, his rights include the right of reproduction of his performance fixed in the field recording (Article 7, WPPT). His rights could be used to protect also the otherwise unprotected music and lyrics.
- (xiii) But it is not clear to what extent the rights of performers are taken into account in these cases, and in any event, the performer may not have the means to exercise and enforce his rights. (It could be added here that for countries that have not yet ratified the WPPT, and depending on national laws, his performance may not be a protected performance if the relevant national law does not require the protection of performances of “expressions of folklore” other than those defined as literary and artistic works in the copyright sense. This is because the Rome Convention and the TRIPS Agreement only require the protection of performances of literary and artistic works. In addition, under the Rome Convention and the TRIPS Agreement, the performer’s rights may not include the right to prevent the reproduction of the fixation of the performance because he had consented to the initial fixation (see the limitation of rights in Rome Convention, Article 7 (1) (c) (i), which is perhaps carried over to TRIPS, Article 14.1).
- (xiv) It can be added here too that had the fixation been audiovisual, the performer’s rights would be much more limited (in short because the TRIPS Agreement and the WPPT cover audio fixations only, and Article 19 of the Rome Convention provides that once a performer has consented to the incorporation of his performance in a visual or audio-visual fixation, Article 7 of the Convention which sets out the performer’s rights, shall have no further application).

This is a simplistic example, but it illustrates that a number of IP questions may arise in connection with the collection, recordal, preservation and dissemination of traditional cultural expressions. The collection, recordal, preservation and dissemination may, viewed from the perspective of indigenous peoples and traditional communities, carry certain IP-related dangers if the relevant IP issues are not successfully managed. While this example concerns music only, as Janke and others make clear, indigenous peoples and traditional communities have similar concerns with other forms of cultural heritage collected and held in archives and museums, such as photographs, documents, research papers, and movable cultural properties.

### ***Protocols, codes of conduct and guidelines***

As this example shows, collectors (fieldworkers) and archives lie at the junction between communities and the marketplace. They can therefore play a key mediatory role in protecting TCEs while also making it possible for people to use, re-use and re-create cultural heritage which is vital to its survival. However, the IP aspects require consideration and management, and in this respect, protocols, codes of conduct and/or guidelines dealing with

the IP aspects may be useful for both communities and for collectors, museums and archives. Member States of WIPO have expressed support for work in this area.<sup>157</sup>

Anthropologists, folklorists, ethnomusicologists and others have discussed this issue at length,<sup>158</sup> and there are already several policies, ethical codes, protocols and guidelines developed by folklorist, ethnographic and anthropological societies and other professional bodies, although few appear to deal with IP questions.

In developing IP-related protocols, codes of conduct and/or guidelines, some existing examples of protocols and codes of conduct could be used as a starting point:

- (i) the Australian National Association for the Visual Art's (NAVA) report *Valuing Art, Respecting Culture: Protocols for Working with the Australian Indigenous Visual Arts and Crafts Sector*. The report has raised public awareness and encouraged discussion of indigenous cultural and IP issues. The report details protocols for dealing with material created by indigenous people and with material containing imagery, motifs or styles which are identifiably indigenous. These codes are not legally enforceable, but they do establish industry standards that may, over time, be pointed to as a standard of conduct setting the course for legal rights;<sup>159</sup>
- (ii) the Statement of Ethics of the American Folklore Society;
- (iii) the Aboriginal and Torres Strait Islander Protocols for Libraries, Archives and Information Services;
- (iv) the Code of Practice of the Australian Arts Council for the Australian Visual Arts and Craft Sector;
- (v) the Research Policy of the Working Group of Indigenous Minorities of Southern Africa (WIMSA);
- (vi) from Canada, the Inuit Tapiriit Kanatami Guidelines for Responsible Research, the Dene Cultural Institute Guidelines and the TK Research Guidelines: A Guide for Researchers in the Yukon, prepared by the Council of Yukon First Nations;
- (vii) previous Possessions, New Obligations (Policies for Museums in Australia and Aboriginal and Torres Strait Islander Peoples).

Certain archives and institutions address these questions in their day to day activities. For example, Chaudhuri reports on efforts at the Archives and Research Centre for Ethnomusicology, American Institute for Indian Studies in India, to protect the rights of performers by limiting the rights of the depositors of field recordings and by contacting the performers of deposited recordings to explain their rights.<sup>160</sup> The American Folklife Center, of the Library of Congress, follows a similar approach, viewing the collector/donor as well as the archive as being in a curatorial position only, and committed to fulfilling the wishes of the original performer of the tradition:

“In other words, only the performer and his/her community or heirs are the rights-holders to the material; the collector/donor and the repository are curators, who are bound by the agreements reached among the parties. Where there are no written agreements, the researchers (sometimes with the help of the repository) must make a good faith effort to contact the original performer(s) to obtain written permission to re-use the material. This is especially in the case of where money may be made in a commercial recording. If that good faith effort fails, the researcher may still contact the collector/donor, who may have an opinion as the intermediary as to the wishes of the performer or the performer's community. Thus, there is a four-way dialogue among the performer, the collector/donor, the repository, and the researcher, where each has a role: The performer is the rights-holder, the collector/donor is the intermediate curator, the repository is the final curator, and the researcher is the applicant for permission to use the material” .<sup>161</sup>

At the Oman Centre of Traditional Music, experts at the center regard the development of new ways of promoting the musical heritage in Oman without the consent of the traditional performer as a violation of the customary understanding of heritage use, they do not believe that exclusive rights should be granted in the reproduction of traditional music. Nevertheless, they do welcome the grant of performers' rights to the performers of traditional Omani music.<sup>162</sup>

### ***A check list and model IP contractual clauses***

Closely linked to the development of protocols, codes of conduct and/or guidelines, would be the development of IP tools to use in elaborating deposit, access, release and license agreements used by ethnomusicologists and other fieldworkers, archives, museums, libraries and other institutions. These tools could include a check list of key issues that should be considered and model IP-related clauses for such agreements.

Several examples exist of license and other agreements that could be used as a basis for such work. For example, the Australian Arts Law Center and the Working Group on Indigenous Minorities of Southern Africa (WIMSA) have developed model agreements and The Center for Folklife and Cultural Heritage of the Smithsonian Institution in the United States of America has extensive archives and collections of original sound recordings, drawings, posters, business records, correspondence, audiovisual recordings and photographic material. As a part of the Center, Smithsonian Folkway Recordings holds extensive collections of American Indian, bluegrass, blues, children's, and classical music as well as other genres. It licenses its music collection for non-profit or commercial purposes and for this purpose has developed a "Master Recording License Request Form".<sup>163</sup>

### ***Digitized cultural heritage – "Rules of Use" and "Copyright Notices"***

Cultural heritage is a rich resource for feeding the communication networks of the information society with cultural content. Museum and other collections are increasingly being digitized and presented in a variety of electronic media, such as websites, CD-ROMs, and specialized databases. This is being done for museological/curatorial and commercial purposes, such as for making educational, scientific and commercial by-products.<sup>164</sup> The interaction of the cultural heritage with the information society poses some complex challenges and questions, however, particularly in so far as public domain TCEs are concerned.

Regarding digitized cultural heritage specifically in relation to public domain TCEs, the development of model IP-related "Rules of Use" and notices (such as "Copyright Notices" for copyright works) for use in connection with websites, CD-ROMs, specialized databases and other electronic multimedia products could be useful. Useful here would be the experiences of the Canadian Heritage Information Network (CHIN) and the Arts Law Center of Australia, amongst others.

### ***Documenting, recording and inventorying TCEs***

While these issues concern mainly collections established and held by others, this section also addresses whether or not it is advisable, from an IP standpoint, for cultural communities to undertake the recordal and documentation of their public domain TCEs as a strategy for either:

- (i) establishing IP in the TCEs (for 'positive' protection purposes); or,
- (ii) preventing the acquisition of IP in the TCEs (for 'defensive' protection purposes).

### ***The documentation and recordal of TCEs as an IP strategy for positive protection***

The documentation of TK related to technical areas such as medicine, biodiversity conservation and agriculture for defensive as well as positive protection purposes is receiving much attention. However, this raises practical and policy questions about the desirability of documentation and publication of TK, given the limitations that have been encountered in applying positive rights to TK that has been publicly disclosed.

It is uncertain whether and how documentation and recordal of TCEs is a valuable strategy for establishing positive rights in the TCEs, at least in so far as copyright in literary and artistic works are concerned. Apart from the huge costs involved in documenting and recording TCEs, the copyright that may vest in the documentation and recordings may (i) not vest in the communities themselves (unless they are the authors or have taken assignment of the rights) and (ii) in any event extends only to the ways in which the TCEs are expressed and not to the 'ideas' represented by the TCEs. Documentation and recordal, on the other hand, and particularly if it is made available in digitized form, makes the TCEs more accessible and available and may undermine the efforts of communities to protect them. It would seem therefore that the mere documentation of TCEs cannot stand alone as an effective strategy for acquiring IP in the TCEs. Documentation does of course play an important role in strategies for the safeguarding of cultural heritage and traditional cultures.

However, there are three areas worth pursuing that may justify the documentation/recordal of TCEs as a strategy for positive protection: the use of software and digital rights management tools; the protection available for collections and databases; and, the harmonization of industrial property documentation standards with cultural heritage documentation standards.

First, much work is being done on using software and digital rights management tools for the management of rights and interests in digitized collections of TCEs. These may offer useful avenues for protection of a technological nature and require further consideration. An example is work being undertaken by the Indigenous Collections Management Project, a collaborative project of the Distributed Systems Technology Center in Australia and the Smithsonian Institute's National Museum of the American Indian (NMAI) Cultural Resources Centre. While recognizing the potential benefits that digital technologies can offer with regard to the preservation and documentation of their histories and cultures, indigenous communities are also coming to understand the opportunities for misuse and misappropriation of their knowledge which may accompany digitization. Software tools which have been designed to enable indigenous communities to protect unique cultural knowledge and materials which have been preserved through digitization. The software tools described here enable authorized members of communities to: define and control the rights, accessibility and reuse of their digital resources; uphold traditional laws pertaining to secret/sacred knowledge or objects; prevent the misuse of indigenous heritage in culturally inappropriate or insensitive ways; ensure proper attribution to the traditional owners; and enable indigenous communities to describe their resources in their own words.<sup>165</sup>

Second, the legal protection afforded to collections, anthologies and databases may offer some protection for documented and recorded TCEs. For example, a database of fading Native American rock art is both preserving and protecting the art.

There are already many electronic databases of traditional cultural expressions throughout the world, such as a CD-ROM containing "Folk Performances of Thailand," published by the Office of the National Culture Commission of Thailand; the Lao database referred to earlier; and the "Cultural Stories" database being

developed by the Tulalip Tribes of the U.S.A. It is not however clear to what extent copyright and related rights issues may be relevant or have been considered in their development and dissemination.

It is often suggested that expressions of folklore may be protected indirectly either by copyright protection afforded to databases that are 'original' by reason of the selection or arrangement of their contents, or by proposed *sui generis* protection for non-original databases.

Database protection under copyright does not protect the contents of the database and is without prejudice to any rights subsisting in the contents. Therefore, the protection in question would not apply to the expressions of folklore in the database, but only to their publication and presentation in the form of a collection, anthology or compilation. There would be nothing, therefore, to prevent a non-indigenous person from extracting one of the songs making up a collection of traditional music and reproducing, adapting and commercializing that song, assuming for the present that no other rights attach to the song.

However, the prospect of *sui generis* database protection may have application in this area. A European Community directive and certain national laws now provide for protection of non-original databases. As an example, the European Community directive provides, for the makers of databases, which represent a substantial investment in either the obtaining, verification or presentation of the contents, the rights to prevent the extraction and/or re-utilization of the whole or of a substantial part of the database's contents. This protection applies irrespective of the eligibility of the contents for protection by copyright or by other rights.

Therefore, from the perspective of indigenous peoples and traditional communities, it is possible that collections and databases of expressions of folklore made by the relevant communities, whether or not the individual expressions are regarded as "literary and artistic works," could be protected under proposals for *sui generis* database protection. However, whether this protection could, in principle, extend to individual expressions being extracted and re-utilized is doubtful.

However, in cases where the collection or other form of database is made by a person or persons other than the indigenous or traditional persons or community that is the source of the expressions of folklore, it is that other person or persons who would own the rights in the database. In order for the relevant indigenous peoples and traditional communities to hold the rights in such databases, they must be regarded as the creators or makers of the databases, or at least acquire the rights from the creators and makers. In this respect, the use of contracts to protect the rights of the TCE performers and or tradition-bearers could be explored further.

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. This could entail, for example, the harmonization of existing industrial property classification and documentation standards (such as the Locarno Agreement Establishing an International Classification for Industrial Designs, 1979 and Standard ST.80 (Recommendation Concerning Bibliographic Data Relating to Industrial Designs (Identification and Minimum Requirements)),<sup>166</sup> and tradition-based design documentation standards (such as the UNESCO methodological guide to the collection of data on crafts, mentioned earlier).

However, the practical usefulness of such work should be evaluated.

### ***Documentation of TCEs as a defensive IP strategy***

This refers to the documentation of TCEs as a means of voiding the possibility of acquiring industrial property titles which have bearing on the use of production of TCEs, with particular reference to industrial designs but potentially also including patents.

Some people consulted on the WIPO fact-finding missions had suggested three steps for an improved protection of TK-based designs under the existing industrial design system: (1) standards for the documentation of tradition-based design should take into account the minimum documentation requirements for industrial designs under the TRIPS Agreement and the Hague Agreement Concerning the International Deposit of Industrial Designs; (2) the industrial property offices should incorporate standardized documentation of traditional designs into their search files for examination of the substantive examination of applications for industrial design titles; (3) relevant classes or subclasses for TK-based designs should be established under the Locarno Agreement Establishing an International Classification for Industrial Designs (1979).<sup>167</sup> The inclusion of the lists of cultural expressions and including them into an international design registry such as the Hague Agreement could help examiners identify cultural expressions belonging to traditional communities and refusing any applications for the registration thereof on the legal basis that they are not new and original, and the applicant is not the creator of the design.

This suggestion mirrors the work being undertaken in relation to ‘technical’ TK and patents aimed at the defensive publication of TK so as to prevent the acquisition of patent rights over TK-based inventions. Accordingly, the integration of information about cultural expressions would aim at enabling documentation initiatives to make public domain tradition-based designs data available to IP offices, and allowing them to integrate such data into their existing procedures for the filing, examination, granting and publication of IP titles.

While this may be pursued, it is not clear to what extent such activities for the ‘defensive publication’ of industrial design information would meet real needs. The acquisition of industrial design rights over handicrafts and other tangible TCEs purportedly already in the ‘public domain’ does perhaps not seem as prevalent as is the case in other areas, such as patents. In addition, as more countries, including developed countries, appear to be moving away from substantive examinations of industrial design applications (particularly novelty searches), extensive activities in relation to the integration of cultural expressions information into searchable prior art for industrial design purposes may not serve practically useful purposes. On the other hand, clear prior publication may be useful in defeating third parties’ adverse claims that designs were new or original.

### **The establishment of registers, list and inventories of TCEs as an IP strategy**

Cultural heritage programs at the international, regional and national levels frequently establish registers, lists and inventories of intangible and tangible cultural heritage as useful tools for identification, promotion and safeguarding. For example, Brazil has established a Registry of Intangible Heritage and the International Convention on the Safeguarding of the Intangible Cultural Heritage being discussed at UNESCO envisages the establishment at the national and international levels of registries, inventories and lists. However, do or could registries, lists and inventories play a role in IP strategies, either to establish positive rights or for defensive protection purposes?

Several States which have established *sui generis* systems for the legal protection of TCEs have created a registration system. Examples are Panama and the Philippines. Certain other countries also provide for registries, such as Cuba.<sup>168</sup> In the response of Costa Rica to the WIPO folklore questionnaire of 2001, detailed proposals are set out for how such registers could be established and managed.

The Model Provisions, 1982 do not provide for any form of registration or documentation, and the Model Law for the South Pacific countries does not do so either.

## **XI. ACQUISITION, MANAGEMENT AND ENFORCEMENT OF RIGHTS**

Numerous countries have provided specific legal protection for expressions of folklore, and it appears that there are few countries in which it may be said that such provisions are actively utilized and functioning effectively in practice. In addition, reported use of existing IPRs where relevant appears limited to a few countries only. Therefore there is a strong need for the strengthening and more effective implementation, at the national level, of existing systems and measures for the protection of TCEs, taking into account the diverse legal, conceptual, infrastructural and other operational needs of countries.

Certain specific suggestions for improving use of existing rights and for strengthening the effective implementation of specific systems include:

- (a) awareness-raising programs and specialized training for indigenous peoples and local communities in accessing, understanding and using formal IP systems and other legal tools available to them;
- (b) public information activities aimed specifically at indigenous peoples and local communities, and other activities carried out by national IP offices and other agencies designed to explain IP rules and systems clearly, and to facilitate access to the national IP offices and the IP system;
- (c) the possible reduction of filing and renewal fees for indigenous peoples and traditional communities;
- (d) the establishment and strengthening of the institutional structures necessary to implement legislative provisions and other measures;
- (e) where possible, making use of existing or new collective management societies;
- (f) national consultations among producers of handicrafts and other expression of folklore;<sup>169</sup>
- (g) the establishment of national focal points;<sup>170</sup>
- (h) the establishment of legal and structural linkages between systems for the legal protection of traditional cultural expressions and researchers and archives; and,
- (h) the use of alternative dispute resolution (ADR).

## 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.



## ANNEX

### COMPARATIVE SUMMARY OF *SUI GENERIS* LEGISLATION FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE

This table contains information on the following *sui generis* systems:

- Tunis Model Law on Copyright for Developing Countries, 1976.
- WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, 1982.
- Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999;
- U.S.A. Indian Arts and Crafts Act, 1990 and Enforcement Act, 2000.
- Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001.
- Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002.

The table has been compiled using the texts of the laws, the texts of related documents such as decrees and regulations, and where relevant the information provided by Member States. It should be noted that this is provided as an information resource only, and is not intended as an authoritative interpretation or legal assessment of any law or international legal instrument.

	<b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b>	<b>Model Provisions (1982)</b>	<b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b>
<b>POLICY CONTEXT AND OBJECTIVES</b>	<p>In so far as “folklore” is concerned, protection is provided “to prevent any improper exploitation and to permit adequate protection of the cultural heritage known as folklore which constitutes not only a potential for economic expansion, but also a cultural legacy intimately bound up with the individual character of the community.” (Notes to Section 6)</p>	<p>Folklore is an important part of living cultural heritage of nations.</p> <p>Dissemination of folklore can lead to improper exploitation of cultural heritage, and any abuse or any distortion of folklore prejudices the cultural and economic interests nations.</p> <p>Expressions of folklore manifesting intellectual creativity deserve IP-type protection.</p> <p>Such protection of expressions of folklore is indispensable for their development, maintenance and dissemination.</p> <p>Therefore:</p> <p>Protection is provided for expressions of folklore against illicit exploitation and other prejudicial actions.</p> <p>Preamble and Section 1.</p>	<p>Promote the effective contribution of IP to the development of Member States.</p> <p>Protect IP in an effective and uniform manner.</p> <p>Contribute to the promotion of the protection of literary and artistic property as an expression of cultural and social values.</p>
<b>SUBJECT MATTER</b> (The protected subject matter)	<p>“Folklore” is defined in Section 18 - all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.</p> <p>Folklore receives <i>sui generis</i> protection.</p> <p>On the other hand, works derived from folklore are treated as copyright works.</p>	<p>Productions consisting of characteristic elements of traditional artistic heritage developed and maintained by a community, in particular, verbal expressions, (folk tales, folk poetry, riddles); musical expressions (folk songs and instrumental music); expressions by action (folk dances, plays and artistic forms or rituals); and tangible expressions (productions of folk art, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket-weaving, needlework, textiles,</p>	<p>“Expressions of folklore” are defined as productions of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community, including folk tales, folk poetry, folk songs, instrumental music, folk dancing and entertainment as also the artistic expressions of rites and productions of folk art (Article 2 (xx)).</p> <p>Expressions of folklore and works derived from folklore seem to be protected as copyright works (Article 5(xii)).</p>

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
and Indian Arts and Crafts  
Enforcement Act of 2000  
(P.L. 101-497)  
(as amended as at September 2003)**

The Indian Arts and Crafts Act 1990 aims to promote the development of American Indian and Alaska Native arts and crafts, improve the economic status of members of Federally-recognized tribes, and help develop and expand marketing opportunities for arts and crafts produced by American Indians and Alaska Natives (1935 predecessor Act). In response to growing sales in the billion dollar U.S. Indian arts and crafts market of products misrepresented or erroneously represented as produced by Indians, the US Congress passed the Indian Arts and Crafts Act of 1990. This Act is essentially a truth-in-advertising law designed to prevent marketing products as “Indian made” when the products are not, in fact, made by Indians as defined by the Act.

The Indian Arts and Crafts Enforcement Act of 2000 expands civil provisions to allow organizations and individuals to sue. It also expands liability to include “indirect” marketers. It includes regulations clarifying the definition of Indian product.

Section 309.2 (d) P.L. 101-497: “Indian products” - any art or craft product made by an Indian (term “made by an Indian” means that an Indian has provided the artistic or craft work labor necessary to implement an artistic design through a substantial transformation of materials to produce the art or craft work. This may include more than one Indian working together). The labor component of the product, however, must be entirely Indian for the Indian art or craft object to be an “Indian product.”

**Panama Law No. 20  
(June 26, 2000)  
and Executive Decree No. 12  
(March 20, 2001)**

The objective is to protect the collective IP rights and TK of indigenous communities through the registration, promotion, commercialization and marketing of their rights in such a way as to give prominence to indigenous socio-cultural values and cultural identities and for social justice (Preamble and Article 1 of the Law; Preamble of the Decree).

Another key objective is the protection of the authenticity of crafts and other traditional artistic expressions

Customs, traditions, beliefs, spirituality, cosmovision, folkloric expressions, artistic manifestations, TK and any other type of traditional expressions of indigenous communities which are part of their cultural assets (cultural heritage) (Law, Article 2).

“Collective IP rights” and “traditional knowledge” embodied in creations such as inventions, models, designs and drawings, innovations contained in images, figures, graphic symbols, petroglyphs and other material, cultural elements of history, music, arts and traditional artistic expressions (Decree, Article 1).

**South Pacific Model Law for  
National Laws  
(2002)**

The objective is to protect rights of traditional owners in their TK and expressions of culture and permit tradition-based creativity and innovation, including commercialization thereof, subject to prior and informed consent and benefit-sharing. The Model Law also reflects the policy that it should complement and not undermine IP laws.

Cultural expressions are the main focus of the Law.

Expressions of culture are defined as any ways in which TK appears or is manifested, including inter alia names, stories, chants, riddles, histories, songs in oral narratives, art and craft, musical instruments, sculpture, painting, carving, pottery, terracotta mosaic, woodwork, metalware, painting, jewelry, weaving, needlework, shell work, rugs, costumes and textiles, music, dances, theatre, literature, ceremonies, ritual performances, cultural practices, designs, architectural forms.

	<p style="text-align: center;"><b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b></p>	<p style="text-align: center;"><b>Model Provisions (1982)</b></p>	<p style="text-align: center;"><b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b></p>
<p><b>SUBJECT MATTER</b> (The protected subject matter)</p>		<p>carpets, costumes, musical instruments, and [architectural forms.] (Section 2).</p>	<p>Translations, adaptations, arrangements and other transformations of expressions of folklore also seem to be protected as copyright works, as are collections and databases of works and expressions of folklore (Article 6 (1) (i) &amp; (ii)).</p> <p>“Performances” as defined include performances of “expressions of folklore” (Article 46).</p>

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
and Indian Arts and Crafts  
Enforcement Act of 2000  
(P.L. 101-497)  
(as amended as at September 2003)**

Section 309.2 (2) P.L. 101-497: Term "Indian product" includes, but is not limited to:  
(i) Art made by an Indian that is in a traditional or non-traditional style or medium; (ii) Craft work made by an Indian that is in a traditional or non-traditional style or medium; (iii) Handcraft made by an Indian (i.e. an object created with the help of only such devices as allow the manual skill of the maker to condition the shape and design of each individual product).

Section 309.2 (3) P.L. 101-497: Examples of non-qualifying products.

An "Indian product" under the Act does not include any of the following, for example:

- (i) A product in the style of an Indian art or craft product made by non-Indian labor;
- (ii) A product in the style of an Indian art or craft product that is designed by an Indian but produced by non-Indian labor;
- (iii) A product in the style of an Indian art or craft product that is assembled from a kit;
- (iv) A product in the style of an Indian art or craft product originating from a commercial product, without substantial transformation provided by Indian artistic or craft work labor;
- (v) Industrial products, which for this purpose are defined as goods that have an exclusively functional purpose, do not serve as a traditional artistic medium, and that do not lend themselves to Indian embellishment, such as appliances and vehicles. An industrial product may not become an Indian product.

**Panama Law No. 20  
(June 26, 2000)  
and Executive Decree No. 12  
(March 20, 2001)**

Collective indigenous rights" means the indigenous cultural and IP rights relating to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people (Article 2, Decree). "Traditional knowledge" means the collective knowledge of indigenous people based on the traditions of centuries, and indeed millennia, which are tangible and intangible expressions encompassing their science, technology and cultural manifestations, including their genetic resources, medicines and seeds, their knowledge of the properties of fauna and flora, oral traditions, designs and visual and representative arts. (Article 2 Decree).

Only subject matter capable of commercial use appears covered (Law, Article 1).

A classification system is created by the Decree (Article 3) and several examples of protected subject matter are given by the Law and the Decree, such as traditional dresses of certain named indigenous communities, musical instruments, music, dances, performances, oral and written expressions, working instruments and traditional art and techniques for making them, such as basket and bead work (Law, Articles 3, 4 and 5).

**South Pacific Model Law for  
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	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)
<b>SUBJECT MATTER</b> (The protected subject matter)			
<b>CRITERIA FOR PROTECTION</b> (Conditions that the subject matter must meet for protection. Examples: originality, novelty, distinctiveness, fixed form etc).	<p>Fixation not required (Section 5bis)</p> <p>Originality not required.</p> <p>No criteria specifically stated.</p>	<p>None specified.</p>	<p>Expressions of folklore and works inspired by them are regarded as “original” copyright works (Article 5).</p> <p>Need not be fixed on material medium (Article 4(2)).</p>

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
and Indian Arts and Crafts  
Enforcement Act of 2000  
(P.L. 101-497)  
(as amended as at September 2003)**

(vi) A product in the style of an Indian art or craft product that is produced in an assembly line or related production line process using multiple workers not all whom are Indians. (For example, if twenty people make up the labor to create the product(s), and one person is not Indian, the product is not an "Indian product.")

Craft products must be authentic Indian product as set out in the Act.

Section 309.2 P.L. 101-497: labor component involved must be entirely Indian

Section 309.6 P.L. 101-497: commercial product can become an Indian product when the Indian labor expended to the craft work or object is sufficient to substantially transform the qualities and appearance of the original commercial item

Craft maker or artisan must be Indian or has received certification as an Indian artisan.

Section 309.4 P.L. 101-497: How can an individual be certified as an Indian artisan?

- (a) In order for an individual to be certified by an Indian tribe as a non-member Indian artisan for purposes of this part-
  - (1) The individual must be of Indian lineage of one or more members of such Indian tribe; and
  - (2) The certification must be documented in writing by the governing body of an Indian tribe or by a certifying body delegated this function by the governing body of the Indian tribe.
- (b) As provided in section 107 of the Indian Arts and Crafts Act of 1990, Public Law 101-644, a tribe may not impose a fee for certifying an Indian artisan.

**Panama Law No. 20  
(June 26, 2000)  
and Executive Decree No. 12  
(March 20, 2001)**

The subject matter must:

- (i) be capable of commercial use (Law, Article 1);
- (ii) be based upon tradition, although it need not be 'old' (Law, Article 15);
- (iii) fit within the classification system established by Article 3 of the Decree;
- (iv) be "collective", i.e., the subject matter must have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people (Decree, Article 2), or must be regarded as belonging to one or more of the indigenous communities of Panama (Decree, Article 5 and 6).

**South Pacific Model Law for  
National Laws  
(2002)**

The subject matter must be "traditional" i.e., (i) created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; (ii) transmitted from generation to generation; (iii) regarded as pertaining to a particular traditional group, clan, or community of people; and (iv) is collectively originated and held (Section 4).

Need not be in material form (Section 8).

	<p style="text-align: center;"><b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b></p>	<p style="text-align: center;"><b>Model Provisions (1982)</b></p>	<p style="text-align: center;"><b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b></p>
<p><b>HOLDER OF RIGHTS</b></p>	<p>Rights in folklore exercised by a competent authority (Sections 6 and 18).</p>	<p>Either a "competent authority" or relevant community.</p>	<p>The author is the first holder of the economic and moral rights. Specific provisions deal with collaborative works, collective works, the works of employees, and other cases – there are no specific provisions dealing with expressions of folklore (Articles 28 to 33).</p>
<p><b>RIGHTS CONFERRED</b> (Including exemptions and free uses)</p>	<p>Section 6 – works of national folklore enjoy rights referred in Section 4 and 5(1) and are exercised by the competent authority.</p> <p>Section 4 – Economic Rights: author has exclusive right to reproduce, make translation, adaptation, arrangement, transformation, communicate work to public either through performance or broadcasting.</p> <p>Section 5(1) - Moral Rights: to claim authorship, to object to and seek relief in connection with distortion, mutilation, modification or any other action which would be prejudicial to his honor or reputation.</p>	<p>The following uses when made with both gainful intent and outside the traditional or customary context, require prior authorization: publication, reproduction, distribution of copies, public recitation, performance, transmission by wire or wireless means and any other form of communication to the public (Section 3).</p> <p>Acknowledgement of source (Section 5) - source must be acknowledged in appropriate manner (mentioning community and/or geographic place from where expression utilized has derived from) in all printed publications, in any communications to the public.</p>	<p>Expressions of folklore and works inspired by them are regarded as copyright works in respect of which economic and moral rights as understood in the copyright sense seem to apply (Article 8 and 9).</p> <p>Performances of expressions of folklore are accorded the same protection as is accorded to other performances (Article 48).</p> <p>In addition, however, expressions of folklore and works that have fallen into the public domain are subject to "<i>domaine public payant</i>" (Section 59).</p>

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
and Indian Arts and Crafts  
Enforcement Act of 2000  
(P.L. 101-497)  
(as amended as at September 2003)**

American Indians; Native Alaskans; State-recognized Indian Tribes (see s 309.2(e) (1), (2), (3) for definition of Indian tribe) [note: s104 (3)(A) Indian tribe - any Indian tribe, band, nation, Alaska Native village, or other organized group or community which is recognized as eligible for the special programs and services provided by the U.S. to Indians because of their status as Indians; or (B) any Indian group that has been formally recognized as an Indian tribe by state legislature, state commission or similar organization legislatively vested with State tribal recognition authority.]

Indian tribe must be resident of U.S.

Indian artisan - individual certified by an Indian tribe as a non-member s 309.2(b)  
Maker must be member of Indian tribe or certified by Indian tribe.

Section 104 (a) P.L. 101-644: Act prohibits the offering or displaying for sale or selling of any good, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the U.S.

Section 102 P.L. 101-644: The Board has the power to create Government trade marks of genuineness and quality for Indian products and the products of particular Indian tribes or groups (Section 2(g)). The scope of rights arising from the creation of such a mark is set out in the Trademark Act of 1946, as amended.

**Panama Law No. 20  
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The relevant indigenous communities represented by their general congresses or traditional authorities.

More than one community can be registered collectively as holders of the rights (Decree, Article 5).

Collective rights to authorize or prevent:  
(i) use and commercialization; (Article 15).  
(ii) industrial reproduction (Law, Article 20).

Collective right to apply for IP over protected subject matter (Law, Article 2).

Collective right to prevent or authorize third parties from acquiring exclusive IP over protected subject matter (Law, Article 2).

Collective right to consent to the certification of cultural expressions as works of indigenous traditional art or handicraft and handmade by natives (Law, Article 10, Decree, Article 15).

**South Pacific Model Law for  
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Traditional owners of TK or expressions of culture, being the group, clan or community, or individual recognized as part of group, clan or community, in whom the custody or protection of the TK or expressions of culture are entrusted in accordance with customary law and practices (Section 4).

If a derivative work is created, IP in work vests in creator or as provided for by IP law (see further below).

The Model Law establishes “traditional cultural rights” and “moral rights” in TK or expressions of culture.

Traditional cultural rights are rights to authorize or prevent the following uses:  
(i) to reproduce the TK or expressions of culture;  
(ii) to publish the TK or expressions of culture;  
(iii) to perform or display the TK or expressions of culture in public;  
(iv) to broadcast the TK or expressions of culture to the public by radio, television, satellite, cable or any other means of communication;  
(v) to translate, adapt, arrange, transform or modify the TK or expressions of culture;  
(vi) to fixate the TK or expressions of culture through any process such as making a photograph, film or sound recording;

	<p style="text-align: center;"><b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b></p>	<p style="text-align: center;"><b>Model Provisions (1982)</b></p>	<p style="text-align: center;"><b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b></p>
<p><b>RIGHTS CONFERRED</b> (Including exemptions and free uses)</p>	<p>Rights do not apply however when works of national folklore are used by a public entity for non-commercial purposes (Section 61bis).</p> <p><i>Domain public payant</i> system also introduced (Section 17). Users of works of national folklore must pay percentage of receipts to competent authority for specified purposes (Section 17).</p>	<p>Exceptions (Section 4 and 5(2)): No authorization required for:</p> <ul style="list-style-type: none"> <li>(i) purposes of education</li> <li>(ii) utilization "by way of illustration" in original work</li> <li>(iii) where expressions of folklore are "borrowed" for creating an original work of author</li> <li>(iv) "incidental utilization" such as reporting on current events, located permanently in public place.</li> </ul>	<p>The exploitation of expressions of folklore and that of works or productions that have fallen into the public domain on expiry of the terms of protection shall be subject to the user entering into an undertaking to pay to the national collective rights administration body a relevant royalty. Royalties collected with respect to the exploitation of expressions of folklore shall be devoted to welfare and cultural purposes.</p>

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
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Exemptions for folkloric dance groups (Law, Article 16) and small non-indigenous artisans in certain cases –they are able to manufacture and market reproductions, but they will not be able to claim the collective rights recognized by this Law (Law, Articles 23 and 24; Decree, Articles 26 and 27)

Registration of collective rights in an object or in TK shall not affect the traditional exchange of the object or the knowledge in question between indigenous peoples (Decree, Article 11).

- (vii) to make available online or electronically transmit to the public (whether over a path or a combination of paths, or both) TK or expressions of culture;
- (viii) to create derivative works;
- (ix) to make, use, offer for sale, sell, import or export TK or expressions of culture or products derived therefrom;
- (x) to use the TK or expressions of culture in any other material form, if such uses are a non-customary (whether or not of a commercial nature) (Section 7).

“Moral rights” refers to rights of attribution of ownership; the right not to have ownership falsely attributed; right not to have TK subject to derogatory treatment (Section 13).

If cultural expressions and derivative works are used for commercial purposes, user must share benefits with traditional owners, acknowledge source and respect moral rights (Section 12).

Traditional cultural rights do not prevent uses of cultural expressions by traditional owners (Section 7(3)), nor to face-to-face teaching, criticism or review, reporting news or current events, judicial proceedings, and incidental use, although sufficient acknowledgement is needed in these cases (Section 7(4) and (5)).

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)
<b>PROCEDURES AND FORMALITIES</b>	<p>None stated.</p> <p>License agreements authorized by the competent authority but must be preceded by negotiations with parties concerned.</p>	<p>Uses as contemplated in Section 3 subject to authorization (section 9).</p> <p>Competent authority grants authorization, fee required (section 10(2)).</p> <p>Appeals against decisions made by person applying for authorization and/or representative of interested community section (section 10(3)).</p>	<p>No particular procedures for expression of folklore</p>

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
and Indian Arts and Crafts  
Enforcement Act of 2000  
(P.L. 101-497)  
(as amended as at September 2003)**

Section 309.6 (d) P.L. 101-497: Filing of complaints  
Complaints about protected products alleged to be offered or displayed for sale or sold in a manner that falsely suggests they are Indian products should be made in writing to the Indian Arts and Crafts Board (IACB).

The IACB may register Government trademarks of genuineness and quality for Indian products without charge (Section 2(g))

**Panama Law No. 20  
(June 26, 2000)  
and Executive Decree No. 12  
(March 20, 2001)**

A special registration system is established (Law, Article 1).

Applications for registration must specify that a collective right is involved, that the object applied for belongs to an indigenous community, the technique used, and the history and brief description of the object (Decree, Article 6).

Registration must be made by the indigenous community or by its general congresses or indigenous traditional authority (Law, Article 7).

The application must contain certain prescribed information (Decree, Article 7) and the form is publicly available. The application must include a specimen of the object.

The application procedure does not require legal services and is exempt from payment (Law, Article 7).

Registrations are published and appeals against them may be lodged (Decree, Article 10).

The register of collective rights is public, with the exception of experiments and cognitive processes conducted by indigenous peoples and the traditional production techniques or methods used (Decree, Article 12).

The position of an examiner on indigenous collective rights is established in the industrial property office to examine all applications filed to ensure that industrial property registrations are not granted that are against the Law (Law, Article 9).

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Uses of cultural expressions require prior and informed consent.

Applications for consent may be made directly to a "Cultural Authority" or directly to traditional owners.

Applications to the Cultural Authority must be in prescribed form; specify manner in which applicant proposes use; state purpose for which use intended; prescribed fee.

The Cultural Authority must finalize application in prescribed period. If not, it is deemed that consent not given by traditional owners.

Applications are published by means of copy to traditional owners, copy in national newspaper, and if required broadcast on radio and TV.

Appeals relating to application must be made within 28 days of publication.

In the event of direct negotiations between the user and the owners, the Cultural Authority must still be provided with a copy of the proposed authorized user agreement (Section 25(2)).

Potential users of cultural expressions must enter into an authorized user agreement with the traditional owners should they agree to the proposed use. An authorized user agreement should include terms and conditions about the following:

- (i) sharing of financial and other benefits arising from the use of the TK or expressions of culture;

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)
<p><b>PROCEDURES AND FORMALITIES</b></p>			
<p><b>RESPONSIBILITIES OF NEW OR EXISTING AUTHORITIES AND INSTITUTIONS</b></p>	<p>Competent authority – proposed that authority be body responsible for administration of authors’ rights within country (Notes).</p> <p>User of work of folklore must obtain authorization from competent authority</p>	<p>Competent authority determined by enacting country (Section 9(1))</p> <p>Court has jurisdiction to hear appeals against decisions of competent authority (Section 11(1)).</p> <p>OR</p>	<p>No particular provisions concerning expressions of folklore.</p>

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
and Indian Arts and Crafts  
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- (ii) compensation, fees, royalties or other payments for the use;
- (iii) whether the use will be exclusive or non-exclusive;
- (iv) duration of the use to be allowed and rights of renewal;
- (v) disclosure requirements in relation to the use;
- (vi) the possible sharing by the traditional owners of any IP rights arising from the use of the TK or expressions of culture;
- (vii) access arrangements for the traditional owners;
- (viii) education and training requirements for the applicant;
- (ix) controls on publication;
- (x) specify whether the rights arising under the agreement can be assigned;
- (xi) choice of law in relation to disputes under the agreement;
- (xii) respect for moral rights of the traditional owners.

If a prospective user and the traditional owners enter into an authorized user agreement, the traditional owners are deemed to have given their prior and informed consent to the proposed use.

The Cultural Authority is to keep a register of authorized user agreements.

The IACB was established in 1935.

- created to promote American Indian and Alaska Native economic development;
- implement Act (P.L. 101-644);
- increase participation of Native Americans in Native Americans fine arts and crafts business;
- assist emerging artists entering market;

Applications for registration are made to the industrial property office or the copyright office (Law, Article 4).

A Department of Collective Rights and Expressions of Folklore is established within the industrial property office to approve applications and maintain the register (Law, Article 7).

The cultural authority must:

- (i) receive and process applications;
- (ii) identify traditional owners;
- (iii) monitor compliance and inform of breaches;
- (iv) develop standard terms and conditions for authorized user agreements;
- (v) keep a register of authorized user agreements;

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)
<b>RESPONSIBILITIES OF NEW OR EXISTING AUTHORITIES AND INSTITUTIONS</b>	<p>Competent authority defined in Section 18.</p> <p>Sums collected by the competent authority must be used <i>inter alia</i> to protect and disseminate national folklore (Section 17).</p>	<p>Court has jurisdiction in case of offences under Section 6 to Section 11(2).</p>	

**Indian Arts and Crafts Act of 1990  
(P.L. 101-644)  
and Indian Arts and Crafts  
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(as amended as at September 2003)**

- assist Native American cultural leaders who are developing institutional frameworks for supporting the evolution and preservation of tribal cultural activities;
- only federal agency that is consistently and exclusively concerned with the economic benefits of Native American cultural development;
- provides professional business advice, information on Act and related marketing issues, fundraising assistance, and promotional opportunities to Native American artists, craftspeople, and cultural organizations;
- interprets potentially unlawful conduct for enforcement purposes;
- can, for example, refer complaints of criminal violations to the Federal Bureau of Investigation and recommend to U.S. Attorney General that criminal proceedings be instituted.

Section 102 (P.L. 101-644): IACB establishes standards and regulations for the use of Government-owned trademarks by corporations, associations or individuals, and to charge for such use under such licenses; can register any such trademark owned by the Government in USPTO without charge and assign it and the goodwill associated with it to an individual Indian or Indian tribe without charge.

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Officials of the industrial property office and the Department of Collective Rights and Expressions of Folklore may go to indigenous communities to gather information necessary for prosecution of applications they may wish to file.

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- (vi) provide training and education for traditional owners and users;
- (vii) develop Code of Ethics;
- (viii) issue advisory guidelines;
- (ix) liaise with regional bodies;
- (x) maintain record of traditional owners and knowledge;
- (xi) provide guidance on meaning of "customary use."

	<p style="text-align: center;"><b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b></p>	<p style="text-align: center;"><b>Model Provisions (1982)</b></p>	<p style="text-align: center;"><b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b></p>
<p><b>SANCTIONS AND ENFORCEMENT PROCEDURES</b></p>	<p>Importation of copies of protected work into national territory constitutes an infringement and can be seized.</p> <p>Person infringing rights obliged to cease infringement; liable for damages; if willful be punishable by fine or imprisonment or both (Section 15(1)).</p> <p>Infringement of rights mentioned which are considered as violation of national cultural heritage and may be curbed by all legitimate means (Section 15(2)).</p> <p>Infringement materials subject to seizure (Section 15(3)).</p> <p>Material proof of infringement may be provided by statements of police officers or certified statements of sworn agents of authors' organization (Section 15(4)).</p>	<p>Offences determined by enacting country (section 6).</p> <p>Seizure of objects which violate law (section 7).</p> <p>Fees collected used for purpose of safeguarding national culture. (section 10(3)).</p> <p>Omissions to acknowledge source in cases where required subject to fine (Section 6).</p>	<p>No particular provisions for expressions of folklore.</p>

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Section 103 (P.L. 101 644): - board may receive complaints of violations of section 1159 of title 18, U.S. Code, and refer complaints of such violations to the Federal Bureau of Investigation for appropriate investigation, recommend criminal proceedings to Attorney General

Within the United States, the Act empowers the IACB a federal agency, to refer violations to the Federal Bureau of Investigation.

The Board may independently recommend to the Attorney General of the United States that criminal proceedings be instituted.

The Board may also recommend that the Secretary of the Interior refer a matter to the Attorney General for civil enforcement action.

Section 104 (P.L. 101-644): Criminal Penalty for misrepresentation of Indian produced goods and products  
The criminal penalties for violating the IACA are as follows:

- initial violations: Individuals; fines up to US\$ 250 000 and/or imprisonment not to exceed 5 years  
Corporate; fines up to US\$1,000,000
- subsequent violations: Individuals; fines up to US\$1,000,000 and/or imprisonment not to exceed 15 years  
Corporate; fines up to US\$5,000,000

[see also Section 106 (P.L. 101-644):  
Penalty for Counterfeiting Indian Arts and Crafts Board Trademark]

The Act also provides for civil action; namely a person may obtain an injunction or equitable relief and recover damages. (Sec. 6. (a)(1) and (2)).

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The importation, smuggling, industrial reproduction of protected objects and other violations of the Law are prohibited and the proceeds of fines are shared with the respective indigenous community (Law, Articles 17 to 21).

Apart from the affected indigenous communities, the regional governor or the country governor may take preventative action (Law, Article 22).

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Various offences are created, punishable on conviction by fine or term of imprisonment, or both.

Traditional owners may also institute civil proceedings.

Remedies: injunction, damage for loss, public apology, cease or reverse false attribution of ownership or derogatory treatment, order for account for profits, seizure of objects, other.

Nothing prevents recourse to mediation procedures, ADR, customary laws.

	Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)	Model Provisions (1982)	Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)
<b>SANCTIONS AND ENFORCEMENT PROCEDURES</b>			
<b>TERM OF PROTECTION</b>	Without limitation in time (Section 6(2)).	No time limit stated.	Economic rights: lifetime of author + 70 years after death.  Moral rights without limit in time. After expiry of economic rights, collective rights administrative body (Article 60) entitled to ensure compliance with moral rights.  Anonymous author = 70 years after first publication or making of the work / lawfully accessible to public (Article 24).

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Section 105 (P.L. 101-644): Cause of action for misrepresentation of Indian produced goods and products.

A civil action may be commenced:

- (A) by the Attorney General of the U.S. upon the request of the Secretary of the Interior on behalf of an Indian who is a member of an Indian tribe or on behalf of an Indian tribe or Indian arts and crafts organization;
- (B) or by an Indian tribe on behalf of itself, an Indian who is a member of the tribe, or on behalf of an Indian arts and crafts organization.

Can in civil action obtain injunctive or other equitable relief and obtain the greater of treble damages or in case of aggrieved individual Indian, Indian tribe, or Indian arts and crafts organization, not less than US\$1000 for each day on which the offer or display for sale or sale continues.

Section 309.5 (P.L. 101-497): Penalties  
■ criminal penalties specified in Section 1159, title 18 US Code and subject to civil penalties (s305e, title 25, US Code)

No express provisions.

Rights are indefinite (not unlimited) (Law, Article 7).

Moral rights and traditional cultural rights continue in force in perpetuity, are inalienable, and cannot be waived or transferred (Sections 9 and 13(4)).

	<p style="text-align: center;"><b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b></p>	<p style="text-align: center;"><b>Model Provisions (1982)</b></p>	<p style="text-align: center;"><b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b></p>
<p><b>INTERACTION WITH EXISTING IP LAWS</b> (and other laws, such as cultural heritage laws)</p>	<p>Works derived from folklore are regarded as copyright works (Section 2).</p>	<p>Under section 12, there is no limit or prejudice to any protection applicable to expressions of folklore under other existing laws or other forms of protection provided.</p>	<p>Provides for the protection of expressions of folklore as copyright works and performances thereof as protected performances under related rights.</p> <p>However, <i>domain public</i> payment also provided for.</p> <p>Title II deals with cultural heritage and provides as follows:</p> <p>“Cultural heritage” concerns folklore, sites and monuments, and ensembles (Article 67). Under Article 68, “folklore” means literary, artistic, scientific, technological and other traditions and productions as a whole created by communities and handed down from generation to generation. Examples are given in Articles 68 to 71.</p> <p>Article 73 prohibits the “denaturing” (distortion), destruction, exploitation, sale, disposal and illegal transfer of any part or a part of the property that makes up the cultural heritage except with authorization by competent authority (Article 73)(1)).</p> <p>Under 73(2), the following acts are prohibited when undertaken for profitable purposes:</p> <ul style="list-style-type: none"> <li>(i) publication, reproduction, distribution of copies of cultural property; and</li> <li>(ii) recitation, public performance, transmission by wire or wireless means and any other form of communication to the public.</li> </ul>

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Board may create trademarks certifying the genuineness and quality of Indian arts and crafts, as is also referred to in the US Trademark Act, 1946.

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The Panamanian Copyright Act, 1984, does not provide copyright protection for "objective expressions of folklore" (Article 9).

Also relevant are Law 27 of July 30, 1997 "Establishing the Protection, Promotion and Development of Handicraft" and Law No. 14 of May 5, 1982 "Enacting Measures on the Custody, Conservation and Administration of the Historical Heritage of the Nation."

The Law and Decree refer also to the Fiscal Code, customs law and the trademarks legislation

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The Law does not affect rights existing immediately before the commencement of the law (in each country), including IPRs.

Traditional cultural rights are in addition to and do not affect IP rights.

IPRs in derivative works (tradition-based creations) vest in the IP holder under relevant IP laws. However, if a derivative work is commercialized, certain duties arise (see above).

	<b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b>	<b>Model Provisions (1982)</b>	<b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b>
<b>INTERACTION WITH EXISTING IP LAWS</b> (and other laws, such as cultural heritage laws)			<p>Several limitations to these rights are provided for, notably the borrowing of cultural heritage for the creation of original works (Article 74 (1)(c)).</p> <p>States shall inventorize, determine, classify, place in security and illustrate the elements that make up the cultural heritage (Article 72).</p> <p>Establishment of a High Commission for the Cultural Heritage (Article 97), to be consulted on all matters concerning the protection, safeguard and promotion of cultural heritage.</p>
<b>CUSTOMARY LAWS AND PROTOCOLS</b>	No reference.	No reference.	No reference.
<b>REGIONAL AND INTERNATIONAL PROTECTION</b> (including the question of the protection of the same or similar cultural expressions from neighboring countries (so-called "regional folklore"))).	<p>Copies, adaptations etc of works of national folklore made abroad without authorization, shall not be imported or distributed in national territory (Section 6(3)).</p> <p>Section 16 (2) Alternative X – law applies to all works which, by virtue of treaties entered into by the country, are to be protected, as well as to works of national folklore.</p> <p>Alternative Y adds further application of the law to include national folklore of countries promulgated.</p>	<p>Subject to reciprocity (Section 14 (i)).</p> <p>Basis of international treaties or other agreements (Section 14 (ii)).</p>	<p>Article 3 (1): Rights relating to the fields of IP, as provided for in the Annexes to the Agreement, are independent national rights subject to the legislation of each of the Member States in which they have effect.</p> <p>Article 4 (2) - the Agreement and Annexes applicable in their entirety to every State that ratifies or accedes to the Agreement.</p>

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No express provisions.

Registration does not affect the traditional exchange of the object of knowledge between indigenous peoples (Decree, Article 11).

In case of dispute, customary laws and practices can be applied as a means to resolve the dispute.

Applies only to Native American Arts and Crafts.

Artistic and traditional expressions of other countries have the same benefits of law, when made by means of reciprocal international agreements (Law, Article 25).

In accordance with reciprocal arrangements, Act provides same protection to TK and expressions of culture originating in other countries or territories as is provided within the country itself.

Section 309.3 (2)(b) (P.L. 101-497)

Products of Indians of foreign tribes.

(1) In general. The unqualified use of the term "Indian" or of the term "Native American" or the unqualified use of the name of a foreign tribe, in connection with an art or craft product, regardless of where it is produced and regardless of country-of-origin marking on the product, is interpreted to mean for purposes of this part that -

- (i) The maker is a member of an Indian tribe, is certified by an Indian tribe as a non-member Indian Artisan, or is a member of the particular Indian tribe named;

The importation of non-original reproductions of protected objects is prohibited (Article 17).

	<p style="text-align: center;"><b>Tunis Model Law on Copyright (1976) (parts of relevance to folklore only)</b></p>	<p style="text-align: center;"><b>Model Provisions (1982)</b></p>	<p style="text-align: center;"><b>Bangui Agreement of OAPI (as amended in 1999) Annex VII, Title I (copyright and related rights)</b></p>
<p><b>REGIONAL AND INTERNATIONAL PROTECTION</b> (including the question of the protection of the same or similar cultural expressions from neighboring countries (so-called “regional folklore”).</p>			
<p><b>TRANSITIONAL ARRANGEMENTS</b></p>	<p>No particular provisions relating to folklore.</p>	<p>No specific transitional rules.</p> <p>Depends on the laws of the individual countries.</p> <p>Legislator may choose either:</p> <ul style="list-style-type: none"> <li>(i) retroactivity of law</li> <li>(ii) non-retroactivity of law</li> <li>(iii) intermediate solution = utilization subject to authorization under law but commenced without authorization before entry into force of laws should be brought to end before expiry of certain period if no relevant authority obtained by user in meantime. (Commentary to the Model Provisions).</li> </ul>	<p>Provisions apply to works that were created, to performances that took place, or were fixed etc. prior to the date of entry into force of Annex VII, on condition that such works have not yet fallen into public domain by reason of expiry of term of protection enjoyed under preceding legislation (Article 66 (1)).</p> <p>Legal effects of acts and contracts concluded or stipulated prior to date of entry into force of Annex remain unaffected (Article 66 (2)).</p>

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- (ii) The tribe is resident in the United States; and
- (iii) The art or craft product is an Indian product.

Section 309.3 (2) (P.L. 101-497):  
Exception where country of origin is disclosed. Paragraph (b) of this section does not apply to any art or craft for which the name of the foreign country of tribal ancestry is clearly disclosed in conjunction with marketing of the product.

The Act applies only to arts and crafts made after 1935.

The Implementing Regulations exclude any art or craft products made before 1935 from the scope of application of the Act. (Sec. 309.2(d)(3)).

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The Law provides that rights accorded previously under the relevant legislation shall be respected and shall not be affected.

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The Law applies to expressions of culture that were in existence before the commencement of the Act (in the relevant country) and those created on or after that commencement (Section 3).

The Law does not affect existing IP (as noted above) nor existing contracts and licenses (Sections 3(2) and 3(3)).

Persons making non-customary uses of cultural expressions at the time the Act comes into force (in the relevant country) have 60 days to apply for the required consent under the Act (Section 35).

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 <sup>(5bis)</sup> 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](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](http://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](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.3rddearmusic.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](http://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](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](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.

