Synopsis to Accompany *Intellectual Property and Traditional Cultural Expressions*, a presentation by Molly Torsen[*] at Santa Clara Law School's Conference on Intellectual Property Protection for Traditional Knowledge and Cultural Expressions, November 9, 2007.

This presentation will walk through a background of the nexus between intellectual property (IP) and traditional cultural expressions (TCEs; also called expressions of folklore [EOF]). It will also show how some jurisdictions and groups are attempting to use the current IP system to accomplish their goals and will then highlight some current prevalent issues within WIPO's Intergovernmental Committee (IGC).

WIPO has not applied a concrete definition to TCEs. The WIPO website offers a description of TCEs as follows:

> Traditional cultural expressions (or, 'expressions of folklore') are integral to the cultural and social identities of indigenous and traditional communities, they embody know-how and skills, and they transmit core values and beliefs. As cultural and economic assets, their protection is linked to the promotion of creativity, enhanced cultural diversity and the preservation of cultural heritage.[1]

As such, some examples of TCEs include music, art, designs, names, signs, symbols, performances and handicrafts, amongst several other manifestations. Because the scope of the subject matter is most similar to that of works that are copyrighted in the Western tradition, I offer some comparisons between the purpose and goals laid out in the Berne Convention[2] to demonstrate how TCEs and copyrighted subject matter differ. I also provide a non-exhaustive list of current legal instruments that address TCEs as well as the core platform at which this is being discussed, WIPO's IGC. Note that none of the instruments is internationally legally binding.

Copyright Law's Imperfect Fit

Copyright law, in the Western sense, provides an imperfect fit for the protection of TCEs for a number of reasons. While reviewing the concepts, it is important to keep in mind that not all indigenous people have the same view regarding their TCEs. New Zealand's Maori people and Alaska's Aleut people have a commonality insofar as their TCEs fall outside the rubric of Western copyright law, but they do not necessarily desire the same treatment of their TCEs nor do they necessarily have the same attitude – for or against – the commercialization of certain aspects of their cultures.

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[*] The views and information expressed in this presentation are those of the author and do not represent the views or opinions of the WIPO Secretariat, its Member States or the International Intellectual Property Institute (IIPI). The author thanks Bryan Stech for his help in streamlining the presentation.

[1] WIPO, Traditional Cultural Expressions (Folklore), available at http://www.wipo.int/tk/en/folklore/

[2] The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, as amended on September 28, 1979, available at http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html. As at November 2007, the Berne Convention is comprised of 163 contracting parties.

Originality is the *sina qua non* of copyright, as has been recently reaffirmed by the US Supreme Court in its 1991 *Feist*[3] case. Most TCEs, handed out from generation to generation, do not spring from an individual author but are purposefully based on or *copied exactly from* creative works that have come before.

The concept of the public domain is not an applicable rubric for many Indigenous people, such as was the case in Australia's 1991 *Yumbulul v. the Reserve Bank of Australia*.[4] In this case, an Aboriginal artist had granted the Aboriginal Artist Agency permission to manage the copyright licensing of his painting of a morning star pole, which has sacred connotations within his Indigenous community. The artist had unfortunately not understood that non-Indigenous people could apply to the Agency to use the basic design of hisartwork in the way th at it was eventually used, which was on a commemorative banknote. The design itself was in the public domain and the court was not in a position to prevent the Bank from continuing its use of the image.

Another poor fit between Berne Convention ideals and TCEs includes the fixation requirement. Many, although not all, parties to the Berne Convention, require that one specific manifestation of a creative work be fixed in a material form to receive copyright protection. For Indigenous cultures that create many more than one fixation of a TCE, the fixation requirement derails the route to copyright. Besides which, many TCEs, if they were considered to belong to any entity, it would not be to an individual artist but rather to the Indigenous community. Western copyright regimes have generally only recognized a sole author, as opposed to communal authorship rights.

Western copyright also sets a finite duration of time during which a copyrighted work is protected. For Indigenous cultures whose TCEs are no less important today than they were hundreds of years ago, the current minimum of the life of the author + 50 years fails to address the generational nature of their focus. Furthermore, the exceptions inherent in most Western copyright regimes (also called fair use or fair dealing, depending on the jurisdiction) do not address the right kinds of issues for most Indigenous cultures. Copyright exceptions generally allow the public to use copyrighted materials freely if the purpose lies in the realm of news reporting, quotation, criticism, research or education. For a Native group that attaches spiritual significance and accompanying ritual to the viewing of a certain TCE, however, it remains unacceptable that the TCE is used in a news story.

Moral rights, those non-pecuniary rights that are aimed at the integrity of a creative work and the reputation of its author, have potential to address some of the issues that Indigenous cultures face with respect to their TCEs. Moral rights in Western copyright traditions, however, remain reserved for individual authors. Australia has proposed an Indigenous Communal Moral Rights Bill in 2003, which is receiving renewed attention.

Jurisdiction and choice of law pose another problem for international TCE protection. Many tribes and Indigenous people spill over country lines. The Kente cloth of the

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[3] *Feist Publications, Inc. v. Rural Telephone Service Co*., 499 U.S. 340 (1991).
[4] (1991) 21 IPR 481

African Ashanti people, for example, is a royal and sacred cloth worn at important ceremonies. Most Ashanti people live in Ghana but they are also in neighboring countries. To the extent, then, that Ghana were to protect the Kente cloth as a TCE domestically, it could not address its mistreatment, distortion or manufacture in other countries.

Current Challenges

Amongst other issues currently being discussed are whether TCE protection and promotion is an international or domestic issue at this stage. Sovereignty, including the applicability of customary Indigenous law in national courts, is another important and complex issue. The Judge in Australia's *John Bulun Bulun & George Milpurrurru v. R & T Textiles Pty Ltd* (1998)[5] applied Australia's Copyright Act to the case at hand, in which one of an Aboriginal artist's paintings, based on the heritage of the Ganalbingu people, was produced without permission overseas and then imported back into Australia. The Judge mentioned a sort of equitable relationship between the clan member and his clan under which some of the artist's rights in his work should be conferred to the clan, based on the clan's law as concerned the important nature of the images. The extent to which Western judges recognize Indigenous or First Nations law in this context is quite piecemeal.

Other current issues discussed at the IGC and other fora include the effect that technology and digitization has on TCEs, whether databases of TCEs should be created, how they could be managed and the extent to which the proceeds from the commercialization of TCEs can or should be shared with their source communities. Art auction houses sell artworks that could be considered TCEs for hundreds of thousands of dollars and some have called for a benefit-sharing mechanism that would funnel some of the proceeds to the relevant Indigenous people.

While some are using what they can of copyright law, trademark law, geographic indications, and authenticity marks, none of these provide an ideal regime. Trademarks, for example, must be used in the stream of commerce. Authenticity marks are sometimes counterfeited or sold to non-Indigenous people. Copyright, as we have seen, provides an attractive platform for addressing the subject matter of TCEs but too many of the ideological bases are mismatched. Some countries, like Panama, are trying to address the TCE problem with *sui generis* law.

WIPO's Current and Future Work

WIPO continues to use the IGC as a forum for its Member States to debate and discuss the issue. It has stepped up efforts to invite relevant stakeholders to the meetings and is being called upon to accelerate its work and focus on the international aspect of the TK/TCE issue. WIPO has also initiated its Creative Heritage Project[6] to develop best practices and guidelines for managing IP issues when recording, digitizing and disseminating intangible cultural heritage. The holistic approach of the Creative Heritage Project focuses on information-gathering in the form of surveys, case studies and a

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[5] (1998) 41 IPR 513

[6] http://www.wipo.int/tk/en/folklore/culturalheritage/index.html

database of current policies and protocols. It is also culling a variety of articles, laws and other materials that will inform its eventual guidelines.

In closing, it should be remembered that TCEs are not static or insignificant. The issue of their protection and promotion is not something to be consigned to history books; rather, TCEs provide a visual distillation of vibrant, evolving communities and cultures and the treatment of those TCEs in an IP context, whether under an international legal instrument or not, deserves due consideration.