

Symposium “IP Protection for Traditional Knowledge and Cultural Expressions”,
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Intellectual Property and Traditional Cultural Expressions



Aboriginal Rock Art – Anbangbang, Kakadu National Park, Australia © istockphoto, 2006

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*The views expressed in this presentation are those of the author and do not necessarily reflect the views of the WIPO Secretariat, its Member States or the IIPi.

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Outline

1. Background
2. Current Challenges
 - International or Domestic Issue
 - Sovereignty of Indigenous People
 - Technology and Databases
3. Current Efforts at Legal Solutions
 - Common Law
 - Sui Generis Law
4. WIPO and the Creative Heritage Project

Definition (Description)

Traditional Cultural Expressions (TCE)

- Integral to the cultural and social identities of indigenous and traditional communities
- Embody know-how and skills
- Transmit core values and beliefs
- TCE are cultural and economic assets
- “Expressions of Knowledge”

TCEs & TK

- TCEs include music, art, designs, names, signs and symbols, performances, architectural forms, handicrafts and narratives, amongst other manifestations
- TK and TCE are often, but not always, integrated
 - TCEs raise unique legal and policy issues in IP
 - TCEs a distinct area of focus

Instruments / Platform

[none internationally binding]

- 1976: The Tunis Model Law on Copyright for Developing Countries
 - 1982: The WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (not legally binding; not adopted by UN or any nation)
 - 1989: UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore adopted by the General Conference at its twenty fifth session.
 - 1990: The Indian Arts and Crafts Act, USA
 - 1997: The Indigenous Peoples Rights Act of the Philippines
 - 1999: The Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI)
 - 2000: The Special IP Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama
 - 2002: The Pacific Regional Framework for the Protection of TK and Expressions of Culture
 - 2006: The Law of the Republic of Azerbaijan on Legal Protection of Azerbaijani Expressions of Folklore
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- WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), est. 2000.

Why Copyright Law Is A Poor Fit

1. Originality
2. The Public Domain
3. The Fixation Requirement
4. Copyright Term (duration)
5. Communal Focus
6. Fair Use / Copyright Exceptions
7. Moral Rights
8. Jurisdiction Problem
9. *Not all indigenous people/tribes want the same kind of protection/exploitation for their TCEs*

Originality

Most TCEs are derived from pre-existing works. To many indigenous people, faithful reproduction of myths, legends and sacred symbols is important. Originality is not valued in this context.

Kum'agyak
(Esk)



From the Alutiiq Museum website

The Public Domain

- Often, no comparative idea for “Public Domain” in traditional cultures
 - *Yumbulul v. Reserve Bank of Australia* (1991)



© Reserve Bank of Australia

Fixation Requirement

- Most Jurisdictions: One Single, “Fixed” Manifestation Receives Protection
- Berne Convention, Art. 2:
It shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form.



Masai Masks from Kenya, courtesy of Brett Sergay, AfricanArt.com

Individual v. Communal Rights

- Western copyright regimes focus on the individual author or the individual copyright holder.
- Joint copyright is generally limited in scope and retains the term problem.
 - *E.g.*, Berne Article 7bis

Finite Duration

Berne Art. 7(1):

The term of protection granted by this Convention shall be the life of the author and fifty years after his death.



Kuba Cloth, from the Democratic Republic of Congo; Image courtesy AfricanArt.com

Fair Use / Exceptions

- Jurisdiction-dependant and vague
 - See Berne Art. 10
 - Education, research
 - Quotation, criticism, comment, news reporting;
- But: Sacred texts or images (revelation to outsiders prohibited within communities, even for Western fair use purposes).
E.g., sun deity, Lam Sua, design in Alaska, copyrighted in book on Aleut history.



Lam Sua, the “person” of the universe. Photo of box panel © Smithsonian Institution

Moral Rights

- Moral rights currently only apply to authors as understood by current copyright laws, however.
- Moral rights vary jurisdictionally
 - (France/US)
 - [Australia's ICMR]

Indigenous Communal Moral Rights, Australia (ICMR)

- Introduced as amendments to the Copyright Act 1968 in 2003.
- Proposes to give Indigenous communities moral rights protection over creative works or films that draw upon Indigenous traditional culture.
- Indigenous communal rights will exist in works and films if there is a voluntary agreement between the creator and the Indigenous community.
- Rights must be exercised by an authorized representative of that Indigenous community and include:
 - the right of attribution
 - a right of integrity
 - a right not to have derogatory treatment of the work, and
 - a right of false attribution

Jurisdictional Challenge

- Many tribes / groups spill over jurisdictional lines



Current Challenges



Bamileke Ceremonial Mask, Cameroon. Image courtesy of Africanart.com

International v. Domestic

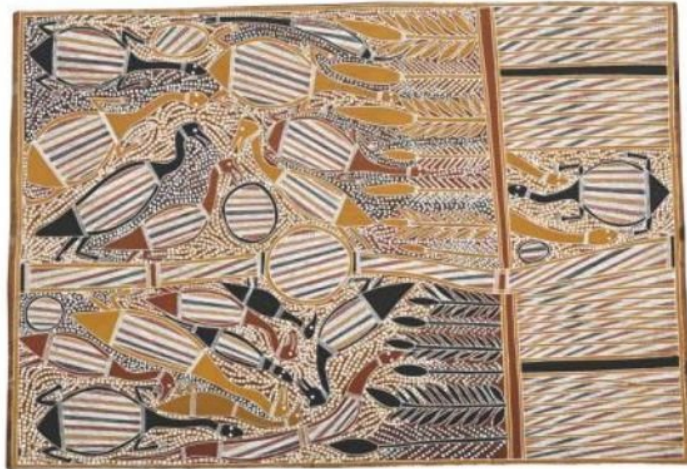
- Should the IGC draft a treaty and/or “best practices”?
- Should we allow the Panamanian or Philippines models to stand alone at least until they have stood the test of time?
- Would an international instrument ever be appropriate?

Sovereignty

- Customary indigenous law is not necessarily static. Paul Kuruk, *The Role of Customary Law Under sui generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge* 17 Ind. Int'l & Comp. L. Rev 67 (2007)
- The recognition and application of customary indigenous law is not uniform.
 - Africa (strongest recognition of customary law)
 - US (creation of tribal courts)
 - New Zealand (piecemeal)
 - Australia (piecemeal)

Sovereignty / Indigenous Law

- *John Bulun Bulun & George Milpurrurru v. R & T Textiles Pty Ltd.* (1998).
- Communal rights for the clan group; fiduciary duty for artists to their clans.
- Damages: Diminution in value because the works had been degraded through commercial use.
- Action brought based on § 37 of Australia's Copyright Act, Infringement by importation for sale or hire



John Bulun Bulun, Sacred waterhole and totemic animals, 1985, natural earth pigments on eucalyptus bark. © Artnet.com

Technology and Digitization



- australianbedandbreakfast.com.au;
- inuitnativeart.blogspot.com

Database Idea, Benefit-sharing, Sales

- More access
 - Would this undermine goal of protection?
 - Who would manage?
- Both database and division of remuneration would require centralized management.
 - Art auction house catalogs are already forming de facto databases
 - Resale right (droit de suite) issue

Current Efforts and Approaches

- 1. Current / Common Law
- 2. *Sui Generis* Law



Baule door influenced by Senufo and Guro tribes.

Image courtesy of AfricanArt.com.

Current Law

- Copyright
- Trademark



- Reproduction of trademark courtesy of Sa-Cinn Native Ent. Ltd. Registered in CIPO, Canada's Trademark Office, No TMA653077

Other Legal Routes

- Geographic Indications

Kullu shawl, India (Nov 2006)



- Authenticity / certification marks

Toi Iho Mark, New Zealand

Silver Hand, Alaska

Igloo Tag, Canada



toi iho™
maori made

Other Legal Routes, con't

- Trade Secret
 - Requires that the thing to be protected be part of the stream of commerce
- Misappropriation
 - Another TM concept
- Human Rights
- Privacy Rights

Sui generis routes

- Panamanian Mola – Law 20
 - Right to contest culturally offensive trademark registrations
 - Does not fix a duration for collective rights
 - Vests power in indigenous authorities to oversee cultural protection.



Section of a Panamanian Mola cloth, © istockphoto / Graham Klotz, 2007

Sui generis, continued

Other Examples:

- **The Law of the Republic of Azerbaijan**
 - “on Legal Protection of Azerbaijani Expressions of Folklore,” 2006
- **United States Database of Native American Insignia, 2001.**
 - No legal requirement to submit an insignia

The USPTO Insignia Database

- 20 Records



World Intellectual Property Organization (WIPO)

Legal frameworks

- UNESCO-WIPO Model Provisions (1982)
- The WIPO Performances and Phonograms Treaty (1996)
- The WIPO Intergovernmental Committee has developed draft provisions for the protection of TCEs.

Capacity-building

- Legal-technical assistance to States and regional organizations

Creative Heritage Project

- Guidance on managing IP issues when digitizing intangible cultural heritage.

WIPO's Creative Heritage Project

- Holistic approach
 - Surveys of existing practices/policies
 - Case Studies
 - Database of codes, guides, policies, protocols relating to IP and the digitization of cultural heritage
 - Other resources: articles, laws, etc.
- Goal: IP Guidelines for Documenting, Recording and Digitizing Intangible Cultural Heritage

Future Prospects

- Member states of WIPO have agreed to continue accelerated work on IP and traditional knowledge, genetic resources and folklore/traditional cultural expressions (TCEs), focusing on the int'l dimension
- IGC Mandate extended for two years
- Many are calling for a binding international legal instrument as the only fully effective response to the global phenomenon of misappropriation and misuse of TK and TCEs.
- *See* <http://www.wipo.int/tk/en/folklore/>

Thank you



Kullawada Dance, Bolivia, © istockphoto 2007