Intellectual Property and Traditional Cultural Expressions in a Digital Environment

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Preface

Christoph Beat Graber and Mira Burri-Nenova

Traditional cultural expressions (TCE; also referred to as "expressions of folklore") form an essential part of indigenous communities' identity and heritage, and their protection and promotion are closely linked to sustaining and furthering cultural diversity. The discussions regarding the protection of knowledge and creativity of indigenous communities have gained particular prominence during the last couple of decades, both in academic and policy-making circles. This enhanced interest is partly a response to diverse negative effects of economic globalisation upon indigenous communities, and more importantly to the potential dangers of illicit appropriation and commercialisation of TCE by globally acting corporate powers. In addition, new technologies, as the epitome of globalisation forces, have often been singled out as a specific peril for TCE and as an inhibitor of their protection.

Despite the wide acknowledgement of the value of TCE and the need to safeguard their creative continuity, modern law has not been able to address the pertinent issues in a comprehensive manner, and the attempts to create solutions, be they legal or political, have suffered from the fragmentation of international law in intellectual property, cultural, economic and human rights regimes. The reasons for this fragmentation and the failure of the international community to put in place appropriate instruments for protection of TCE are due not only to collisions between competing regulatory regimes, but also to collisions between global communication systems (such as the law or the economy) and local traditions inherent to the TCE issues. Indigenous communities have criticised attempts to regulate TCE at the global, regional or national levels as being unable to reconcile the interests of a modern society with their traditional customs and laws. Their counter-suggestion, however, which is to rely upon customary law as a basis for indigenous self-determination, appears to be in conflict with the primacy and universality of internationally recognised human rights standards.

The collisions between competing regulatory regimes and between global law and local traditions have been particularly intensified by the ever-expanding digital environment, characterised by a plethora of content distribution platforms and networks. Indeed, the ability of the digital mode to express any type of information in a line of zeroes and ones and to transport this information

instantaneously puts the TCE debates into a new perspective, creating additional challenges, but perhaps also new opportunities.

Against the above backdrop, the objective of the present book is twofold. First, it seeks to examine the collisions between the global and the local within a truly transdisciplinary selection of topics. To this end, it offers a unique combination of approaches of history, philosophy, anthropology, social theory and law. This allows for a comprehensive analysis of the entangled TCE issues from a polycontextural perspective and paves the way for a discussion of the policy proposals recently put forward at the international level. Only a methodology such as this could also secure the conditions for achieving more coherence among the evolving regulatory frameworks and for eventually pinpointing models of effective and efficient protection of TCE. In this spirit, the first part of the book outlines the divergent perspectives of global law and local traditions, and the collisions thereof, from the viewpoint of the historian Monika Dommann and subsequently and thought-provokingly through an application of the instruments of legal sociology, presented by Gunther Teubner and Andreas Fischer-Lescano. The second part follows with discussions of human rights and intellectual property, which are core issues in any analysis of TCE. While Elizabeth Burns Coleman questions the nature of cultural rights as human rights from the standpoint of anthropology and political philosophy, Fiona Macmillan deals with the same topic as a legal scholar, both analysing and challenging conventional positions. Christoph Beat Graber then suggests a novel approach based on the institutional dimension of human rights to tackle the double fragmentation of TCE, and puts forward a procedural solution for reconciling collisions between IP law and indigenous customs. In order to reveal the collisions between competing regulatory regimes, the third part of the volume offers a detailed analysis of the intellectual property law and policy and the current state of play in the different fora creating rules relevant to TCE. Martin Girsberger shows the incredible divergence of these rules and the difficulty of identifying common concepts. Wend Wendland of the World Intellectual Property Organization (WIPO) analyses the work done within the most important forum elaborating TCE rules, namely WIPO's Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, and outlines the chances of establishing an international legal instrument for the protection of TCE. Finally, against the background of the WIPO Secretariat's recently proposed draft provisions, Johanna Gibson offers a fresh and stimulating view of the relationship between land, tradition and intellectual property rights from the perspective of the theory of intellectual property law.

The second, distinct objective of this publication is to extend the scope of reflection of conventional TCE enquiries to a consideration of the specific features of the new digital environment – an environment that profoundly

changes the way we distribute information and communicate, and ultimately affects the relationships between the centre and the periphery in the global society. Although admittedly this new digital environment raises the risks of misappropriation of traditional knowledge and creativity, it may equally offer new opportunities for traditional communities to communicate and to actively participate in trade in cultural expressions of various forms thus revitalising indigenous peoples' values and providing for sustainability of TCE. In this sense, Mira Burri-Nenova explores the intrinsic features and new dynamics of the digital networked environment and outlines some possibilities for protecting and above all promoting TCE through an application of a multi-faceted toolbox mobilising the potential of digital technologies. Herbert Burkert follows with his intriguing analyses of how international lawmaking has reacted to and employed information and communication technologies, and looks into the relation of this policy and of law-making processes to the protection of TCE. Miriam Sahlfeld's contribution tackles the relationship between TCE and development, which is another important and often politicised theme in the TCE context. She investigates the latter not in the sense of development of TCE but rather of development by means of TCE and looks into their impact on economic, social and human development. Christoph Antons deepens the analysis of the development aspect of TCE with a comparative perspective inspired by concrete examples from Australia and Southeast Asia.

The present book is the outcome of an international symposium organised in June 2007 by the research centre i-call (International Communications and Art Law Lucerne) of the University of Lucerne within the framework of the eDiversity project. This project, focusing on the legal protection of cultural diversity in a digital networked environment, is a part of the Swiss National Centre of Competence in Research (NCCR): Trade Regulation, funded by the Swiss National Science Foundation.

It is our hope, as editors, that the unique combination of viewpoints and methods presented here will stimulate a more comprehensive debate on the protection and promotion of TCE and reveal novel ways of approaching these complex issues in practice.*

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* By way of guidance to the readers, it should be noted that all websites, except otherwise specified, were last accessed on 1 January 2008. For readers' convenience, the most pertinent and often referred to excerpts of WIPO documents have been reproduced at the end of the volume. The editors thank Susan Kaplan, Jane Müller and Thomas Steiner for their valuable assistance.

PART ONE

Local traditions and global law

1. Lost in tradition? Reconsidering the history of folklore and its legal protection since 1800

Monika Dommann

In January 1954, *Billboard*, the leading US music and entertainment journal, reported on an exclusive contract between the American record company Tempo Records and the government-owned radio station in Afghanistan, Radio Kabul. The contract guaranteed exclusive recording rights in Afghanistan. During a five-month trip around India, Pakistan and Afghanistan, Irving Fogel, President of Tempo Records at the time, collected original indigenous music. The record company planned to release the records in Afghanistan and the United States, where universities and colleges showed particular interest in obtaining the recordings for their collections. Further use of the music by the television and motion picture industries was intended.[1]

At least two issues concerning the above are worth further consideration. The first issue is related to *technology*: formerly insubstantial and fluent, only preserved by oral transmission from generation to generation, music became tangible and fixed by the recording process. Hitherto embedded in local cultures, music was decontextualized. It became extremely mobile and entangled with new milieus such as universities, museum collections, radio stations and even the motion picture and television industries. After the music had been recorded, it became what the French philosopher and cultural anthropologist Bruno Latour calls "immutable mobiles".[2] Music could be used and reused on a global scale as an object of scientific research and as a source for economic exploitation.

The second issue is related to *law.* Radio Kabul and the record company Tempo Records made a contract concerning recording rights to indigenous music in Afghanistan. Yet in international copyright law, neither the Berne

[1] "Afghan Radio Gives Tempo Waxing Rights", *The Billboard*, 2 January 1954, at p. 12.

[2] Bruno Latour, "Visualization and Cognition: Thinking with Eyes and Hands" (1986) Knowledge and Society. Studies in the Sociology of Culture Past and Present 6, pp. 1–40.

Convention established in 1886, nor the Universal Copyright Convention established in 1952, included traditional music in their categories of protected works, as we shall see below. In any case, Afghanistan was not a signatory to those treaties at that time. It is no accident that the parties to this contract were a record company and a representative of Afghanistan, at that time a constitutional monarchy. This contract nationalized tradition: it was not an individual or a delegate of a tribe; it was a representative of the Afghan nation who was the relevant entity for negotiating the trade in traditional music. Since the rise of nationalism at the end of the 18th century, the nation state had become the relevant social collective in Western societies. The side note about a contract on traditional foreign music, which appeared in the US music journal, mirrors the situation in the early 1950s when the legal status of traditional culture was not an issue at all – either on the national or the international level.

In what follows, the history of the discourse on "traditional cultural expressions" (TCE) will be analysed. As a social and cultural historian, I am particularly interested in the cultural background to the current legal discourse. Consequently, I will follow the transformations of the core concepts since the 18th century, and analyse the contexts in which they were created and challenged.

Law is both socially constituted and constitutive: legal categories are based on the language of a period and shaped by political negotiations. However, at the same time legal categories condition the social relations, the economic practices and the production and circulation of goods. The controversies about established legal norms are indicators of social conflicts. Historians are therefore used to reading these legal conflicts as a means to analyse social change.

I am mostly interested in the construction of *tradition* as a cultural and legal concept. I argue that tradition is quite a new category. It is strongly associated with the advent of its counterpart, the category of *modernity*. My arguments will focus on folklore music since folklore music was the first object to raise debates about the adequacy of old copyright concepts for the protection of traditional culture. I will show which actors and institutions were involved in that discourse and identify continuities, shifts and changes. Although the debate about TCE seems to be a recent phenomenon, it has a history going back to decolonization after World War II and even to the early history of copyright in the 18th century.

1. THE INVENTION OF TRADITION

The concept of tradition is a child of modernity. It became popular in the middle of the 18th century. In the encyclopaedia of Johann Heinrich Zedler, published in 1745, tradition was defined as what is known only through oral

transmission and not through texts: "Tradition, lat. *Traditio*, ist auch so viel, als eine Erzählung, die man nur vom Hören sagen weiss, nirgends aber bei einem tauglichen Schriftsteller aufgezeichnet findet"("Tradition, lat. *Traditio* is what you know from hearsay, but what you will not find written down by any capable author").[3]

The term traditional became the counterpart of the notion *civilized*. In the dictionary by the Brothers Grimm, published in the mid-19th century, the term traditional borrowed from French appears in opposition to the term civilized.[4] The dichotomy between written culture associated with Europe and oral culture associated with the New World dates back to the travelogues of the 17th century.[5] Since the 18th century, tradition had been associated with the uncivilized, the oral, the pre-modern, or the non-Western.

William Thomas introduced the term "folk-lore" in 1846 to express "knowledge of the people".[6] In 1878, the "Folk-Lore Society" was established in London with the aim of studying, collecting and publishing local and foreign folklore. In the German-speaking countries, the study of rural peasants and preferably uneducated groups untouched by modern life was initiated by Jakob Grimm and his brother Wilhelm, who started to collect fairy tales. As new academic disciplines such as "folklore" (in German-speaking countries "Volkskunde") emerged, collecting, recording, writing down and classifying fairy tales, costumes, music, dance, arts and crafts became their major aim and method.[7] "Folklore" was an attempt to rehabilitate and study the neglected oral cultures in both the old and the new world. The underlying impulse was

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[3] Johann Heinrich Zedler (ed.), "Tradition" in Johann Heinrich Zedler (ed.), *Grosses vollständiges Universallexikon aller Wissenschaften und Künste*, Vol. 44, Leipzig and Halle: Johann Heinrich Zedler, 1745, at p. 925. English translation by the author.

[4] Jacob and Wilhelm Grimm, "Tradition" in Jacob and Wilhelm Grimm, *Deutsches Wörterbuch von Jacob und Wilhelm Grimm*, Vol. 21, Leipzig: S. Hirzel, 1854–1860, at p. 1026: "Eine gemeinsame Bildungsatmosphäre entwickelte sich […] im Gegensatz gegen die traditionellen Anschauungen und Erkenntnisse".

[5] Erhard Schüttpelz, *Die Moderne im Spiegel des Primitiven. Weltliteratur und Ethnologie (1870–1960)*, Munich: Wilhelm Fink, 2005, at p. 19.

[6] Brockhaus, "Folklore" in Brockhaus, *Brockhaus Konversations-Lexikon*, Vol. 6, Leipzig, Berlin and Vienna: Brockhaus, at p. 747 and Meyer, "Folklore" in Hermann Julius Meyer, *Meyers Grosses Konversations-Lexikon*, Vol. 6, Leipzig and Vienna: Bibliographisches Institut, 1907, at p. 954: "Wissen des Volks".

[7] On Swiss Volkskunde, see Danièle Lenzin, "*Folklore vivat, crescat, floreat!*" *Über die Anfänge der wissenschaftlichen Volkskunde in der Schweiz um 1900*, Zurich: Volkskundliches Seminar der Universität Zürich, 1996. For Germany and Great Britain, see Daniela Happel, *Folkloreforschung in Deutschland and Grossbritannien im 19. Jahrhundert. Ein Beitrag zur internationalen Wissenschaftsgeschichte*, Trier: Wissenschaftlicher Verlag, 1995.

often nationalistic. The historian Eric Hobsbawm uses the notion of the "invention of tradition" to describe the nation-building process during the 19th century.[8] Reference to traditional culture became extremely important for nation-building. Specific costumes, music or architecture rooted in the past became unifying symbols of the new "imagined communities".[9] However, not all traditions are as old as they seem: sometimes they recombine older sources, or are even new inventions. The case of Swiss folk music is a typical example: foreigners, especially exponents of the French Enlightenment like Jean-Jacques Rousseau, discovered Swiss alpine people and their customs. They praised them as "pure natives". After 1800, this hetero-stereotype became an auto-stereotype: shepherds, farmers and people from the Alps, as well as new festivals like the *Unspunnenfest* were used as core symbols of the young federal nation. What we understand today as traditional Swiss folk music began basically after 1920 in urban areas such as Zurich.[10] Its exponents were not farmers, but workers in urban factories. The sale of records and the broadcasting of performances on the radio in the 1920s and 1930s were important means for popularization of what became famous later as Swiss folk music.

It is thus evident that tradition was an invention of modernity. Modernity defined itself *ex negativo* as not being traditional, uneducated or uncivilized. The legal concepts of modern copyright are part of these cultural assumptions, as the next section shows.

2. LOST IN TRADITION: FOLKLORE IN COPYRIGHT

Modern copyright laws are deeply embedded in the concept of a genius and individual author, who is responsible for the creation of unique works.[11] This idea is explicitly opposed to the notion of creation inspired by God or by manipulation of traditional materials. The distinction between an author as a creator of original works and a mere writer as a subject of divine inspiration had to be laboriously constructed in the Europe of the 18th century. The advent of the author was the outcome of a new concept based on aesthetic and legal

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[8] Eric John Hobsbawm and Terence Osborn Ranger (eds), *The Invention of Tradition*, Cambridge: Cambridge University Press, 1983.

[9] Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London and New York: Verso, 1991.

[10] Dieter Ringli, *Schweizer Volkmusik im Zeitalter der technischen Reproduktion*, Zurich: Studentendruckerei, 2003.

[11] Martha Woodmansee, "The Genius and the Copyright: Economic and Legal Conditions of the Emergence of the 'Author'" (1984) Eighteenth-Century Studies 17:4, pp. 425–448.

concepts.[12] Originality (in German *Eigentümlichkeit*) legitimizes property (in German *Eigentum*).[13] The form in which individual ideas are presented is the central concept for copyright protection. Thus, copyright for musical works was initially acquired only by scoring. Whatever is not notated cannot be protected has been the rule since the end of the 18th century.[14] Although popular music was excluded explicitly from copyright law, the editing of folk music fell under copyright protection. Oral transmissions became a musical work through the process of being written down. These concepts (e.g. the requirement for an individual author and the written form for legal protection) once diligently constructed proved to be all the more durable during the following centuries.

After 1900, the concept of authorship for musical works was extended. Besides notation, fixation by recording technologies was included in the legal categories. The rise of recording technologies fundamentally changed the structure of trade in music. It was responsible for the rise of what was later called "cultural industry".[15] Authors' societies representing authors, performers and producers became important as centralized bodies collecting royalties for sheet music sales, record sales, public performances, radio and television broadcasts and motion pictures. With the emergence of the phonograph, folk music became the object of widespread recording activities by phonogram archives in both Europe and the United States. The Vienna Phonogram Archive was founded in 1899 and the Berlin Phonogram Archive in 1900.[16] Huge folklore collections in the expanding American museums, libraries and universities followed in the early 20th century.[17] There is a strong correlation between periods of social and economic change and claims for the protection of tradition. For instance, the immense Archive of Folk Songs in the US

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[12] Anne Barron, "Copyright Law's Musical Work" (2006) Social and Legal Studies 15:1, pp. 101–127.

[13] Gerhard Plumpe, "Eigentum – Eigentümlichkeit. Über den Zusammenhang ästhetischer und juristischer Begriffe im 18. Jahrhundert" (1979) Archiv für Begriffsgeschichte 23, pp. 175–196.

[14] Johann Vesque von Püttlingen, *Das musicalische Autorrecht. Eine juristisch-musicalische Abhandlung*, Vienna: Wilhelm Braumüller, 1864; Lydia Goehr, *The Imaginary Museum of Musical Works. An Essay in the Philosophy of Music*, Oxford: Clarendon Press, 1992, at p. 219.

[15] Theodor W. Adorno, "Résumé über Kulturindustrie" in Theodor W. Adorno (ed.), *Kulturkritik und Gesellschaft*, Vol. 1, Prismen, Frankfurt: Suhrkamp, pp. 337–345.

[16] Christoph Hoffmann, "Vor dem Apparat. Das Wiener Phonogramm-Archiv" in Sven Spieker (ed.), *Bürokratische Leidenschaften. Kultur- und Mediengeschichte im Archiv*, Berlin: Kadmos, 2004, pp. 281–294.

[17] Regina Bendix, *Amerikanische Folkloristik. Eine Einführung. Bearbeitet von Nicholas H. Schaffner*, Berlin: Dietrich Reimer, 1995.

Library of Congress was founded in 1928 after a period of massive technological change. Generally, collecting folklore and national heritage was a flourishing endeavour during the crises in the 1930s.[18] Although it looks like a contradiction at first sight, traditional culture proved to be most popular in times of rapid modernization. What had been invented in the past was now feared to be lost.

However, folklore, exploited by musicologists and record industries, did not fit the classifications used in copyright law because no notation is involved, and the question as to whether the material should be in the public domain or who could be defined as its authors caused controversies. The first debate about the legal situation of folklore emerged in the United States in the 1950s when folk songs on records became popular. In 1955, the International Folk Music Council adopted a provisional definition of folk music: "Folk music is music that has been submitted to the process of oral transmission. […] It is the fashioning and re-fashioning of the music by the community that gives it its folk character."[19] This definition demands attention because transmission is reduced to oral transmission, although a lot of folklore is transmitted and preserved by the work of wandering folklore collectors.[20] In 1962, the folklorist Gershon Legman criticized the practice of copyrighting folk music by way of adaptations and arrangements. He argued that, if anyone, it was not the persons who made new arrangements of old songs, but those who collected and printed folklore who should be the copyright owners.[21] This statement provoked a reply by another folklorist, Charles Seeger, who argued against any copyright and called for a law penalizing any intent to claim copyright for items in the public domain.[22] At the same time as the question whether folklore could be copyrighted became an issue in the US, the legal categories of copyright law concerning folklore were put on the agenda of international law and policy by the young Asian and African nations.

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[18] O. Wayne Coon, "Some Problems with Music Public-Domain Materials under United States Copyright Law as Illustrated Mainly by the Recent Folk-song Revival" (1971) Copyright Law Symposium 19, pp. 201–218, at p. 204.

[19] Barbara Friedman Klarman, "Copyright and Folk Music" (1965) Bulletin of the Copyright Society of the U.S.A. 12, pp. 277–292, at p. 278.

[20] G. Legman, "Who Owns Folklore?" (1962) Western Folklore 21:1, pp. 1–12, at p. 11.

[21] *Ibid*.

[22] Charles Seeger, "Who Owns Folklore? – A Rejoinder" (1962) Western Folklore 21:2, pp. 93–101. For analyses of the folklore debate from a legal point of view, see Klarman, *supra* note 19 and Coon, *supra* note 18.

3. FOLKLORE AND COPYRIGHT AFTER DECOLONIZATION

The break-up of the colonial empires after World War II, first in Asia and later in Africa, changed the world map fundamentally. But decolonization did not mean the abolishment of European state concepts and legal systems. In fact, the birth of new nations was based on the nation-state model and the concept of nation-building developed in Europe during the 18th and 19th centuries. But young "independent" African and Asian nations began to dispute the claim for the universality of copyright law dating back to 18th-century Europe. The "developing countries", as they were then called, began to criticize the universality of the categories and patterns of classification. The Berne Convention's policy was to maintain the *status quo* that existed before the new countries became independent. Developing countries faced strong pressure to adhere to the Berne Convention. They became extremely active and influential in the preparation of the programme for the revision of the Berne Convention scheduled in 1967 in Stockholm. In August 1963, a conference was held in Brazzaville under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the International Office for the Protection of Intellectual Property (BIRPI).[23] This was the first occasion on which the question of folklore and the claim for its integration in copyright became an issue for consideration in international law. The main issue at the conference was the demand for special conditions for the import of cultural goods. The critique was articulated in unusually sharp words: "International copyright conventions are designed, in their present form, to meet the need of countries which are exporters of intellectual works. These conventions, if they are to be generally and universally applied, require review and re-examination in the light of specific needs of the African continent."[24] The representatives of African countries considered folklore as a synonym for the "cultural heritage of the African nations": "Ce patrimoine constitue non seulement une source d'inspiration pour développement culturel et social des peuples des différents Etats africains, mais contient aussi un potentiel d'expansion économique susceptible d'être exploité au profit des citoyens de chaque Etat" ("This heritage constitutes not only a source of inspiration for the cultural and social development of the people of different African states, but contains also a potential for economic expansion susceptible of being exploited for the

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[23] UNESCO and BIRBI, "Réunion africaine d'étude sur le droit d'auteur. Rapport présenté par M. L'Abbée Ntahokaja (Burundi)" (1963) Inter-Auteurs 152, pp. 151–155.

[24] Royce Frederick Whale, *Protocol Regarding the Developing Countries*, London: British Copyright Council, 1968, at p. 8.

benefit of the citizens of each state").[25] Folklore was discovered as cultural capital and an economic resource of new nation states.

Two years later a draft model copyright law for African countries was discussed at a meeting in Geneva.[26] The working group proposed to integrate a new category of "works inspired by folklore" in African copyright laws, whereby "folklore" meant "any work composed by any author […] with the aid of elements which belong to the traditional African cultural heritage". The reference point for folklore was now "Africa". Tradition was brought in the context of Pan-Africanism. With the separation of "works inspired by folklore" (included in copyright) and "works of folklore" (in the public domain), the old categories of copyright developed at the end of the 18th century remained untouched. Only the Tunisian Copyright Act of 1966 included folklore seeking "to prevent folklore from falling into the hands of third parties who might wish to exploit them for commercial purposes".[27] Other African nations such as Ghana, Zambia and Malawi did not include folklore in their copyright legislation.[28] At the East Asian Seminar on Copyright, held in New Delhi in January 1967, the Czechoslovak delegate stressed the problem of the inadequacy of national laws for the protection of folklore in Africa. Folklore was appreciated and largely distributed in industrialized countries, he argued. He criticized the proposal of the Stockholm Conference because African demands for the protection of folklore were not mentioned at all.[29] Given the huge conflicts between developed and developing countries at the Stockholm Conference in June and July 1967, the topic of folklore was only a minor matter, but no less controversial. India proposed to include folklore in the list of works entitled to protection under the Berne Convention:

> The question of protection of folklore had already been discussed at the East Asian Seminar on Copyright in 1967, which had decided that works of folklore might represent the creative efforts of a number of unidentified indigenous authors. They were therefore not only anonymous works in the sense of the Brussels text […] of the Berne Convention, but also joint works, since in nearly all cases they were

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[25] UNESCO and BIRBI, *supra* note 23, at p. 153. English translation by the author.

[26] UNESCO and WIPO, "Records of the Committee of African Experts to Study a Draft Model Copyright Law, Geneva, 30 November to 4 December 1964" (1965) Copyright Bulletin XVIII, pp. 9–47, at pp. 14 and 20.

[27] WIPO, Records of the Intellectual Property Conference of Stockholm, 11 June–14 July 1967, Geneva: WIPO, 1971, at p. 876.

[28] Mario Moreira da Silva, "Folklore and Copyright" (1967) EBU Review 101, pp. 53–59, at p. 58.

[29] Ministry of Education, Government of India, *International Copyright: Needs of Developing Countries. Symposium*, New Dehli: Ministry of Education, 1967, at p. 84.

> unfixed and represented a constantly changing pattern produced by successive performers and authors.[30]

Australia proposed the protection of folklore, outside the framework of the Berne Convention, by a *sui generis* solution: "The whole structure of the Convention was designed to protect the rights of identifiable authors. With a work of folklore there was no such author."[31] France, a nation deeply involved in colonialism in the past, made a plea for guarantees for persons carrying out scientific research based on folklore. Canada fundamentally opposed any action to restrict the public use of folklore material. The Canadian delegate declared himself to be "deeply unwilling to enter into a discussion as to who owned or was entitled to use such material".[32]

The definition of "folklore" provoked serious problems during the discussion. African delegates opposed the proposal to subsume "folklore" under the category of "anonymous works". The delegate from Brazzaville, Congo, argued: "Folklore could be the product of a tribe, a family or even of a particular person in that family; the definition of the term varied from country to country. Folklore could also be regarded as including a work which had been forgotten but which might have been the exclusive property of a family or a group".[33]

Ultimately, folklore was not integrated into the Stockholm Act. Instead, a new article was introduced, referring to "those productions, which are generally described as folklore".[34] But this notion was no longer visible. The term "folklore" was not used in the legislative text. Only the legislative history of the provision indicates that folklore was also intended to be covered:

> 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 who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.[35]

The protection of folklore remained limited to national legislation and beyond the reach of international law.

The Stockholm Conference was the first Berne Convention revision conference at which the interests of developing countries were asserted. Moreover,

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30 WIPO, *supra* note 27, at p. 876.
31 *Ibid*. at p. 876.
32 *Ibid*. at pp. 877–878.
33 *Ibid*. at p. 914.
34 *Ibid*. at p. 1173.
35 *Ibid*. at p. 1298.

it was the first time that an adopted text was not put into effect because of a lack of ratification. Nor did the revised Paris Act of 1971 turn the tide: folklore remained a special category of anonymous works.[36] At the Paris Conference of July 1971, the Bolivian observer reminded the conference participants of folklore in the defence and protection of intellectual works. He recommended an annex to the Convention "directly aimed at protecting the folk heritage of nations with a view to defending the legitimate property rights of anonymous people who created, cultivated and preserved that heritage."[37] The suggestion was not taken up. Although the folklore issue was not the major bone of contention at the Stockholm Conference, the decision not to integrate folklore into international copyright law reflected the deep gap between developing and developed countries in the early 1970s. The basic assumptions of copyright, valid since the 18th century, to split creations based on writing and authorship and creations inspired by God or ancestors, and orally transmitted, remained intact. These legal categories had strong economic effects. Developed countries exported goods protected by intellectual property law, while developing countries exported folklore, falling into the public domain. Whereas developed countries could benefit commercially from their works, the cultural products of developing countries remained objects of commercial exploitation by others.

4. THE RENAISSANCE OF TRADITION: TRADITIONAL CULTURAL EXPRESSIONS

In 1967, Tunisia integrated folklore into copyright legislation. Several countries, for example, Bolivia, Chile, Morocco, Algeria and Senegal, followed suit and included folklore in their framework of national copyright laws. Folklore served a young African nation as a pillar of national identity. In the Copyright Law of Senegal of 1973 folklore was called "l'un des éléments fondamentaux de patrimoine culturel traditionnel sénégalais".[38] During the 1970s, no further

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[36] WIPO, Records of the Diplomatic Conference for the Revision of the Berne Convention, Paris, 5–24 July 1971, Geneva: WIPO, 1974, at p. 188.

[37] *Ibid*. at p. 141.

[38] Babacar Ndoye, "La protection des expressions du folklore au Sénégal" (1989) Le droit d'auteur 102, pp. 396–401, at p. 398: "Le folklore s'étend de l'ensemble des productions littéraires et artistiques créées par des auteurs présumés de nationalité sénégalaise, transmise de génération en génération et constituant l'un des éléments fondamentaux de patrimoine culturel traditionnel sénégalais". See also Sherylle Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation" (1996) Yearbook of Traditional Music 28, pp. 57–86.

action was taken on the level of international law. However, the Government of Bolivia submitted a request to UNESCO that it examine the status of folklore in the Universal Copyright Convention.

In 1980, a working group under the auspices of UNESCO and the World Intellectual Property Organization (WIPO) met to prepare a draft of model provisions for national legislation and international measures for the protection of works of folklore.[39] Cultural anthropologists and musicologists were invited to participate.[40] The result was a massive consciousness-raising and information campaign. It was recommended that a special type of law be established outside copyright law for adequate protection against unauthorized exploitation of folklore. The Universal Copyright Convention (UCC) and the Berne Convention disagreed in 1985 about future international instruments. Hence again no further action was taken in regard to this draft.

As of the 1980s, the absence of legal protection for traditional culture and folklore in copyright received broader attention.[41] In 1989, UNESCO adopted the Recommendation on the Safeguarding of Traditional Culture and Folklore.[42] Folklore was considered to be endangered, requiring legal protection in the future "recognizing the extreme fragility of the traditional forms of folklore, particularly those aspects relating to oral tradition and the risk that they might be lost". There was a shift from "nations" to "humanity" as the entity of reference: whereas in the Model Provision of 1982 folklore was described as the "important cultural heritage of every nation", folklore was now declared to be part of the "universal heritage of humanity". The recommendation proposed the protection of folklore "in a manner inspired by the protection provided for intellectual productions".

In addition to the old copyright experts, new voices arose. Cultural anthropologists and ethnomusicologists entered the debate about intellectual property

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[39] UNESCO and WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions) of 1982, Geneva: WIPO, 1985.

[40] Lauri Honko, "Copyright and Folklore" in Alan Dundes (ed.), *Folklore. Critical Studies in Literary and Cultural Studies*, Vol. 1, London and New York: Routledge, 2005, pp. 347–352, at p. 348.

[41] Antonio Chaves, "Le folklore brésilien et sa protection" (1980) Le droit d'auteur 93, pp. 109–112; Marie Niedzielska, "Les aspects de la propriété intellectuelle de la protection du folklore" (1980) Le droit d'auteur 93, pp. 279–286; E.P. Gavrilov, "La protection juridique des oeuvres de folklore" (1984) Le droit d'auteur 97, pp. 75–79; Yves D. Epacka, "La question collective du droit d'auteur: l'expérience pratique d'une société africaine" (1987) Le droit d'auteur 100, pp. 390–396; Ndoye, *supra* note 38.

[42] UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore, adopted by the General Conference at its 25th session in Paris on 15 November 1989, Paris: UNESCO, 1989.

as it applied to rituals, indigenous music, traditional culture and the ownership of culture.[43] Ethnomusicologists began to reflect their involvement in the introduction of their sound recordings to the commercial music industry. Some of them criticized international copyright law as ethnocentric and the integration of folklore into African national legislation as nationalistic.[44] Others criticized this view as being "romantic assumptions",[45] or "romanticism in the age of industrialized capitalism": "In this view, the market is regarded as an external and artificial imposition, and so these communities, necessarily epistemologically elsewhere, are cast in aura of noble savagery".[46] Martin Scherzinger argued in the *Yearbook of Traditional Music* that the creators of copyright law in the 18th century and their critics at the end of the 20th century shared the same cultural oppositions:

> The same kind of thinking […] separates human beings into non-Western *groups*, on the one hand, and Western *individuals*, on the other. It separated their stylized patterns of behaviour into non-Western *ritual* as opposed to Western *culture*, their creative activity into non-Western *craft* as opposed to Western *art* and their music into non-Western *social activity* as opposed to Western *aesthetic autonomy*.[47]

In his paper "Ritual as Intellectual Property", the cultural anthropologist Simon Harrison challenged the notion that communities own rituals.[48] He argued that complex intellectual property relations are involved in rituals and put forward the argument that they share the same characteristics as the creation of a play or a music composition: "Specific groups or individuals may own the exclusive rights to perform or organize it, to enact the leading roles in it, or to teach or transmit it authoritatively."[49] Following Harrison's argument

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43 Simon Harrison, "Rituals as Intellectual Property" (1992) Man (New Series) 27:2, pp. 225–244; Mills, *supra* note 38; Marylin Strathern, "Potential Property. Intellectual Rights and Property in Persons" (1996) Social Anthropology IV:1, pp. 17–32; Michael F. Brown, "Can Culture Be Copyrighted?" (1998) Current Anthropology 39:2, pp. 193–222; Martin Rudoy Scherzinger, "Music, Spirit Possession and the Copyright Law: Cross-Cultural Comparisons and Strategic Speculations" (1999) Yearbook of Traditional Music 31, pp. 102–125; Anthony McCann, "All That Is Not Given Is Lost: Irish Traditional Music, Copyright, and Common Property" (2001) Ethnomusicology 45:1, pp. 89–106; Kimberlee Weatherall, "Culture, Autonomy and Djulibinyamurr: Individual and Community in the Construction of Rights to Traditional Designs" (2001) The Modern Law Review 64:2, pp. 215–242; Honko, *supra* note 40.

44 Mills, *supra* note 38.

45 Brown, *supra* note 43, at p. 193.

46 Scherzinger, *supra* note 43, at p. 104.

47 *Ibid*. at p. 111.

48 Harrison, *supra* note 43.

49 *Ibid*. at p. 235.

the distinction between modern individual authorship and traditional collective work was dispensable because it did not represent cultural practices properly.

Finally, the dualism existing since the 18th century, dividing the west from the rest, was challenged. The basic cultural assumptions relating to copyright law separating modern authors from traditional creators was questioned.

The question remains as to what follows "after the fall of an asserted universality, revealed as disguised particularity", to use an expression of Martti Koskenniemi.[50] What comes after the deconstruction of the core concepts as Eurocentric? What could replace the old legal and cultural framework based on the polarity "modern vs. traditional"? After four decades of unsuccessful norm-building on folklore protection on the international level, a Fact-finding Mission was established by the WIPO in 1998.[51] Its aim was to integrate tradition into the legal framework "in order to promote the contribution of the intellectual property system" to the "social, cultural and economic development" of the holders of tradition.[52] Since 2001, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has continued the norm-setting process based on the Model Provision of 1982.[53] Folklore is now part of an expanded notion of "traditional knowledge" associated with potential sources of "innovation and creativity". The aim of WIPO is to include the once excluded areas of art and knowledge production in the structure of intellectual property legislation.

Looking back at the long history of the cultural and legal construction of tradition in modern societies several shifts can be observed: during the 18th century modernity defined itself *ex negativo* as the counterpart to tradition associated with the oral, pre-modern and non-western. Once excluded from the modern project, tradition was discovered and rehabilitated by scholars and young nation states. The copyright norms established in the mid-18th century based on a strong dualism of modern written cultures centred around individual authors and pre-modern oral cultures embedded in communities. The universal approach was questioned by young African and Asian nations as of

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[50] Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960*, Cambridge: Cambridge University Press, 2002, at p. 505.

[51] WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva: WIPO, 2001.

[52] *Ibid*. at p. 19.

[53] Wend B. Wendland, "Intellectual Property, Traditional Knowledge and Folklore: WIPO's Exploratory Program" (2002) International Review of Industrial Property and Copyright Law 33, pp. 485–504.

the early 1960s. The critiques by some cultural anthropologists since the 1990s have gone even further: they argued that what is called "traditional culture" is much more entangled with "modern culture" than the 18th-century European philosophers, the 19th-century scholars and state-builders and even the 20th-century folklorists ever believed. At the beginning of the 21st century, the international agenda of WIPO is discussing "traditional cultural expression" as a tool for cultural and economic development. Old categories are being broadened, former requirements such as fixation, single authorship and limitation of the term of protection, might be abolished and/or softened in a future model provision.[54] Being authorless and timeless, two key attributes of the traditional invented by the modern might no longer be an obstacle to becoming part of the modern legal framework. The tradition is modernized now.

[54] WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/8/4, 8 April 2005, at Annex (unaltered in WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, and WIPO/GRTKF/IC/12/4(c), 6 December 2007). The draft provisions are reproduced in the Annex of this volume.

2. Cannibalizing epistemes: will modern law protect traditional cultural expressions?

Gunther Teubner and Andreas Fischer-Lescano*

1. TRADITIONAL KNOWLEDGE: SOCIAL ISSUE FRAMING

True miracles are ascribed to the Neem Tree (*Azadirachta indica*), particularly in India, where the tree is worshipped as being holy. Extracts from its leaves are used to fight against 14 different types of fungus and against bacteria found in burn tissue, as well as against typhoid pathogens. The extract is used to prevent viral infections, and is implemented against small pox, chicken pox, hepatitis B and herpes. All parts of the tree are used in ayurvedic medicine.[1] Bio-pesticides and bio-fungicides are also extracted from the Neem Tree. The Turmeric powder (*Curcuma longa*) is a spice of similar versatility. It is used in Indian medicine to combat infectious diseases and to heal wounds, but also as a spice and dye. What these two natural products have in common is that they were both objects of economic interest, exploited by transnational networks. While the US company W.R. Grace & Co. acquired a whole series of patents in connection with the production of a stabilizing *Azadirachta* solution for fighting fungi, researchers at the University of Mississippi Medical Centre patented the use of turmeric in the USA for purposes of healing wounds.[2] Both

* We would like to thank Isabel Hensel for helpful suggestions.

1 Heinrich Schmutterer, *The Neem Tree Azadirachta Indica A. Juss. and Other Meliaceous Plants: Sources of Unique Natural Products for Integrated Pest Management, Medicine, Industry and Other Purposes*, Weinheim: VCH, 1995.

2 For details on both cases, see Murray Lee Eiland, "Patenting Traditional Medicine" (2007) Journal of the Patent and Trademark Office Society 89, pp. 45–84; Anja v. Hahn, *Traditionelles Wissen indigener und lokaler Gemeinschaften zwischen geistigen Eigentumsrechten und der public domain*, Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Vol. 170, Berlin: Springer, 2004, at p. 270 (Turmeric) and at p. 279 (Neem Tree). See also Rekha Ramani, "Market Realities v.

attempts to attain knowledge using transnational networks faced severe resistance from indigenous groups. In both cases, activists from various NGOs appealed against the patents granted; both appeals were successful. After the Indian Council of Scientific and Industrial Research applied for the turmeric case to be reconsidered, the patent was revoked (US Patent No. 5.401.504). The reason given for revocation was that the invention was no longer a novelty.[3] The conflict situation in the Neem patent case, brought before the European Patent Office (EPO), was similar. After the appeal by the environmental activists, under the guidance of Vandana Shiva and Magda Alvoet, had been filed, the European patent No. 0436257 was revoked by the EPO as well according to Article 52(1) of the European Patent Treaty (EPT)[4] as it no longer qualified as a novelty according to the information submitted orally or in writing on its technical status.[5]

Both cases represent a brave and honourable, but very problematic, attempt to combat the exploitation of traditional knowledge[6] through exploration methods – which are used by modern economics, science, technology, medicine and culture in peripheral societies – by bringing the conflicts before the legal forums of the industrialized world.

Indigenous Equities" (2001) Brooklyn Journal of International Law 26, pp. 1147–1176, at footnote 5 – regarding the patent of Turmeric. The literature concerning the patent of the Neem Tree is extensive, particularly instructive: Shalini Randeria, "Rechtspluralismus und überlappende Souveränitäten: Globalisierung und der listige Staat in Indien" (2006) Soziale Welt 57, pp. 229–258, at p. 237; Emily Marden, "The Neem Tree Patent: International Conflict over the Commodification of Life" (1999) Boston College International and Comparative Law Review 22, pp. 279–295, at p. 283; Vandana Shiva and Radha Holla-Bhar, "Piracy by Patent: The Case of the Neem Tree" in Jerry Mander and Edward Goldsmith (eds), *The Case of the Global Economy: And for a Turn Toward the Local*, San Francisco: Sierra Club Books, 1996, pp. 146–159, at p. 148.

[3] Reexamination Certificate B1, 3500, 21 April 1998, cancelling claims in US Patent No. 5. 401. 504; Graham Dutfield, "TRIPS-Related Aspects of Traditional Knowledge" (2001) Case Western Reserve Journal of International Law 33, pp. 233–275.

[4] Implementing Regulations to the Convention on the Grant of European Patents (European Patent Convention) of 5 October 1973, as last amended by the Act revising Article 63 EPC of 17 December 1991 and by Decision of the Administrative Council of the European Patent Organisation of 21 December 1978, of 13 December 1994, of 20 October 1995, of 5 December 1996, of 10 December 1998, and of 27 October 2005, as well as the preliminary applicable regulations of the Act revising the Convention on the Grant of European Patents of 29 November 2000.

[5] EPO, Decision revoking the European Patent, 13 February 2001, Application No. 90250319.2-2117, Patent No. 0436257; the objection to this decision was decided negatively on 8 March 2005 (Az. T 0416/01 – 3.3.2).

[6] In the following text, the concept of traditional knowledge due to the holistic context of the production of knowledge thereby refers also to each form of traditional culture.

The real problem behind these litigation strategies lies in their issue framing. What are the categories in which politics and law in the centres of modernity perceive the problem of traditional knowledge in peripheral societies? It is these categories that ultimately decide upon the ransom conditions, the content and execution of sanctions against the exploitation of traditional knowledge. Public interest lawyers necessarily depend upon the issue framing given by the courts before which they stand, or by the administrative bodies to which they appeal, and from the legal norms whose interpretation they are debating. Although this dependency gives them the opportunity to connect to existing legal regulations and also opens scenarios for incremental legal innovations, it does bind them too closely to the conceptual system of the special legal field they are dealing with and precludes them effectively from exploring the real dimensions of the conflict and from finding solutions tailored to these problems. The issue framing in the Neem Tree case was particularly bizarre. Did the successful attack on the novelty of the patent at all contribute to conceiving the problem of traditional knowledge adequately? No. The plaintiffs only succeeded in proving that traditional knowledge pertaining to the healing powers of the tree had already been recorded in religious sources.[7] Expressing the *quaestio iuris* of the Neem Tree exclusively in intellectual property (IP) speak is to defy the purpose of the actual conflict, because the IP-specific "novelty" of the knowledge is not the problem requiring regulation. Instead, the problem for regulation is how to protect the generation of traditional knowledge as such. Which issue framing then should be used to record conflicts that result from the utilization of traditional knowledge by modern society in science, technology, medicine, media, art and economics, and into which *quaestio iuris* are they to be translated adequately?

The question of how to qualify traditional knowledge as a legal issue confronts experts of international law with the acute problem of fragmentation of international law.[8] There are several international organizations that have registered the problem of traditional knowledge under the influence of public protest and have initiated legal regulations – but they registered the problem with only their own tunnel vision. Therefore, the starting point is precisely this issue of fragmentation of law:

> Indeed, the attempts to create [traditional knowledge] protection rules on the global level reveal substantial fragmentation. After the early success of a joint effort of the

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[7] So distinctively formulated by the EPO deciding the request against the revocation of the patent, see *supra* note 5, at p. 21: "In conclusion, the main request fails for lack of inventive step (Article 56 EPC)".

[8] For the fragmentation of the international law on traditional knowledge, see Martin A. Girsberger's contribution to this volume.

> World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO) to elaborate a sui generis model for IP-type protection of traditional knowledge (UNESCO-WIPO Model Provisions, 1982), the international community has shown no coherence in its approaches to traditional knowledge. The multiplicity of regional, national and civil society endeavours to protect different aspects of traditional knowledge, complicates the picture and deepens the fragmentation.[9]

However, where protection of traditional knowledge is at the mercy of normative collisions resulting from legal fragmentation, issue framing becomes even more exigent. The heated debate on legal fragmentation that was first formalized in the report issued by the International Law Commission (ILC) working group demonstrates that unifying the existing legal provisions or setting up court hierarchies does not avoid collisions of this nature. The debate shifted attention from the juridical to the political dimension, from norm conflicts to policy conflicts between international regimes.[10] Various international organizations – the World Trade Organization (WTO), the United Nations Food and Agriculture Organization (FAO), WIPO, etc. – collide with their respective institutionally ingrained problem definitions and their respective strategies for solution. Today, traditional knowledge has been drawn into the maelstrom of the policy conflicts and is wedged between an aggressively propagated global expansion of intellectual property rights on the one hand, and the maintenance of cultural diversity and biodiversity on the other.[11]

A strange *effet pervers*[12] of the global juridification of traditional knowledge is revealed: not only transnational enterprises exploit traditional knowledge to feed their profit strategies, but also transnational regulatory regimes do the same to feed their regulatory strategies. Of course, they do not abuse traditional knowledge for private purposes, nevertheless they instrumentalize the

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[9] NCCR, International Symposium "Traditional Cultural Expressions in a Digital Environment", Lucerne, *Symposium's Programme*, June 2007.

[10] Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission: Draft conclusions of the work of the Study Group, ILC, 58th Session, A/CN.4/L.682, 13 April 2006; see also the (inferential) Report of the Study Group of the International Law Commission. Draft Conclusions of the Work of the Study Group: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, ILC, 58th Session, A/CN.4/L.702, 18 July 2006.

[11] See Commission on Intellectual Property Rights, Integrating Intellectual Property Rights and Development Policy, London: Commission on Intellectual Property Rights, September 2002.

[12] Raymond Boudon, *Effets pervers et ordre social*, Paris: Presse Universitaire Française, 1977.

knowledge of peripheral societies, for the good of a transnational *ordre public* – despite taking the side of developing world countries. Palpable regulatory regimes set up by the national legislative following initialization through global regimes evidence this trend. India has attempted to balance two conflicting political goals, under the influence of global politics, in Article 36(5) of the Biological Diversity Act 2002: incentives of intellectual property and biological diversity.[13] But what a peculiar detour biodiversity is as a means of protecting traditional knowledge by pursuing policies of sustainability in order to preserve the diversity of biological species! The instrumentalization of traditional knowledge for biological and economic purposes at the same time does not fit the peculiar nature of traditional knowledge, as was effectively demonstrated in Thailand – this time for medical purposes. The Thai legislative subsumes all norms that are designed to facilitate traditional knowledge as "protection and promotion of traditional Thai medicinal intelligence".[14] And even if traditional knowledge preservation is "inherently" proclaimed as a policy goal, such as in Brazil and the African Model Legislation, they understand it to be a knowledge stock of high "socio-economic value", which should be transcribed, documented, stored and utilized in digital databases. Thus, they tend to miss the goal of protecting the processes that lead to the generation of knowledge.[15] Finally, the instrumentalization of traditional knowledge becomes obvious when protective IP regimes for traditional knowledge pronounce the explicit goal of adapting indigenous groups to modern markets: "We contend that carefully designed IPRs in traditional knowledge could help developing countries become full players in global agricultural markets while equally rewarding indigenous people for their contributions to international well-being".[16]

In relation to such a subordination to the idiosyncratic regulatory logic of international organizations, it makes a substantial difference to detach the

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[13] The Article reads as follows: "The Central Government shall endeavour to respect and protect the knowledge of local people relating to biological diversity, as recommended by the National Biodiversity Authority through such measures, which may include registration of such knowledge at the local, State or national levels, and other measures for protection, including *sui generis* system". Hereunto, see Thomas Cottier and Marion Panizzon, "Legal Perspectives on Traditional Knowledge: The Case for Intellectual Property Protection" (2004) Journal of International Economic Law 7, pp. 371–399, at p. 380.

[14] See WIPO, Comparative Summary of Existing Sui Generis Measures and Law for the Protection of Traditional Knowledge, WIPO/GRTKF/IC/5/INF/4, 20 June 2003.

[15] Regarding the legal situation in Brazil and the African Model Act, see *ibid*.

[16] Cottier and Panizzon, *supra* note 13, at p. 372.

fragmentation of traditional knowledge law from its overly tight connection to regime policies and to retrace it to fundamental conflicts within modernity. As Martti Koskenniemi notes in the ILC working group's report on fragmentation, regime collisions are an expression of profound contradictions in global society.

> In a sociological sense, they may even be said to express different social rationalities: a clash between them would appear as a clash of rationalities – for example, environmental rationality against trade rationality, human rights rationality against the rationality of diplomatic intercourse. Thus described, fragmentation of international law would articulate a rather fundamental aspect of globalized social reality itself – the replacement of territoriality as the principle of social differentiation by (non-territorial) functionality.[17]

It then becomes clear that regime collisions do not merely result from policy conflicts, but also from conflicts between different societal systems.[18] In the various attempts at regulating the traditional knowledge problem at a global level, partial rationalities of global society collide with each other: economic, scientific, medical, cultural and religious principles are in conflict about access to traditional knowledge. Greatly simplified, this means: when using traditional knowledge, economic, scientific, artistic, media-related and medical utilization interests collide with claims of integrity and diversity of cultures, religions and ways of life. As a consequence, related regulatory projects react to these conflicts in very different ways. Is reconciling these interests using hierarchical decisions or negotiations between regimes possible?

Seen from this perspective, traditional knowledge rightly qualifies as a problem of colliding rationalities in modern society. However, it is necessary to go a considerable step further, beyond the current discussions on legal fragmentation. The term 'colliding rationalities' does not adequately describe the problem of traditional knowledge, as it does justice to simple rather than to double fragmentation in global society. Although it makes clear how stocks of traditional knowledge are subjected to diverging demands from functional regimes worldwide, it does not take into account the second level of fragmentation – the cultural polycentrism, the conflict between various world

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[17] Koskenniemi, *supra* note 10, at para. 133, footnote 168; Martti Koskenniemi and Päivi Leino, "Fragmentation of International Law? Postmodern Anxieties" (2002) Leiden Journal of International Law 15, pp. 553–579; Andreas Fischer-Lescano and Gunther Teubner, *Regime-Kollisionen: Zur Fragmentierung des globalen Rechts*, Frankfurt: Suhrkamp, 2006.

[18] Saskia Sassen, *Territory-Authority-Rights – From Medieval to Global Assemblages*, Princeton, NJ: Princeton University Press, 2006.

cultures.[19] However, the traditional knowledge conflict arose precisely from this double fragmentation of functional global systems on the one side and regional cultures in global society on the other.[20] By rerooting the conflicts alone, it becomes possible to give the search for legal norms sociological directions that deal with the conflict more adequately. Political issue framing and the legal qualification of traditional knowledge problems cannot ignore this double polycentricity and, instead, should accept it as given, reflect it in its consequences and build up their regulatory projects on this basis.

Of course, it requires strong self-discipline to escape from the singing sirens: "clash of cultures" (Samuel P. Huntington) in international relations, "Jihad vs. McWorld" (Benjamin Barber) in political science; "multiple modernities" (Schmuel Eisenstadt) in sociology; and "uniqueness of legal cultures" (Pierre Legrand) in jurisprudence.[21] They all insinuate that in today's global society different regional cultures that are shut off hermetically from each other, clash. As influential as such concepts of a cultural conflict between modern and traditional societies have become, their assumptions of cultures as totalities or "compact", exclusive units "tout court", which have to fight to secure their boundaries, are questionable. Instead, it is essential to analyse how in particular highly specialized hyperstructures of global society have become capable of sabotaging the integration mechanisms of regional cultures from the inside.[22]

The decisive factor is the distinction between global and regional cultural principles of society: functional differentiation of "modern" knowledge stocks *versus* the social embedding of traditional knowledge. This distinction gives the conflicts of traditional knowledge their idiosyncratic colouring. Not the modern society as such – as a capitalist society, as an organizational society or as a knowledge society – is involved, but individual, highly specialized action centres have emerged from internal differentiation – functional systems, formal organizations, networks, epistemic communities – each of which is

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[19] Surya P. Sinha, "Legal Polycentricity" in Hanne Petersen and Henrik Zahle (eds), *Legal Polycentricity: Consequences of Pluralism in Law*, Aldershot: Dartmouth, 1995, pp. 31–69.

[20] Rudolf Stichweh, "Strukturbildung in der Weltgesellschaft – Die Eigenstrukturen der Weltgesellschaft und die Regionalkulturen der Welt" in Thomas Schwinn (ed.), *Die Vielfalt und Einheit der Moderne. Kultur- und strukturvergleichende Analysen*, Wiesbaden: VS Verlag für Sozialwissenschaften, 2006, pp. 239–257; this approach is used by Christoph Beat Graber in this volume.

[21] *Ibid.* Pierre Legrand and Roderick Munday, *Comparative Legal Studies: Traditions and Transitions*, Cambridge: Cambridge University Press, 2003; Benjamin R. Barber, *Jihad vs. McWorld: How the Planet is Both Falling Apart and Coming Together and What This Means for Democracy*, New York: Random House, 1995.

[22] Stichweh, *supra* note 20.

participating in the disintegration of knowledge production in regional cultures in its own special way. If these modern institutions, that are specialized in one function each, meet with diffuse structures in segmented or stratified societies, they have no choice but to tear traditional knowledge generation out of its context in which it has been embedded and transform it into their own metabolisms: "To divorce 'science' from 'religion' and to tear away the 'cosmological' or spiritual gloss from an allegedly 'practical' core will undermine many forms of traditional knowledge."[23]

Monocontextural regimes utilize "integrated" traditional cultural connections for their specialized goals by detaching them from the reproductional connection on which traditional knowledge relies for its further development. In short, the multidirectional traditional institutions are undermined by the unidirectionality of modern hyperstructures.

The way in which scientific and economic processes of global society attempt to brutally cut off "holistic", particularly religious, relations inherent in traditional knowledge forms and use them in favour of their own specialized rationalities is exemplified by the Ayahuasca liana (*Banisteriopsis caapi*).[24] This plant, a native of the Amazon delta, is processed by the shamans of indigenous peoples to produce the psychoactive drink "Ayahuasca". This drink is (in Brazil as in Santo Daime) an integral part of various myths and rituals of Amazonian spirituality.[25] It is used to cure illnesses (in particular rheumatism, bronchial diseases and traumatization)[26] and in religious ceremonies to facilitate encounters with the gods and the universe. The intoxication experienced after drinking Ayahuasca is seen as a return to the origins of everything. Because the drink is also used to set up contact with the ghosts of the dead, the Ayahuasca liana is frequently referred to as *liana de los muertos*

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[23] Rosemary J. Coombe, "Protecting Cultural Industries to Promote Cultural Diversity: Dilemmas for International Policy-Making Posed by the Recognition of Traditional Knowledge" in Keith Maskus and Jerome Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Intellectual Property Regime*, Cambridge: Cambridge University Press, 2005, pp. 559–614, at p. 606.

[24] See also Michael F. Brown, *Who Owns Native Culture?,* Cambridge, MA: Harvard University Press, 2004, at p. 107.

[25] Beatriz Caiuby Labate and Wladimyr Sena Araujo, *O Uso Ritual da Ayahuasca*, Campinas: Mercado de Letras, 2004; Carsten Balzer, *Wege zum Heil: Die Barquinha. Eine ethnologische Studie zu Transformation und Heilung in den Ayahuasca-Ritualen einer brasilianischen Religion*, Mettingen: Brasilienkunde-Verlag, 2003; Benny Shannon, *Antipodes of the Mind: Charting the Phenomenology of the Ayahuasca Experience*, Oxford: Oxford University Press, 2002; Arturo Burga Freitas, *Ayahuasca: Mitos, leyendas y relatos de la amazonía peruana*, Lima: Tipo-Offset, 1980, at p. 55.

[26] See the contributions in Jacques Mabit, *Memoria del Segundo Foro Interamericano Sobre Espiritualidad Indígena*, Lima: CICEI, 2001.

(liana of the dead).[27] Ignoring these integral connections, the botanic patent US 5751 P that was registered in favour of Loren S. Miller on 17 June 1986, aimed at optimising the economic possibilities for utilization of the plant. The Ayahuasca liana patented by Miller, called "da Vine", can be distinguished from previously discovered lianas in particular by its colour and petals. Miller intended to utilize the patent specifically for medicinal purposes.[28] After the patent became known to a South-American non-governmental organization (NGO), a network of NGOs applied for it to be reinvestigated.[29] As in the Neem Tree case, the application was granted and the patent annulled, as it had not met the prerequisite to qualify as novelty.[30] By contrast to the Neem Tree case, however, this decision was appealed by the US Patent and Trademark Office (PTO). In 2001, the PTO decided in favour of the patent owner, who had been able to prove that the plant patented was sufficiently distinguishable from the previously known types.[31] Even though the patent protection for "da Vine" expired in 2006, after its 20-year protection period, this case manifests how little legal argumentation directed at the "novelty" of the discovery actually accomplishes.[32] The authorities are frequently satisfied with proof that already minimal modifications to traditionally used plants (petal colour, leaf shape) are sufficient to satisfy the requirement of novelty. Should this easily manipulable requirement be the decisive factor, when different patterns of interpretation, views of people and of the world, as well as fundamental forms of differentiation in global society stand in conflict with one another?

The requirement for the discovery to be "new" as a *quaestio juris* in cases of general incommensurability appears to be wholly insufficient. Because the

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27 Rosa Giove, *La Liana de los Muertos al Rescate de la Vida*, Tarapoto: Takiwasi, 2002.

28 According to the patent specification: "The subject plant is being investigated for its medicinal value in cancer treatment and psycho-therapy. It is useful in treating post-encephalytic Parkinsonism and angina pectoris. It also has antiseptic, bactericidal properties and has both amoebicidal and antihelmentic action. It is an attractive house plant which seasonally blooms". See the summary, Description of US 5751P.

29 Request for Reexamination of US Plant Patent No. 5751, 30 March 1999.

30 Leanne M. Fecteau, "The Ayahuasca Patent Revocation: Raising Questions About Current US Patent Policy" (2001) Boston College Third World Law Journal 21, pp. 69–105; Glenn Wiser, "US Patent and Trademark Office Reinstates Ayahuasca Patent" (2001) Center for International Environmental Law Publications 25, pp. 1–14; Maggi Kohls, "Blackbeard or Albert Schweizer: Reconciling Biopiracy" (2007) Chicago-Kent Journal of Intellectual Property 6, pp. 108–137.

31 For details, see Hahn, *supra* note 2, at p. 275 and Wiser, *supra* note 30.

32 Valerie J. Phillips, "Half-Human Creatures, Plants and Indigenous Peoples: Musings on Ramifications of Western Notions of Intellectual Property and the Newman-Rifkin Attempt to Patent a Theoretical Half-Human Creature" (2005) Santa Clara Computer and High Technology Law Journal 21, pp. 383–451, at p. 402.

conflicts on biodiversity and transnational knowledge accumulation represent the politicized form of a basic conflict between peripheral cultures and functionally differentiated world centres:[33]

> We cannot concentrate on 'bio-diversity' and knowledge alone, as much more than that is at stake. Indeed, our whole perception of the world, our cultures, our homes, our spirituality as indigenous peoples is put into question. All of these factors are connected to each other.[34]

"Bio-piracy" is therefore a suitable description for the utilization of traditional knowledge by modern society after all, to the extent that we stay aware that the embedding of cultural life is not only endangered by the economic profit principle, but also by the globalized science's urge to expand, or of the healthcare system or the cultural industry.[35] "Cannibalizing epistemes" in its double meaning may be even more appropriate as a metaphor – cannibalization of knowledge, cannibalization through knowledge. It is always about the maximization of the inherent rationality of hyperstructures inside global society in its enhanced need for information – of functional systems, formal organizations, of networks and epistemic communities – tearing stocks of knowledge of regional cultures out of their vital context and inexorably drawing them into their wake. This becomes particularly evident by the way in which globalized science treats traditional knowledge.[36] The scientifically legitimate claim that knowledge belongs in the public domain necessarily destroys structures of communal ownership of knowledge in regional cultures. The principle of general access to knowledge violates spheres of confidential-

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[33] Marcelo Neves, *Verfassung und Positivität des Rechts in der peripheren Moderne*, Berlin: Duncker and Humblot, 1992.

[34] "No debemos focalizar sólo en la 'biodiversidad' y el conocimiento, porque estamos hablando sobre mucho más que éso. En realidad estamos hablando sobre toda nuestra concepción del mundo, nuestras culturas, nuestras tierras, nuestra espiritualidad como pueblos indígenas. Todo ésto está vinculado. Debemos contemplar el panorama completo" (Stella Tamang, Federación de las Nacionalidades, Nepal, en el Seminario/Consulta Asiático, cited in Grupo Internacional de Trabajo sobre Asuntos Indígenas (IWGIA), "Los Pueblos Indígenas Reivindican su Integridad Intelectual" (1995) Asuntos Indíginas, at pp. 14–15).

[35] For a critique of the concept of bioprospecting, see Vandana Shiva, "Bioprospecting as Sophisticated Biopiracy" (2007) Journal of Women in Culture and Society 32, pp. 307–313.

[36] See e.g. Articles 1(1) and 12(3) of the International Treaty on Plant Genetic Resources for Food and Agriculture. Regarding Daes' criticism of well-meaning projects protecting traditional knowledge by a global database and thus subduing it to the principles of modern sciences, see Erica-Irene Daes, "Intellectual Property and Indigenous Peoples" (2001) American Society of International Law Proceedings 95, pp. 143–150, at p. 144.

ity motivated by religion. Scientifically specialized methods of controlled verifiability necessitate the deletion of dependence on religion, culture and habitat, which, however, are necessary for traditional knowledge to survive in the first place.

2. DEALING WITH COLLISIONS OF SOCIAL FORMS OF DIFFERENTIATION

Given these carefully calibrated invasions by global modernity in regional cultures, it does not make much sense to deal with the culture conflict as such, using broad political and legal counter-strategies. The direction in which action has to be taken is not general resistance against modernization in the name of traditional societies, but rather in its turn a carefully calibrated restriction of global society hyperstructures. It is necessary to start with the individual expansive institutions of modernity and demand that they regulate themselves by exerting pressure on them from the outside. Other methods will not work. Political and legal counter-reactions to epistemic cannibalization have to build up external pressure to compel the expansive sub-systems of modern society to regulate themselves. The formula is: externally enforced self-restriction of the destructive expansion into socially embedded stocks of knowledge. The hyperstructures of globalized, modern society need to be coerced into respecting the indisposability of regional cultures.[37]

The sociological theory of basic rights developed by Niklas Luhmann will be categorically useful in regard to issue framing. It has shown that destructive aspects of functional differentiation have been successfully counteracted by social counter-movements in other contexts, in which those counter-movements coerced expansive social systems to self-restriction. Additionally, however, the theory needs to be adjusted to apply to different types of conflict between functionally differentiated "globalness" and knowledge embedded in regional cultures. Seen from a sociological perspective, basic rights are not judicially protected rights of individuals against State power that lawyers usually see. They are the social counter-institutions that exist inside individual sub-systems and restrict their expansion from within. From the point of view of systems theory, the historic role of basic rights is not exhausted by protecting individual legal positions, but primarily consists in securing the autonomy

[37] With regard to the difficulties, subsuming traditional self-conceptions in modern categories, especially in judicial categories, see Coombe, *supra* note 23, at p. 611.

of social spheres against tendencies to usurp them.[38] In reaction to the emergence of autonomous spheres of action in modern society, basic rights have historically emerged, especially in response to the matrix of autonomized politics. As soon as expansionist tendencies became evident in the political system that threatened the integrity of other autonomous areas of society, turbulent social conflict ensued. The positions attained in the course of these conflicts have been formulated as basic rights and institutionalized in politics as counterinstitutions. Such expansionist tendencies have manifested themselves historically in very different constellations; in the past, mainly in politics; today, mainly in economics, science, technology and other sectors of society. Strengthening the autonomy of spheres of action as a countermovement against usurping tendencies constitutes the general, reactive mechanism that works in the conventional, vertical dimension of political basic rights as well as in the contemporary horizontal dimension in which basic rights are deemed to have a "third-party effect" on other expansive subsystems. If the core task of political basic rights was to protect the autonomy of spheres of action from political instrumentalization, then securing the chance for the so-called non-rational action logic to articulate against the matrix of the dominant social trends towards rationalization has become the central task of "social basic rights".[39]

Bio-piracy is a good example of today's expansionist tendencies in diverse sub-systems elsewhere, namely on the problematic border between globalized modern-day society and traditional regional culture. The primary issue is actually a problem of the horizontal effect of basic rights. "In the fields of cultural protection and biopiracy, however, the key actors are not states but private entities, such as universities, museums, and business corporations."[40]

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[38] Regarding the system of theoretical approach to basic rights as institution, see Niklas Luhmann, *Grundrechte als Institution: Ein Beitrag zur politischen Soziologie*, Berlin: Duncker and Humblot, 1965. See also Gert Verschraegen, "Human Rights and Modern Society: A Sociological Analysis from the Perspective of Systems Theory" (2002) Journal of Law and Society 29, pp. 258–281. Regarding his elaborations in various societal contexts, see Gunther Teubner, "Die anonyme Matrix: Menschenrechtsverletzungen durch 'private' transnationale Akteure" (2006) Der Staat 45, pp. 161–187. Karl-Heinz Ladeur, "Helmut Ridders Konzeption der Meinungs- und Pressefreiheit in der Demokratie" (1999) Kritische Justiz 32, pp. 281–300; Christoph Beat Graber and Gunther Teubner, "Art and Money: Constitutional Rights in the Private Sphere" (1998) Oxford Journal of Legal Studies 18, pp. 61–74.

[39] For continuative analyses, see Gralf-Peter Calliess, "Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law" (2002) Zeitschrift für Rechtssoziologie 24, pp. 185–217; Peer Zumbansen, "The Privatization of Corporate Law? Corporate Governance Codes and Commercial Self-Regulation" (2002) Juridicum 3, pp. 32–40; Ralph Christensen and Andreas Fischer-Lescano, *Das Ganze des Rechts. Vom hierarchischen zum reflexiven Verständnis deutscher und europäischer Grundrechte*, Berlin: Duncker and Humblot, 2007.

[40] Daes, *supra* note 36, at p. 148.

Thus, a further generalization with regard to the basic rights theory becomes necessary; this time in the other direction. If the matrix of functional differentiation not only threatens the integrity of areas of autonomy within modern society, but also threatens the integrity of traditional knowledge in regional cultures, then it would correlate with the institutionalized logic explained here to expect that external conflicts, protests, organized resistance and social movements of modern-day hyperstructures all coerce the institutionalization of basic rights so as to internally restrict their inherent urge to expand. And institutional imagination is required to realize the coerced self-restriction of functional systems, organizations, networks and epistemic communities in effective policies and legal norms.

Consequently, leading principles that are to be unfolded in the context of a modified theory of basic rights need to aim for the development of hybrid legal forms within modern law that represent a peculiar compromise between regional cultural identities and modern-day legal mechanisms of protection. If the protection of basic rights is indeed to work in this way, the compromise has to find a way past modern institutions' sensitivity to regional-cultural specialities on the one side and the operativity of modern law on the other. Simply taking sides with the cultural integrity is not enough. In order to be effective, 'basic rights' protection has to be fitted into modernity's normative programs, particularly into their sanctions of basic rights' violation, into their prohibitions, and provisions defining invalidity, punishments and compensation. This is indeed something very different to the subsumption under the policies of IP law criticized above.[41]

2.1. The Re-entry of "Extrinsic" into "Intrinsic"

Self-regulation under external pressure implies that modern legal institutions ought to be encouraged to reconstruct the interests of indigenous cultures within their own context in order to protect their basic rights. Does this then mean that protecting traditional knowledge has to be facilitated using modern law that refers to customary law, with the aid of collision rules? In the past, policy-makers influenced by anthropology have actually supported this option,[42] which expresses the relation between global modernity and regional cultures as a question of basic rights but confronts the law with the

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[41] See Tade Matthias Spranger, "Indigene Völker, 'Biopiraterie' und internationales Patentrecht" (2001) Gewerblicher Rechtsschutz und Urheberrecht 2, pp. 89–92, at p. 91.

[42] Daes, *supra* note 36; Anthony Taubman, "Saving the Village: Conserving Jurisprudential Diversity in the International Protection of Traditional Knowledge" in Maskus and Reichman, *supra* note 23, pp. 521–564; Coombe, *supra* note 23.

fundamental problem of whether extrinsic values can even be reconstructed to be intrinsic.

Is this not fatally reminiscent of the questionable traditions of colonial law? British colonial powers did not simply impose their own laws, but widely incorporated the "indigenous laws" of the colonial population they administered into their official law.[43] They suspended existing customary law only if it turned out to be incompatible with fundamental British legal principles. The limiting factor was the "repugnancy principle": indigenous law was held not to apply if it was "repugnant to natural justice, equity and good conscience".[44] However, this was not a wise delegation of norm-producing power to the indigenous population, but rather the absolute opposite. Critical anthropologists have succeeded in exposing the secret mechanisms of power behind this apparently gentle law. In arduous and detailed research they have proved that the so-called customary law as such did not exist at all. The whole thing was a scam – pure fiction, created by the British colonial administration and their submissive anthropologists![45] The trick was hidden in exactly this lie: indigenous or customary laws were not "rules that trace back to the habits, customs, and practices of the people",[46] as had been assumed by traditional anthropologists, but were "constructs of the European expansion and capitalist transformations" and therefore nothing more than a "myth of the colonial era".[47] British lawyers picked out those elements that suited their purpose from a multitude of very different cultural sediments, and put together a collage they labelled "existing indigenous law", in order to be able to stamp it with the official seal of colonial power.

What does this highly selective incorporation of "indigenous culture" by a colonial administration teach us? There is no way around it. This is the hard reality we have to accept. If the goal is to limit the expansion of modern-day institutions using basic rights, there is no way around reconstructing extrinsic factors using intrinsic definitions, in order to erect internal barriers in the appropriate positions. Otherwise, external protest and resistance in the name of regional cultures will rebound off them without any effect at all. The chance lies in increasing the reconstruction in its responsiveness, in its sensitivity toward traditional cultures, which is all that counts. These are always "reconstructions", as indigenous law does not "actually" exist. It is a sheer construct

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43 Sally Engle Merry, "Legal Pluralism" (1988) Law and Society Review 22, pp. 869–896.

44 *Ibid*. at p. 870.

45 Francis Snyder, *Capitalism and Legal Change: An African Transformation*, New York: Academic Press, 1981.

46 Anthony Allott, *Essays in African Law*, London: Butterworths, 1960, at p. 62.

47 Merry, *supra* note 43, at p. 875.

of its modern inventors. Modern law picks out the elements of factual usages and customs of the regional cultures that it needs, drawing them together into a collage that it presents as "customary law", that is, as normative ownership positions and obligations to act that are supposed to be created by the regional culture. Modern law's reading of regional cultures is thus based on a single huge misunderstanding – possibly a creative misunderstanding. It is only creative, however, where it does not project new discoveries out of the blue and where it succeeds to trace and transform actually existing foreign cultural material into modern law. To vary Polanyis's famous distinction: the legal misunderstanding is creative to the extent that it builds its explicit, modern, legal knowledge on the basis of implicit traditional social knowledge. Despite all discords, the misunderstanding remains an understanding! As the Portuguese legal sociologist Boaventura de Sousa Santos, who is staging a post-modern theory of legal pluralism, says: "Law. A Map of Misreading".[48]

The law of global modernity systematically misunderstands certain communications within regional cultures as legal acts, capable of creating legal norms, and indeed has to misunderstand them if they are to become effective barriers to the expansion of modernity – notably not only as legal acts through which law judges with the help of norms produced elsewhere, but as legal acts that produce norms themselves. Using this real fiction, law creates a new legal production mechanism in the institution of "indigenous law" that is capable of counteracting modern expansionist tendencies by implementing prohibitions and other legal sanctions. This is where the opportunities lie for a global system to protect basic rights for indigenous peoples to develop responsiveness. The attempt at understanding how these people see themselves appears to be the only promising chance, in order to reconstruct this understanding as restrictions in the respective language of the fragmented systems. The way in which the producers of traditional knowledge perceive themselves – "the principle of indigenous self-determination" – should be the normative center of gravitation.[49] It is therefore not about an abstract protection of traditional knowledge as such, but about protecting the cultural conditions in which traditional knowledge is produced.

2.2. Trans-individual Basic Rights

A basic rights theory established on sociological principles also ought to be

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[48] Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization and Emancipation*, Evanston, IL: Northwestern University Press, 2003, at p. 417.

[49] Coombe, *supra* note 23; Taubman, *supra* note 42, at p. 46; Daes, *supra* note 36, at p. 146.

able to confront one of the most difficult problems posed by securing the self-perception of indigenous cultures using basic rights, with a fair chance of success: who is the beneficiary of the basic right? Modern law says, of course, the individual author of the knowledge. However, this individualist perception of basic rights is opposed to the communal or collective character of traditional knowledge. This conflict became dramatically evident in Australian judicial proceedings in which the relationship of indigenous groups with their land in terms of modern categories of "ownership" was formulated.[50] However, a basic rights theory founded on sociological principles attributes basic rights to impersonal communication processes as well as to individuals and thereby categorically approaches a perception that regional cultures have of themselves. It should not be sufficient to declare "communities, associations, cooperatives, families, lineages" (in other words: groups or collectives) to be legal entities,[51] as a peculiar intercultural compromise, as in this case, traditional knowledge itself and not its authors – neither as individuals nor as a collective – would be the addressees of institutionally understood basic rights. The instructions for global law should be to de-individualize basic rights more radically and recognize indigenous communication processes as basic rights' addressees in their own right and to design suitable procedures to guarantee their legal protection.[52] In addition to individual and collective rights, indigenous "cultural rights" would then be recognized as a third, "hybrid" form of rights. Declaring cultural processes to be legal "entities" facilitates the identification of traditional knowledge in foreign cultures for a basic rights theory.[53] This would be law *sui generis*, worthy of the name.

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[50] Daniel J. Gervais, "Spiritual but Not Intellectual? The Protection of Sacred Intangible Traditional Knowledge" (2003) Cardozo Journal of International and Comparative Law 11, pp. 467–495; Daniel J. Gervais, "Traditional Knowledge and Intellectual Property: A TRIPS-Compatible Approach" (2005) Michigan State Law Review, pp. 137–166; Taubman, *supra* note 42.

[51] Cottier and Panizzon, *supra* note 13, at p. 388; Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Oxford University Press, 1996; Rodolfo Stavenhagen, "Cultural Rights: A Social Science Perspective" in Eide Asbjørn, Catarina Krause, and Allan Rosas (eds), *Economic, Social and Cultural Rights*, The Hague: Kluwer Law International, 2001, pp. 85–109; David R. Downes, "How Intellectual Property Could Be a Tool to Protect Traditional Knowledge" (2000) Columbia Journal of Environmental Law 25, pp. 253–282, at p. 255; Gervais (2003), *supra* note 50, at p. 481. For a critique of this approach, see the contribution of Elizabeth Burns Coleman to this volume.

[52] The Canadian constitutional law – by its collective and institutional understanding – may make advances to this concept of basic rights. Article 35(1) of the Canadian Constitutional Act of 1982 reads as follows: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[53] See Christoph Beat Graber's contribution to this volume; Christoph Beat

3. TRADITIONAL KNOWLEDGE AS AN INSTITUTIONAL ADDRESSEE OF BASIC RIGHTS

The trans-individual dimension of traditional knowledge protection does not aim at helping either individuals or collectives to assert their intellectual property rights, it rather intends to legally incite a self-regulation by imposing targeted prohibitions, restrictions on patents and similar access restrictions. In other words: the devil, transnational cannibalization of common knowledge,[54] cannot be driven out by the Beelzebub of national–individual patent rights (see Section 1 above), and cannot be combated by simply transforming the conflict into an issue of unified global patent law (see Section 2 above). In fact, rather complex protective measures are required, which in turn make it necessary to establish procedural devices in the context of transnational traditional knowledge law (as will be shown below).

3.1. Coordinating National Patent Law?

Neem Tree, Turmeric and Ayahuasca – these are three examples of traditional knowledge patenting that use litigation in national patent law. The question of whether the discovery was actually new was central to the conflicts. A whole series of distinctions use this requirement as a starting point: written/oral proof,[55] criteria for determining the "inventive step", in connection with which people "with ordinary skills" can be referred to (according to a suggestion of the Asian group)[56] or a closer definition of public policy that could be opposed to a national patent.[57] At last – and again it is about the achievement of a solution in regard to the novelty criteria in the patent law – there are experiments focusing on the installation of national databases, in which traditional knowledge is mapped. Thus, protection against private appropriations by national

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Graber and Martin Girsberger, "Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture That Includes Cultural Diversity" in Jörg Schmid and Hansjörg Seiler (eds), Recht des ländlichen Raums Festgabe der Universität Luzern für Paul Richli zum 60. Geburtstag, Zurich: Schulthess, 2006, pp. 243–282.

[54] Sebastian Bödeker, Oliver Moldenhauer and Benedikt Rubbel, *Wissensallmende: Gegen die Privatisierung des Wissens der Welt durch "geistige Eigentumsrechte"*, Hamburg: VSA-Verlag, 2004.

[55] Siddartha Prakash, *Trade and Development Case Studies, Country Studies: India, Local Species – Turmeric, Neem and Basmati*, Geneva: World Trade Organization, 1998, at p. 83.

[56] WIPO, Technical Proposals on Databases and Registries of Traditional Knowledge and Biological/Genetic Resources, Document submitted by the Asian Group, WIPO/GRTKF/IC/4/14, 6 December 2006, at Annex.

[57] Hahn, *supra* note 2, at p. 297.

patents as evidence against the novelty of discoveries, the protection of "morality" and a sensible dissemination and the utilization of traditional knowledge by the global public are rendered possible.[58]

The Ayahuasca Liana patent case shows particularly well how short-lived euphoria can be if conflicts are carried out in the setting of national patent law: the campaign against the patent was successful at first, but ultimately unsuitable because it supported the trend to treat the problem by exclusively using the logic of patent law. This enabled the manipulation of the novelty requirement and was totally insensitive towards the indigenous culture. The problem behind relying on national patent law is revealed by the Ayahuasca Liana case, where "da Vine" was only patentable because of its slightly modified petal and leaf shape. But also approaches relying on the restrictions inherent in national patent law are not sufficiently radical either. The NGOs, arguments in the Ayahuasca case focused on the concepts of public policy and common decency.[59] At first, such arguments appear to be suitable for reconstructing indigenous logic in the abstract parameters of western doctrine. Indeed, some precedents in western law can be described as "culturally rooted relativism that may apply to morality and *ordre public* exceptions to IP rights".[60] According to this, patent offices would need to gain certain knowledge of foreign cultures, much in the same way as family courts do. Nevertheless, this route does not lead to the desired level of protection. As understandable as it is that current conflicts on traditional knowledge patenting have to revert to the doctrines of national patenting systems, it is also obvious that this protection strategy can only be a temporary solution. The legal consequence of generally excluding traditional knowledge from patenting is that traditional knowledge is assigned to the public domain and is made generally accessible.[61] However, this solution thus reveals a complementary problem:[62] not only the patent registration, but also the non-patentability by reason of it

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58 The examples of India and Peru are classical, see BUKO – Kampagne gegen Biopiraterie, *Grüne Beute: Biopiraterie und Widerstand*, Frankfurt: Trotzdem-Verlag, 2005, at p. 139. Still forced up by the World Bank project of a global database for traditional knowledge, see Daes, *supra* note 36, at p. 144. The Google-project itself is confronted with criticism of biopiracy: "Google was presented with an award as part of the Coalition Against Biopiracy's Captain Hook Awards for Biopiracy in Curitiba, Brazil, this week. The organizers allege that Google's collaboration with genomic research institute J. Craig Venter – to create a searchable online database of all the genes on the planet – is a clear example of biopiracy". See Andrew Donoghue, "Google Accused of Biopiracy", ZDNet News, 30 March 2006.

59 Hahn, *supra* note 2, at p. 297.

60 Taubman, *supra* note 42, at p. 541.

61 For details, see William van Caenegem, "The Public Domain: Scientia Nullius" (2002) European Intellectual Property Journal 24, pp. 324–330.

62 Taubman, *supra* note 42, at p. 544.

belonging to the public domain can also harm the integrity of traditional knowledge, for the epistemic trap of patent–legal thinking lies in the false dichotomy of IP or public domain. Both can destroy the productivity of traditional knowledge, whether through the market (IP), or through the public domain. In order to avoid a pyrrhic victory, basic protection from usurpation by the public domain appears to be necessary for the cultural context that produces traditional knowledge.

3.2. Restriction through Globally Defining Indigenous IP Rights?

Suggestions for securing the protection of traditional knowledge in the communal domain area by using harmonized minimum standards and general principles of law are more radical. Concepts which aim to "develop new IP tools to protect traditional knowledge not protected by existing traditional knowledge tools"[63] go the farthest in trying to develop characteristics that do justice to inherent indigenous logic by using traditional knowledge-analytical epistemology. This results in wide-ranging gradations. While sacral elements should generally be inaccessible, concerning other forms of knowledge a "quasi-public domain" is imaginable.

By the efforts of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) the attempts to solve the question of traditional knowledge in the context of unified global patent law have become considerably dynamic. For a number of years now, the WIPO has been working on a project to substitute current discussions on the liberalization of national patent law systems, which are tailored to WTO law, in particular to the Trade-related Aspects of Intellectual Property Rights (TRIPS) Agreement, by substantive global patent law. In the core process, a complex of three contracts will be negotiated: (i) the Patent Law Treaty (PLT),[64] adopted in Geneva in June 2000, which harmonizes national procedural provisions, in particular the formal administrative procedures that lead to a patent; (ii) the Patent Cooperation Treaty (PCT), adopted in Washington in 1970, which primarily introduces a centralized patent listing system; and (iii) a Draft Substantive Patent Law Treaty (SPLT), which is supposed to unify worldwide patent law and has been discussed in its initial draft version by the WIPO Standing Committee on the Law of Patents (SCP) in May 2002.[65]

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[63] WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva: WIPO, 2001, at p. 226.

[64] WIPO Doc. PT/DC/47.

[65] For an instructive synopsis in regard to the complex of WIPO patent law, see

The work of the IGC has not been concluded so far. The differences in opinion between developing world countries on the one hand and the USA, Canada and Australia on the other are too great.[66] Negotiations up to now have merely resulted in a preliminary draft of provisions,[67] which is, however, hardly more than an agonized coercion of rationalities into coexistence. The main problem is that substantial legal unification of traditional knowledge and traditional knowledge-related provisions do not adequately address indigenous cultural diversity, being either too abstract or too specific to one particular culture, and therefore not suitable for the application in other cultures:

> Any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples' knowledge runs the risk of collapsing this rich jurisprudential diversity into a single 'model' that will not fit the values, conceptions or laws of any indigenous society.[68]

Although the IGC recognizes this problem, it has not stopped it from applying patterns of differentiation to peripheral societies, patterns which have not even been uniformly accepted by the centers of global society. The WIPO draft generally distinguishes between TCE and traditional knowledge, thereby casually brushing over traditional holistic patterns:[69]

> There are two distinct sets of draft objectives and principles, the first dealing with traditional cultural expressions ("expressions of folklore") and the second with traditional knowledge as such. This responds to the choice made in many cases to address distinctly the specific policy and legal questions raised by these two areas.

Carlos Correa and Sisule Musungu, "The WIPO Patent Agenda: The Risk for Developing Countries", South Center Working Papers 12/2002.

66 See e.g. WIPO, Decisions of the Tenth Session of the Committee, 30 November–8 December 2006, WIPO/GRTKF/IC/10, 8 December 2006.

67 WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/8/4, 8 April 2005 (unaltered in WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, and WIPO/GRTKF/IC/12/4(c), 6 December 2007; reproduced in the Annex of this volume) and WIPO, Revised Draft Provisions for the Protection of Traditional Knowledge: Policy Objectives and Core Principles, WIPO/GRTKF/IC/9/5, 9 January 2006.

68 Four Directions Council, *Forests, Indigenous Peoples and Biodiversity*, Submission to the Secretariat for the Convention on Biological Diversity, Lethbridge, Canada: Four Directions Council, 2006.

69 See in this sense, Joint Statement of the Indigenous Peoples Council on Biocolonialism (IPCB), Call of the Earth/Llamado de la Tierra (COE), and International Indian Treaty Council (IITC), WIPO/GRTKF/IC/10, 4 December 2006, at para. 2: "We find it necessary to state that we find the separation of TCEs and traditional knowledge rather artificial and contrary to the holistic nature of Indigenous peoples' cultural heritage."

> The draft materials are prepared, though, in the understanding that for many communities these are closely related, even integral, aspects of respect for and protection of their cultural and intellectual heritage.[70]

In addition, the form in which local rights are generated and the respective decisional processes are abstracted from local customs into substantive universal law, and ultimately paternalized by moral decisions of the center (in contrast to those of the periphery).

3.3. Regulation through Colliding Norms

Instead of a substantive global approach, it appears to be more appropriate to link up with and recognize existing practices, and acknowledge in the context of a conflict-of-law approach, "that traditional knowledge must be acquired and used in conformity with the customary laws of the peoples concerned".[71]

But what are the "customary rights of the affected peoples"? Alternatively, how can modern law reformulate the holistic framework requirements of traditional knowledge internally, without reproducing colonialist patterns?

An abundance of international legal texts and global regimes is committed to answering these questions. Experts from the respective areas apply the logic of each field and, in doing so, enhance the contradictions in global society in a specific, functionally fragmented manner. The following organizations currently deal with traditional knowledge: the United Nations Economic Social and Economic Committee (ECOSC), United Nations Convention to Combat Desertification (UNCCD), the United Nations Conference on Environment and Development (UNCED), the United Nations Conference on Trade and Development (UNCTAD), the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the United Nations Development Fund for Women (UNIFEM), UN Working Group on Indigenous Populations and Indigenous Peoples (UNWGIP), the World Health Organization (WHO), the International Labour Organization (ILO), the FAO, the WTO, and the World Bank. Many international agreements explicitly address the issue of traditional knowledge: the Convention on Indigenous Peoples Living in Tribes in Independent States,[72] the Draft United

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[70] ECOSOC, Information Received from the United Nations System: World Intellectual Property Organization, E/C.19/2006/6/Add. 13, 21 March 2006, at para. 10.

[71] Four Directions Council, *supra* note 68.

[72] ILO-Convention (No 169), adopted in Geneva on 7 June 1989 by the General Conference of the International Labour Organisation at its 76th Session, entered into force 5 September 1991. See Kerrin Schillhorn, *Kulturelle Rechte indigener Völker und Umweltvölkerrecht – Verhältnis und Vereinbarkeit*, Berlin: Duncker and Humblot, 2000, at p. 50.

Nations Declaration on the Rights of Indigenous Peoples,[73] the Inter-American Draft Declaration on the Rights of Indigenous Peoples,[74] the Convention on Biological Diversity (CBD),[75] the United Nations Convention to Combat Desertification in Countries Strongly Affected by Drought and/or Desertification, particularly in Africa;[76] the International Agreement (initiated in the context of the FAO) on Plant Genetic Resources for Nutritional and Agricultural Purposes,[77] and the UNESCO Intangible Heritage Convention.[78] The Convention on the Protection of New Plant Types (UPOV)[79] in relation to seeds is also worth mentioning. Countless international organizations are committed to observing the rights of indigenous peoples, such as the European Bank for Reconstruction and Development, the Asian Development Bank, and the African Development Bank. The UNDP and the World Bank have set up programs in favour of indigenous peoples. UNCTAD has contributed to systematizing the legal material in this field, in their comprehensive report "Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions".[80]

Article 27 of the TRIPS Agreement, part of the WTO legal framework, contains a further obligation for national States to protect plant-related traditional knowledge. Article 27.3 TRIPS requires members to protect plant species using either patents or a working system *sui generis*, or a combination of both. In compliance with this obligation, the European Union, for instance, has issued the Biopatent Directive, which makes it possible to patent living organisms.[81] The fact that Article 27 of the TRIPS Agreement has a strained

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[73] United Nations Commissioner for Human Rights, Draft United Nations Declaration on the Rights of Indigenous Peoples, A/HRC/1/L.3, 23 June 2006.

[74] Proposed American Declaration on the Rights of Indigenous Peoples (approved by the Inter-American Commission on Human Rights on 26 February 1997, at its 1333rd session, 95th Regular Session), OEA/Ser/L/V/.II.95 Doc.6 (1997).

[75] Adopted by the United Nations Conference on Environment and Development (UNCED), concluded in Rio de Janeiro on 5 June 1992.

[76] Concluded in Paris on 17 June 1994.

[77] Concluded in Rome on 3 November 2001.

[78] See also the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005, entered into force 18 March 2007.

[79] International Convention for the Protection of New Varieties of Plants (UPOV-Convention), 2 December 1961.

[80] UNCTAD, Protecting and Promoting Traditional Knowledge: Systems, National Experiences and International Dimensions, UNCTAD/DITC/TED/10, November 2004.

[81] Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 about the Legal Protection of Biotechnical Patents, OJ L 213, 30 July 1998, at p. 13.

relationship with the Biodiversity Convention has been widely discussed.[82] In response to these discussions, the WTO Council of Ministers, the responsible council under the TRIPS Agreement, according to paragraph 19 of the Doha Ministerial Declaration,[83] has given up trying to formulate "the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1" in more precise terms. "In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension." In the meantime, all further work by the WTO within the Doha Round has shown little (if no) progress in this connection.

Further suggestions for making systems compatible have been developed in other functional connections as well. In 2002, the conference of CBD member states accepted the "Bonn Guidelines on Access to Genetic Resources and Benefit-sharing", which contain guidelines on the protection of traditional knowledge. The Bonn Guidelines were designed to spell out CBD Article 8(j), according to which member states are obliged to

> [subject to their national legislation] respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Finally, we refer to Articles 19 and 27 of the ICCPR, as part of the United Nations Human Rights Framework, in particular to the general comment on Article 15 CESCR:

> With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual

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82 See Graber and Girsberger, *supra* note 53.

83 WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, at para. 17.

> property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.[84]

This corresponds with the rights expressed in Articles 8(j) and 15(7) of the CBD, according to which traditional knowledge carriers and benefit sharing are central features – requirements conflicting in a certain degree with the norms in the WTO context.

A glance that was arrested upon the identification of the colliding regimes did not go deep enough for traditional knowledge.[85] The virulence of the collision is underestimated if it is considered to be incompatible in fully separated contexts, as in this particular case collisions do not take place merely between the subjective rights of intellectual property owners, or between rights of various national States, or even between norms that have been formulated in different regime contexts. In the case of traditional knowledge, fundamental social principles of organization collide, whose treatment as regime collisions already alienates the actual conflict.

3.3.1. Limitation by the fictitious law of collision

These considerations suggest the development of a conflict of laws between specialized modern law and holistic institutions in traditional society. At this point, the usual suggestions for a law of collision demand recourse to "the acquisitions and use of indigenous people's heritage according to the customary laws of the indigenous people concerned".[86] As we said above, direct recourse to customary law is, however, impossible, because making reference to local customary law already means looking at holistically organized forms of society through the lens of functional differentiation and functional coding. The law of collision in this sense presupposes a modern counterpart for

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[84] Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15(1)(c)), UN Doc. E/C.12/2005, 21 November 2005; on TCE, see in particular para. 32.

[85] For details, see International Court of Environmental Arbitration and Conciliation, Consultative Opinion on the Compatibility Between Certain Provisions of the CBD and the TRIPS as to the Protection of Traditional Knowledge (EAS – OC 8/2003), Rep. Michael Bothe.

[86] WIPO, Composite Study on the Protection of Traditional Knowledge, WIPO/GRTKF/IC/5/8, 28 April 2003, at para. 105.

autonomous law. As this does not exist, it is necessary to follow the approach described above as "productive misunderstanding": modern, transnational institutions will each have to develop their own norms that refer to normative constructs of traditional societies and develop substantive norms of self-restraint. In doing so, it will not be possible to attain a substantive definition for traditional knowledge (either policy or structure). Instead, effective protection may be attained through reference to non-modern holistic knowledge practice that is reconstructed by modern law as "indigenous law" with an *ordre public* reservation.

If we follow this institutionalist point of view, it immediately becomes apparent that it is not enough to protect traditional knowledge as a mere store of knowledge, such as some authors suggest for digital evaluation, documentation and securing of traditional knowledge.[87] Of course, this may better serve the use by modern economy and science. It may also help to prevent illegitimate patenting practices, as the qualification of a discovery as being a novelty becomes impossible due to its prior digitalization. However, it fails to protect and to facilitate the necessary conditions for traditional knowledge production, because the development of such knowledge depends mainly on the context in which it was produced. In other words: the framework requirements of the respective local culture have to be maintained. At this point, the conflict between the highly specialized modern-day definition of knowledge and holistic traditional knowledge reerupts. Can modern law fulfill the expectations raised by this conflict? "Globalize diversity holistically" – this is Taubman's paradox response.[88] It is not only the result, but the entire process of knowledge production, which has to be included in the basic rights' protection. If one wants to protect traditional knowledge in a certain culture, then basic rights' protection must include both the knowledge itself and its embedding within culture.[89]

3.3.2. Proceduralized protection of traditional knowledge

In other words, modern-day basic rights need to be capable of guaranteeing the conditions of possibility for an autonomous traditional knowledge epistemology. At the same time, it is clear that basic rights should not merely aim at preserving existing culture reservations in their existing form. Solely introducing a species' protection policy is insufficient, as it targets structural rather than procedural autonomy. The protection of basic rights needs to create a framework in which indigenous cultures can develop independently and in

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87 Legitimate criticism by Daes, *supra* note 36.
88 Taubman, *supra* note 42, at p. 525.
89 *Ibid.* at p. 540.

conflict with modernity, either by restricting specific invasions through modernity or, in compensation, stipulating a resource transfer to indigenous peoples. There are a number of starting points with regard to the realization of this aim, to which the law of collision protecting traditional knowledge can connect and provides first indications for further advancement of global basic law protection.

This applies also for the attribution of communal–collective rights. Who is the beneficiary of such procedural rights? As discourse rights, these rights serve transsubjective goals. In identifying the range of beneficiaries using the "traditional knowledge discourse" criterion, it is not an entity in an ontological sense, but the contingent development of processes of subjectification: to what process should the legal enforcement of discourse rights be entrusted? Generally speaking, a personified collective is unnecessary, instead, a whole series of techniques can be used to attribute rights to entities, with the help of which rights of traditional knowledge can be implemented. This is important not only for the rights themselves, but also for the procedural standing. For instance, the Australian Court stated in *Onus v. Alcoa of Australia Ltd.* that,

> the members of the [Gourditichjmara] community are the guardians of the relics according to their laws and customs and they use the relics. I agree […] that in these circumstances the applicants have a special interest in the preservation of these relics, sufficient to support *locus standi*.[90]

A broad definition of the term "community" that reflects the contingencies in the formation of epistemic groups is required,[91] but simultaneously enables the protection of the discourse rights and the effective determination of the circle of addressees. As an example, the Brazilian law describes communities as being a: "human group, including descendants of Quilombo communities, differentiated by its cultural conditions, which is, traditionally, organized along successive generations and with its own customs, and preserves its social and economic institutions".[92]

Enabling these groups to participate in the decision to allocate traditional knowledge is the central challenge in making legal norms compatible. To the extent that authors criticize this challenge as a desideratum of bureaucratization,[93] they tend to ignore that the logic of *altera pars* requires reciprocity. Doing without it ultimately means to accept the monodirectional usurpation of

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90 *Onus v. Alcoa of Australia Ltd.*, C.L.R. 27 (1981), at p. 149.

91 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, London: Verso, 1991.

92 Provisional Act No. 2, 186–16, 23 August 2001, at Article 7(2).

93 Hanns Ullrich, "Traditional Knowledge, Biodiversity, Benefit-Sharing and the Patent System: Romantics v. Economics?" (2005) EUI Working Paper 2005/07.

global society, and to give in to global de-regulation instead of striving for constitutionalization. It also means misjudging the various legal obligations, which particularly urge parties to observe the concept of "prior informed consent" and "benefit sharing".[94] Developing both mechanisms further will be the key to effective traditional knowledge protection.

"Prior informed consent" (PIC)[95] ensures that communal groups participate in the decision-making processes that affect them,[96] and in relation to which they should be given the right to deny access to their resources and knowledge, if necessary.[97] Article 5 of the African Model Act endeavours to put this concept into words:

> (1) Any access to biological resources, knowledge and or technologies of local communities shall be subject to the written prior informed consent of: (i) the National Competent Authority; as well as that of (ii) the concerned local communities, ensuring that women are also involved in decision making. (2) Any access carried out without the prior informed consent of the State and the concerned local community or communities shall be deemed to be invalid and shall be subject to the penalties provided in this legislation or any other legislation that deals with access to biological resources. (3) The National Competent Authority shall consult with the local community or communities in order to ascertain that its/their consent is sought and granted. Any access granted without consultation with the concerned community or communities shall be deemed to be invalid and in violation of the principle and requirement for prior informed consent as required under this Article.[98]

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[94] See also the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, June 1993. Para. 2.5 thereof reads: "Develop in full co-operation with indigenous peoples an additional cultural and intellectual property rights regime incorporating the following: collective (as well as individual) ownership and origin, retroactive coverage of historical as well as contemporary works, protection against debasement of culturally significant items, cooperative rather than competitive framework, first beneficiaries to be the direct descendants of the traditional guardians of that knowledge, multi-generational coverage span."

[95] See Marc-Antoine Camp, "Wer darf das Lied singen? Musikethnologische Anmerkungen zum rechtlichen Status traditioneller Musikkulturen" (2005) sic! – Zeitschrift für Immaterialgüter-, Informations- und Wettbewerbsrecht 9, pp. 307–315.

[96] Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, 22nd session, 19–23 July 2004, at p. 5: "Free, prior and informed consent recognizes indigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them, based on the principle of informed consent."

[97] See Ulrich Brand and Christoph Görg, *Postfordistische Naturverhältnisse. Konflikte um genetische Ressourcen und die Internationalisierung des Staates*, Münster: Westfälisches Dampfboot, 2003, at p. 75.

[98] African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological resources, OAU Model Law, Algeria, 2000, available at http://www.wipo.int/tk/en/laws/pdf/oau_modellaw.pdf.

The various legal consequences that are available in response to a usage of traditional knowledge without valid agreement are addressed here. As such, they are hardly noticeable in the proposed European Commission's Directive of 26 April 2006 on Criminal Measures to Enforce Rights of Intellectual Property, aimed at tightening the Commission's Directive 2004/48/EC,[99] which restricted itself to product piracy. Questions of bio-piracy remain unaddressed. The reference to the creation of consensus according to the customs of the respective epistemic community is particularly relevant with regard to the question of PIC and secondary liabilities in cases of omission, and the resulting penalization or restitutionary obligations.[100] Work on certifying origins in order to secure prior consent and ensure that usage is allocated effectively is decisive in the context of the CBD.[101] The obligation to disclose the origin of knowledge helps not only to guarantee "that only really new discoveries are patented",[102] but also opens up a contact point for communication on controlling established rights of procedure.

To the extent that norms regulating profit distribution to indigenous groups are designed to facilitate usage of traditional knowledge for economic purposes by the usufructuary, contractual agreements regulating usage seem to be least suitable. Integrating the culture into western exchange-economies and destroying cultural–religious content contracts would do the opposite of protecting cultural autonomy. From an intercultural point of view, a solution using funds may therefore be more suitable and less difficult to implement than other regulatory norms, and therefore possibly most promising. The fund solution offers the option of diffuse monetary compensation, which could compensate for the lack of direction in these highly specialized intrusions.

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99 COM(2006) 168 final, 26 April 2006.

100 Hence liability regimes regularly refer at the same time to customary law. See Tracy Lewis and Joseph H. Reichman, Using Liability Rules to Stimulate Local Innovation in Developing Countries: A Law and Economics Primer, unpublished paper, Columbia University Earth Institute, Center on Globalization and Sustainable Development, 15 September 2003; Carlos Correa, *Protection and Promotion of Traditional Medicine: Implications for Public Health in Development Countries*, Geneva: South Centre, 2002. In the Philippines, the Philippines Indigenous Peoples' Rights Act, Republic Act 8371, § 32 protects, for instance, the rights of indigenous peoples "to the restitution of cultural, intellectual religious, and spiritual property taken without their free and prior informed consent or in violation of their laws, traditions and customs".

101 See lately CBD, Report of the Meeting of the Group of Technical Experts on an Internationally Recognized Certificate of Origin/Source/Legal Provenance, UNEP/CBD/WG-ABS/5/2, 20 February 2007.

102 Gregor Kaiser, "Biopiraterie: Der neue Kolonialismus" (2006) Blätter für deutsche und internationale Politik 51, pp. 1172–1176, at p. 1175.

UNCED Agenda 21[103] of the World Summit for Sustainable Development in South Africa in September 2002 offered strong support for this regulatory technique. The summit took place a few months after the Bonn Guidelines had been passed. Criticism of the Guidelines was initially directed at facilitating better access to traditional knowledge and placing less emphasis on PIC issues or benefit sharing, but has led to the call to "negotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources" at the Johannesburg World Summit.[104] In response to this demand, the Eighth Conference of the Parties to the CBD of March 2006 in Curitiba has preliminarily systematized these efforts in its Decision VIII/4.[105] It seems to be a promising start for making the contradictory logic described above compatible, to the extent that it culminates in the establishment of an international regime under the umbrella of the CBD that will introduce the concepts of prior informed consent and benefit sharing as effective regulations.

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[103] Rio de Janeiro, June 1992, at http://www.un.org/esa/sustdev/documents/agenda21/english/ agenda21toc.htm.

[104] UN, Report of the World Summit on Sustainable Development, A/CONF.199/20, 2002, at Section 44(o).

[105] CBD, Draft Decisions of the Eighth Meeting of the Conference of the Parties to the Convention of Biological Diversity, UNEP/CBD/COP/8/1/Add.2, 1 March 2006, at pp. 48–59.

PART TWO

Intellectual property and human rights

3. The Disneyland of cultural rights to intellectual property: anthropological and philosophical perspectives

Elizabeth Burns Coleman

In this paper I will argue against the concept of a human right to intellectual property in traditional cultural expressions (TCE), in so far as they are defined as arts. In so doing, however, I do not deny, and indeed intend to defend, the intuition that there are moral issues surrounding the use and transmission of TCE. I will argue that, while there is no human right to the protection of arts, not all TCE should be thought of as "arts", as this misrepresents the functional role they play. However, once we see what role they play, and why we should accept that they are morally important, we should not think of them as human rights.

1. INTRODUCTION

The "right to culture" is considered a human right. Article 27 of the International Covenant on Civil and Political Rights (CCPR)[1] states, that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in the community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language". The right to enjoy one's culture might be considered uncontroversial if it were merely taken to mean that it would be wrong of a government to forcibly suppress or destroy the culture of an indigenous minority group. Yet, the United Nations Report "Protection of the Heritage of Indigenous Peoples"[2] suggested that the term "enjoys" here might be interpreted as a property right. It declares that a society

[1] International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171.

[2] United Nations Commission on Human Rights, "Protection of the Heritage of Indigenous Peoples", Report by Erica-Irene Daes, E/CN.4/sub.2/1995/26, 21 June 1995.

owns its heritage, as that heritage gives it a distinct identity. The heritage of indigenous peoples includes all moveable cultural property as defined by the relevant conventions of UNESCO; all kinds of literary and artistic works such as music, dance, song, ceremonies, symbols and designs, narratives and poetry; all kinds of scientific, agricultural, technical and ecological knowledge, including cultigens, medicines and the rational use of flora and fauna; human remains; immoveable cultural property such as sacred sites, sites of historical significance, and burials; and documentation of indigenous peoples' heritage on film, photographs, videotape, or audiotape. Moreover, the report declares, "[e]very element of an indigenous peoples' heritage has traditional owners".[3]

The focus of my discussion on the right to TCE is the understanding of culture as arts: literary and artistic works such as music, dance, song, symbols and designs, narratives and poetry. This focus reflects the intuition that indigenous and minority cultural groups have been specifically disadvantaged by colonialism and Western intellectual property laws, and it reflects the areas in which many of the high-profile debates have played themselves out in post-colonial societies – from questions of whether white men should play the blues in the United States, the appropriation of voice debates in literature in Canada, and the appropriation of Aboriginal visual art in Australia.

The report "Protection of the Heritage of Indigenous Peoples" has been spelt out in greater detail at a recent convention. According to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage,[4] States should adopt a range of measures "aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission" of traditional intellectual property, through "formal and non-formal education, as well as the revitalisation of the various aspects of such heritage".[5] This Convention is aimed at the protection of pre-industrial, folkloric traditions. Richard Kurin, director of the Smithsonian Centre for Folklife and Cultural Heritage argues that the constructive effect of the Convention will be its emphasis that "the practice of one's culture is a human right", and that "all cultures give purpose and meaning to lives and thus deserve to be safe-

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[3] *Ibid.* at para. 13, which reads in its entirety: "Every element of an indigenous peoples' heritage has traditional owners, which may be the whole people, a particular family or clan, an association or society, or individuals who have been specially taught or initiated to be its custodians. The traditional owners of heritage must be determined in accordance with indigenous peoples' own customs, laws and practices" (reiterated in subsequent UN documents on indigenous peoples).

[4] United Nations Educational, Scientific and Cultural Organization (UNESCO), Convention for the Safeguarding of the Intangible Cultural Heritage, adopted 17 October 2003, entered into force 21 April 2006.

[5] *Ibid.* at Article 2(3).

guarded".[6] Kurin is not a lawyer, or a philosopher, but his comment is important as he was a party to the wording of the Convention, and he sets forth the primary moral reason why culture might be considered a human right. This is the role culture has in giving "meaning" and "purpose" to a human life.

What worries advocates of indigenous rights to culture is that cultures are "perishable". As Donald Horowitz has pointed out, the language of preservation equates assimilation with annihilation. The Burmese Karens worry about their "gradual extinction as a community", the Indian Bihar worry they will become "extinct like the American Indians" and so forth.[7] One of the ways in which cultures may "perish", it is argued, is through the appropriation of traditional cultural expression, as this leads to blurring of the difference between cultural groups, and destabilizes authority structures within them. The anthropologist Michael Brown, one of the most astute observers of the legal and political debates over culture, has suggested that emerging technologies of reproduction make the claims of indigenous peoples for culture as a right more strident and demanding.

In his recent essay, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property", Brown suggests that the challenge for understanding cultural property in the digital age is a proper understanding of the notion of information. "Information answers to its own rules", he states. "Most conspicuously, it can reside in an infinite number of places simultaneously. The homelessness of information undermines the distinction between real and counterfeit, just as it weakens the bonds that tie units of information together in meaningful systems".[8] The protectionist ideology aims to reembed information in cultural situations. Yet the issue concerns not only our distinctions between the real and the counterfeit, but also "cultural identity". In an earlier work, "Who Owns Native Culture", Brown stressed that,

> [t]he increasing porosity of all societies and the strain of maintaining a firm grip on one's identity in a media rich world generate spirited resistance. For indigenous peoples, this takes the form of hypersensitivity to perceived misuse of cultural symbols. It also gives rise to dreams of separateness, of control over the stories, art, music and religious practices of one's community.[9]

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[6] Richard Kurin, "Tangible Progress" (2003) Cultural Comment, cited in Michael F. Brown, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property" (2005) International Journal of Cultural Property 12, pp. 40–61, at p. 56, footnote 25.

[7] Donald L. Horowitz, *Ethnic Groups in Conflict,* Berkeley: University of California Press, 1985; as cited in Kwame Anthony Appiah, *The Ethics of Identity,* Princeton: Princeton University Press, 2005, p. 131.

[8] Brown, *supra* note 6, at pp. 41–42.

[9] Michael F. Brown, *Who Owns Native Culture?,* Cambridge, MA: Harvard University Press, 2003, at p. 92.

The copy, Brown points out, has a destabilising effect on indigenous cultures, as new technologies often threaten existing lines of authority and social control. Similarly, "[t]he advent of the printing press, which gave literate persons access to inexpensive Bibles, challenged the power of church authorities and helped bring about the reformation".[10] It might be added that, not only did the availability of copies of the Bible undermine the authority structures of the society and the power of the church, in England the head of the Church (and State) responded by bringing out an authoritative version of the Bible. Although Brown does not expand on this point, the issues of the authority over cultural objects, their authenticity, and the social structure are not unrelated. Authenticity supports power, just as power creates authenticity.

Moreover, it appears that for many indigenous peoples, the ideas of a "right to enjoy one's culture", the "preservation of culture", "cultural identity", and the protection of "traditional cultural expression" are interlinked. The only explicit human right acknowledged in Article 27 CCPR is the right of an individual as a member of a minority to enjoy their culture. Yet, this human right to enjoy one's culture requires the protection of heritage, as heritage, it is suggested, is what gives a culture group its identity, and, according to UNESCO, rights in heritage are property rights. Property rights in heritage include rights in intangible heritage, such as traditional cultural expression. Accordingly, it might be argued that the human right to enjoy one's culture logically, and morally, implies a right to ownership of traditional cultural expression (regardless of whether a human right to ownership of traditional cultural expression is explicitly recognized in human rights law), as this ownership preserves cultural identity.

What worries opponents of the development of such rights in heritage and traditional cultural expression is the prospect of living in a world in which culture is owned and regulated by corporate bodies. The philosopher Kwame Anthony Appiah, suggests that,

> [t]alk of cultural partrimony ends up embracing the sort of hyper-stringent doctrine of property rights […] that we normally associate with international capital: the Disney Corporation, for instance, would like to own Mickey Mouse in perpetuity. It's just that the corporations the patrimonialists favor are cultural groups. In the name of authenticity, they would extend this particularly Western, and modern, conception of ownership to every corner of the earth. The vision is of a cultural landscape consisting of Disney Inc. and the Coca-Cola Company, for sure; but also of Ashanti Inc., Navajo Inc., Maori Inc., Norway Inc.: All rights reserved.[11]

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[10] *Ibid*. at pp. 93–94.

[11] Kwame Anthony Appiah, "Whose Culture Is It, Anyway?" in Kwame Anthony Appiah and Henry Louis Gates (eds), *Cosmopolitanism: Ethics in a World of Strangers*, New York: W. W. Norton and Company, 2006, pp. 115–136, at p. 130.

Similarly, Michael Brown discusses the conflict between our sympathies towards indigenous groups and our rejection of the expansion of intellectual property systems. He points to legal thinkers who argue passionately for more freedom to borrow and blend artistic forms and knowledge into new creations and the lamentations of the closure of the intellectual commons by corporations "whose predatory approach to copyright and patent law" makes it difficult to innovate. And he points to legal thinkers concerned about the intellectual commons in which, by definition, the folk knowledge and arts of indigenous peoples have been believed available for all to use as a public resource.

> Advocates of the indigenous "we own our culture" perspective find themselves in the odd position of criticising corporate capitalism while at the same time espousing capitalism's commodifying logic and even pushing it to new extremes. This position fragments what should be broad public opposition to the ways of the Microsofts and Mercks and Disneys and AOL Time Warners of the world manipulate the intellectual property system to their advantage.[12]

The justification for the expansion of intellectual property rights to all forms of traditional cultural expression depends on a moral claim. This moral claim may be based on the human right to practice one's culture (as discussed above), or on the idea that cultural identity is in some way a primary good for humans, the denial of which would be a grave injustice. This second articulation also suggests that the preservation and practice of a culture is a human right. The philosopher Jeremy Waldron has argued that the ideal of cultural distinctness involves ignoring the fact of our interconnected social structures, and of what anthropologists discuss in terms of the "creolization" or mixing of culture.

> We live in a world that is formed by technology and trade; by economic, religious, and politico-cultural influences. In this context, to immerse oneself in the traditional practices of, say, an aboriginal culture might be a fascinating anthropological experiment, but it involves an artificial dislocation from the world […] The charge, in other words, is one of *inauthenticity* […] Let me state it provocatively. From a cosmopolitan point of view, immersion in the traditions of a particular community in the modern world is like living in Disneyland and thinking one's surroundings epitomize what it is for a culture really to exist. Worse still, it is like demanding the funds to live in Disneyland and the protection of modern society for the boundaries of Disneyland, while still managing to convince oneself that what happens inside Disneyland is all there is to an adequate and fulfilling life. It is like thinking that what every person most deeply needs is for one of the Magic Kingdoms to provide a framework for her choices and her beliefs, completely neglecting the fact that the framework of Disneyland depends on commitments, structures, and infrastructures that far outstrip the character of any particular façade.[13]

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12 Brown, *supra* note 9, at p. 237.

13 Jeremy Waldon, "Minority Cultures and the Cosmopolitan Alternative" in

In this passage, Waldron denies that the possession of distinct culture is a particularly important aspect of people's lives. He suggests that the demands for the preservation of cultures are based on an unrealistic understanding of human life. If this is true, "culture" cannot be a human right.

In order to begin to shed light on these issues, let us start by identifying what we think a "human right" is.

2. THE NATURE OF HUMAN RIGHTS

The philosopher James Nickel lists eight characteristics of those rights we call human rights; however, only four are particularly important in this context.[14] I will introduce and discuss these so that we can clarify the main point to be made in this chapter – that the control over artistic forms is not a human right, even though we may still consider them morally important.

The first characteristic of human rights is that they are political norms, dealing with how governments should treat their citizens, rather than ordinary moral norms that deal with interpersonal conduct. So, for example, a right against slavery concerns the political norm of whether it should be legal for humans to be treated as property. An example of an ordinary moral norm would be "it is wrong to lie".

Secondly, human rights may exist in various forms: as "a shared norm of […] human moralities", as a "justified moral norm supported by strong reasons", as a legal (civil or constitutional) right, or as "a legal right within international law".[15] However, it seems that it is not possible to take a purely legal positivist position on human rights in an appeal to their authority. This is because human rights involve an appeal to a greater moral authority than the law. The strength of legal positivism, as H.L.A. Hart once said, is its ability to make a distinction between law and morality. What the law is, and what it should be, are two different things.[16] Accordingly, it might be the case that the United Nations did not recognize a right against slavery, and that a right against slavery was not recognized in any civil or constitutional law, but it would follow that the right did not exist. Human rights appeal to moral real-

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Will Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford: Oxford University Press, 1995, pp. 93–119, at p. 101, first published in (1992) University of Michigan Journal of Law Reform 25:3, pp. 751–793.

14 James Nickel, "Human Rights" in Edward N. Zalta (ed.), *The Stanford Encyclopaedia of Philosophy*, available at http://plato.stanford.edu/entries/rights-human.

15 Nickel, *ibid.*

16 H.L.A. Hart, *The Concept of Law,* Oxford: Clarendon Press, 1963, at pp. 7–8.

ism: objective moral standards about how we should treat others, and how governments should treat people (this is not to be confused with moral absolutism). Furthermore, these norms must be universalizable. To say they are universalizable is to say that the norms apply to all people, or specific populations of people (such as all women, or all children). Because of this, human rights appeal to more than a consensus of cultural norms: it might be the case that slavery is widely accepted, and is even accepted within the majority of cultures, but this would not make slavery an acceptable moral practice. Cultural relativism, while a form of moral realism because it is possible to identify objective moral truths, does not supply moral truths that can be universalized cross culturally.

The third characteristic I wish to mention is Nickel's claim that human rights are "high-priority norms"; in other words they are of "paramount importance".[17] Nickel explains that in order to gain this level of priority we need to be able to show a plausible connection with "fundamental human interests or powerful normative consideration".[18] The final point Nickel makes that I wish to emphasize is that "human rights *require robust justifications that apply everywhere and support their high priority*. Without this they cannot withstand cultural diversity and national sovereignty".[19] These characteristics seem to reflect the history of human rights as universal rights, as well as the distinction we make between the infringements of human rights and ordinary moral norms. There are levels of wrongdoing. Killing someone is worse than lying to them – human rights concern the most serious kinds of wrongdoing. Human rights evolved from natural law, and concern the relationship between our nature as humans and as moral agents. There are fundamental human goods that we discern and assent to through reason, hence the need to be able to provide a robust justification for our moral positions.[20]

A robust justification need not mean that everyone agrees, but we might demand that the argument be sound. First, the argument must be valid. By valid, I mean that the premises lead to the conclusion. Second, the premises must be true. In addition, a moral argument must contain a clear statement of value. As I will argue, however, no sound argument is forthcoming in relation to a human right to intellectual property in art forms. The arguments for the value of culture do not convincingly lead to the type of protection and promotion of cultural forms set out in recent UN conventions. Moreover, when we consider the cultural forms to be protected by these conventions, we find that,

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17 Nickel, *supra* note 14.

18 Nickel, *ibid.*

19 Nickel, *ibid.* (emphases in the original).

20 Stephen Buckle, "Natural Law" in Peter Singer (ed.), *A Companion to Ethics*, Oxford: Blackwell, 1993, at pp. 166–168.

while morally significant, they are not the kinds of thing we should consider subject to human rights.

3. THE HARMS OF APPROPRIATION

In providing a moral argument, it helps to be able to identify the value of something to a person or group of people, as well as the harm involved in its denial. So, for example, in relation to capital punishment we might say that life is something that people particularly value, and that taking life is a harm. There may be dispute about whether capital punishment is ever morally justified, or the conditions under which it is justified, but, even where people believe that it is justified, neither the perpetrator nor the victim are confused about what the value of life is or about the nature of the harm to the person whose life is taken. In fact, on these points, the perpetrator and victim appear to be in agreement: the State that enforces capital punishment or includes it among its permissible punishments knows exactly what it means for people to lose their lives. We cannot say the same of the loss of culture; it is unclear what culture's value is, and what the harm from its loss involves. The claim that there is a need for the protection of TCE suggests that the appropriation of such forms is a harm to the group.

Bruce Ziff and Pratima Rao, who published one of the early collections on the ethics of cultural appropriation in 1997, summarized the arguments that cultural appropriation was wrong in a variety of claims.

> One is that cultural appropriation harms the appropriated community. This claim is therefore based on a concern for the integrity and identities of cultural groups. A second complaint focuses on the impact of appropriation on the cultural object itself. The concern is that appropriation can either damage or transform a given cultural good or practice. A third criticism is that cultural appropriation wrongly allows some to benefit to the material (i.e. financial) detriment of others. This is a claim based on sovereignty.[21]

This is a log of claims rather than a series of arguments, and the various elements may be combined in a variety of ways. The problem with each of these claims is that none of them leads to a strong justification for a human right.[22]

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[21] Bruce Ziff and Pratima V. Rao, "Introduction to Cultural Appropriation: A Framework for Analysis" in Bruce Ziff and Pratima V. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation*, New Brunswick, NJ: Rutgers University Press, 1997, pp. 1–30, at p. 8.

[22] By the term "claim", I mean an assertion, rather than a legal claim.

Ziff and Rao do not consider the second claim, which is concerned with the damage to the cultural form, understood as an art form, to be morally significant. Discussions of such claims focus on the purity or authenticity of the object or form. Ziff and Rao acknowledge that oral traditions can be lost through disuse, but suggest stewardship in the context of intellectual property "can imply the need for a level of purity of cultural expression that seems artificial".[23] Indeed, it is generally agreed that cultural forms change and evolve over time. New forms are created from combining the old. This is as true for indigenous communities as it is for Western societies. Moreover, a concern with the purity of cultural forms fails as a claim for a human right as it is the cultural form that is harmed, rather than people. We might think animals have rights, or the environment deserves ethical consideration, but these are not human rights. Similarly, the purity of a cultural form is not a *sufficient* ground for a human right, because what is harmed is not human. Purity of a cultural form cannot be the focus of our moral concern.

The most likely contender for a strong moral argument that will justify culture as an important human right may be found in the first claim, that failure to protect culture leads to its degradation. However, it is not clear what cultural degradation is supposed to be. The most convincing account of cultural degradation is given by Herder's cultural essentialism, but, this position is rejected by anthropologists, and, as I will show, alternative formulations of indigenous claims to culture as a product of postcolonialism fail to establish culture as necessary to group identity or the well-being of the group.

Often, such claims to culture as a human right sound particularly romantic. For instance, in an article called "Stop Stealing Native Stories" that appeared in the Canadian newspaper *Globe and Mail,* Lenore Keeshig-Tobias used a claim that language and stories were centrally important for maintaining cultural strength in her condemnation of films such as *Where the Spirit Lives*.[24] She stated:

> Canada's Francophones have a strong and unique voice in North America. Why? Because they have fought to ensure that their language remains intact. Language is the conveyor of culture. It carries the ideas by which a nation defines itself as a people. It gives voice to a nation's stories, its mythos […] [Stories] reflect the deepest, most intimate perceptions, relationships and attitudes of a people. Stories show how a people, a culture, thinks.[25]

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[23] Ziff and Rao, *supra* note 21, at p. 14.

[24] Lenore Keeshig-Tobias, "Stop Stealing Native Stories" in Ziff and Rao, *supra* note 21, pp. 71–73, first published in *Globe and Mail*, 26 January 1990.

[25] *Ibid.* at p. 71.

Keeshig-Tobias's claim appears to restate Herder's analysis of a nation and its relationship with language and culture. Herder held that language expresses the character of a nation, and that the content of thought could not be separated from its expression.

> Has a people anything dearer than the speech of its fathers? In its speech resides its whole thought-domain, its tradition, history, religion, and basis of life, all its heart and soul. To deprive a people of its speech is to deprive it of its one eternal good […] No greater injury can be inflicted on a nation than to be robbed of her national character, the peculiarity of her spirit and her language. Reflect on this and you will perceive our irreparable loss. Look about you in Germany for the character of the nation, for their own particular cast of thought, for their own peculiar vein of speech; where are they? Read Tacitus; there you will find their character: "The tribes of Germany, who never degrade themselves by mingling with others, form a peculiar, unadulterated, original nation, which is its own archetype. Even their physical development is universally uniform, despite the large numbers of the people", and so forth. Now look about you and say: "The tribes of Germany have been degraded by mingling with others; they have sacrificed their natural disposition in protracted intellectual servitude; and, since they have, in contrast to others, imitated a tyrannical prototype for a long time, they are, among all the nations of Europe, the least true to themselves".[26]

Herder's cultural nationalism, where language and arts express the essence of the group is roundly dismissed. As Rosemary Coombe has written:

> Within cultural nationalism, a group's survival, its identity or objective oneness over time, depends upon the secure possession of a culture […] What identifies a nation or culture are the traits that distinguish it from other cultures – what it has and they don't. Moreover, those properties that define a nation's culture in a nationalist worldview are characterized by their "originality" or "authenticity". Cultural traits that come from elsewhere are, at best, borrowed and at worst, polluting; by contrast those aspects of national culture that come from within the nation, that are original to it, are "authentic." […] [C]ontemporary anthropology challenges such claims. The notion that only pristine objects untouched by the forces of modernization bespeak cultural identities has long been discounted as a norm of imperialist nostalgia. The capacity of peoples to live in history, and to creatively interpret and expressively engage historical circumstances using their cultural traditions to do so is now recognised as the very life and being of a culture, rather than evidence of its death and decline.[27]

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[26] Johann Gottfried von Herder, "Materials for the Philosophy of the History of Mankind" in *The Internet Modern History Sourcebook*, available at http://www.forham.edu/halsall/mod/1784herder-mankind.html.

[27] Rosemary J. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Ziff and Rao, *supra* note 21, pp. 74–96, at p. 85, first published in (1993) The Canadian Journal of Law and Jurisprudence 6:2, pp. 249–285.

Coombe suggests that indigenous claims over the control of culture cannot be characterized as a Herderian romanticism of culture. According to Coombe, the concept of the indigenous has no ethnic referent. Rather, what the various groups we now term indigenous have in common is the suppression of culture by colonial powers. Colonial States systematically adopted policies of assimilation that involved education systems in which their language was not spoken, and their culture was considered inferior and backward. State education systems, and the establishment of reserves and missions, upset traditional patterns of mobility and undermined oral authority. In some colonies, such as Canada, there were laws suppressing rituals, while in others, such as Australia, the suppression of religion was more likely to be undertaken by the missionaries that controlled reserves. The State supported the removal of artifacts, and settlers desecrated sacred sites. The international category of indigenous peoples is thus a postcolonial one in which rights are asserted by groups of peoples who constitute their identities and make their claims by reference to language, religion, law, technology, art, and music.[28]

In this fashion, the defence of indigenous peoples' position and arguments for the protection of culture seeks to distance the position from Herder's cultural essentialism. The history of colonized peoples involves the suppression of their language, arts and culture, and hence their identity is formed and expressed in the fight for cultural rights. Yet in distancing contemporary indigenous positions from cultural essentialism, it appears that the importance of culture is undermined as a moral argument. This is because it is no longer the necessary condition for the maintenance of the identity of a group. Chandran Kukathas, for example, used this dynamic feature of indigenism and group identity formation to undermine the concept of a group right to culture in his famous essay "Are There Any Cultural Rights?".[29] Kukathas uses Donald Horowitz's analysis of ethnic groups in conflict to show that collective identity cannot be the basis of claims in moral and political settlements. Horowitz argued that all ethnic identity has a contextual character, and that group identities and boundaries shift with political context: "As Horowitz observes, 'Culture is important in the making of ethnic groups, but it is more important for providing *post facto* content to group identity than it is for

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[28] Elizabeth Burns Coleman and Rosemary J. Coombe, "Broken Records: Subjecting Music to Cultural Rights" in Conrad Bunk and James O. Young (eds), *The Ethics of Cultural Appropriation,* Oxford: Blackwell, 2008.

[29] Chandran Kukathas, "Are There Any Cultural Rights?" in Kymlicka, *supra* note 13, pp. 105–139, first published in (1992) Political Theory 20. In *The Liberal Archipelago: A Theory of Diversity and Freedom* (Oxford: Oxford University Press, 2003), Kukathas expands upon this argument to address Kymlicka's account of the nature of groups (*ibid*. at pp. 77–85) and Margalitz and Raz's account of group rights (*ibid*. at pp. 196–202).

providing some ineluctable prerequisite for an identity to come into being'".[30] If claims for cultural rights emerge from the political context in which their culture is suppressed, rather than from a cultural essence that gives them identity, then we effectively undermine the claim that cultural difference is a *necessary* condition for the existence of a group.

If ethnic identity is largely determined within political contexts, then the loss of cultural difference does not imply the loss of political or sovereign identity. Indeed, there is an important distinction to be made between cultural nationalism and political nationalism here. It might be thought that an indigenous or minority group should have a political boundary because it has historically been persecuted, without thinking that we need to promote any specific national culture for the group.[31] It might be the case that this entity seeks to preserve certain cultural characteristics, but if it were to be culturally assimilated in the sense of coming to share the broader groups' value systems and beliefs, and to lose its distinctiveness as a cultural group, then this loss need not be thought a tragedy. Appiah draws this point out when he claims that it is perfectly possible for individuals' lives to go better, rather than worse, when they are submerged into larger groups or entities, for example, when *Napolitani* started to think of themselves as *Italiani*. Appiah asks,

> [s]o what if Provençal – or Savoyard or Neopolitan – identity loses its salience as power ascends to a more overarching level? Is it morally troubling that the peoples of the Campa kingdom were long ago absorbed into what's now thought of as Vietnam? That the formerly distinct populations of Madi and Bari have coalesced into the Lugbara in northeastern Uganda? Might it not be better if Hutu and Tutsi all become Rwandans or Burundians?[32]

The harm Herder perceived was the degradation of the culture understood as a lack of purity or inauthenticity – but such an understanding is widely rejected by anthropologists as a sound understanding or model of what culture is. Ziff and Rao gesture that the harms involved in the degradation of culture must be empirically verifiable but they are vague about what the degradation of culture is, and who, or what, is being harmed. One example they provide of cultural degradation is the way in which a symbol can be transformed. They mention the Nazi Party and Third Reich's use of the swastika symbol: a symbol at least five thousand years old and used in China, on statues of the Buddha, by the Jains, and by indigenous cultures on many different continents.

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30 Donald L. Horowitz, cited in Kukathas (1995), *ibid*. at. p. 233.

31 Alan Patten, "The Autonomy Argument for Liberal Nationalism" (1999) Nations and Nationalism 5:1, pp. 1–17, at p. 2.

32 Appiah, *supra* note 7, at p. 131.

They claim that the symbol is now marred for all these groups; indeed for every group except the neo-Nazis. This claim is hard to verify. I saw a swastika, or something that looked very much like one, in a Bollywood movie only recently. One wonders if World War II looms as large in other cultures' memories as it does in our own. Moreover, the example lacks coherence with their suggestion that particular cultural expressions, such as the purity or impurity of jazz, cannot supply a sufficient basis for a moral right to culture. It is hard to see, then, how a change in the meaning of a symbol, such as the swastika, which probably never had a single meaning, could be in a different category. But even if we conceded the need for the meaning of symbols to be protected, how is this a case of the degradation of a culture? Another kind of degradation to which they refer is Charles Taylor's concept of the harm of misrecognition, which, it is claimed, may imprison people in a false, reduced mode of being. But the problem with this reference is that Taylor is describing the harm of misrecognition of individuals, and the crippling self-depreciation they suffer when they internalize the images of their inferiority; he is not presenting the harm as being the loss of integrity to a culture.[33] Finally they refer to Edward Said's concerns about Orientalist scholars creating stereotypes of Arabic life and custom, though they do not spell out how this has degraded Arabic life and custom, and threatened Arabic cultures' integrity.

Michael Brown points out that the absence of standards for assessing the well-being of cultures, as distinct from the well-being of groups of people or of individuals, "creates openings for extravagant, unprovable claims" of cultural damage. His example is of an "otherwise instructive" essay on questions of Native American intellectual property, in which a legal scholar observes that the use of the name Redskins by a Washington football team is "part of a pattern and practice that causes irreparable, substantial harm that has a direct effect on the survival of a culture within the United States".[34] Brown wryly observes that, "Native American cultures have survived five centuries of pestilence, military conflict, and dispossession. Compared with these catastrophes, in what meaningful sense does the name of a professional football team put their survival at risk?"[35] If there is a risk that the use of the name would cause irreparable harm, then the causal mechanisms perhaps need explaining, rather than asserting. I think Brown's problem is that he cannot see how the culture would be destroyed by the use of the name.

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[33] See Charles Taylor, "The Politics of Recognition" in Amy Gutman (ed.), *Multiculturalism*, Princeton: Princeton University Press, 1994, pp. 25–26.

[34] Brown, *supra* note 9, at p. 220.

[35] *Ibid.*

The issue of cultural authenticity, Brown thinks, needs to be separated from the issue of financial equity (and, one suspects he believes it should also be quietly dropped). He finds critics of intellectual property systems at their most persuasive when they question what should be a part of the public domain. This public domain, which is free for all to use, includes all folkloric knowledge and arts, as well as previously proprietary knowledge whose protection has lapsed. "From the indigenous rights perspective, the public domain is the problem […] because it defines traditional knowledge as a freely available resource".[36] But the economic injustice associated with the appropriation of indigenous music, literature and art is not that it takes something away from indigenous people, but "with the appropriators' social capital, which leaves them better positioned than their indigenous counterparts to reap financial reward. This is manifestly unfair, but it is symptomatic of broader social realities, not a failure of intellectual property law as such".[37] The upshot of Brown's argument is that the problem of cultural appropriation is not a violation of a right to cultural integrity, but a problem of distributive justice understood in terms of social advantages. It does not, however, amount to a moral argument for any specific mechanism to alleviate hardship, or to a right to culture, let alone a right to a specific or distinct culture.

Distributive justice asks us to look at the overall well-being of groups, and to ameliorate disadvantage. If "culture" could be a good considered as a right on the basis of distributive justice it must be something like a resource. A resource must be something we can have more or less of. But, as Appiah has argued, it is not easy to imagine a person or group of people bereft of a culture. "The problem with grand claims for the necessity of culture", Appiah writes, "is that we can't readily imagine an alternative. It's like *form*: you can't not have it". [38] To imagine people to be without culture is like imagining children raised by wolves. It is true that they would not have culture, but this does not appear to be the danger spoken of in discussions about the loss of culture. Moreover, it is not like we can think of a group of people in this state. If human groups cannot be without culture, then it does not give rise to a right. As John Tomasi has pointed out, "[t]aken existentially, cultural membership is a primary good only in the same uninteresting sense as is, say, oxygen: since (practically) no-one is differentially advantaged with respect to that good, it generates no special rights".[39] To speak of a cultural degradation or decay simply appears to mean a process of cultural transition or change, judged

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36 *Ibid.* at p. 237.

37 *Ibid*. at p. 236.

38 Appiah, *supra* note 7, at p. 124.

39 John Tomasi, "Kymlicka, Liberalism, and Respect for Cultural Minorities" (1995) Ethics 105, at p. 590, cited in Appiah, *supra* note 7, at p. 124.

negatively. So perhaps we need to look at the claim for life in specific cultures in terms of its stated value for humans.

4. CULTURE AS A GOOD

Herder thought that individuals reached their true potential as members of a community with shared customs, traditions and languages, but rejected the view that there was one ideal way to human fulfilment that could be the same for all peoples, and condemned colonialists, such as the British for imposing their way of life on the Indians, as well as the religious groups, such as the Christian church, for converting the Balts among other groups.[40] Herder saw the naturalness of ethnic groups as being part of the fabric of the world, and to this extent put forth a claim from natural law:

> Nature has sketched with mountain ranges which she fashioned and with streams which she caused to flow from them the rough but substantial outline of the whole history of man. One height produced nations of hunters, thus supporting and rendering necessary a savage state; another, more extended and mild, afforded a field to shepherd peoples and supplied them with tame animals; a third made agriculture easy and needful; while a fourth led to fishing and navigation and at length to trade. The structure of the earth, in its natural variety and diversity, rendered all such distinguishing conditions inescapable. Seas, mountain ranges and rivers are the most natural boundaries not only of lands but also of peoples, customs, languages and empires, and they have been, even in the greatest revolutions in human affairs, the directing lines or limits of world history. If otherwise mountains had arisen, rivers flowed, or coasts trended, then how very different would mankind have scattered over this tilting place of nations.[41]

Even if this had once been the case, in contemporary multicultural societies, linked globally with telecommunications, the opposite situation might be said to be true. Indeed, it is the problems associated with globalization and the interrelations between societies that have led the United Nations to promote cultural diversity as a value.[42]

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[40] Thomas Mautner, *A Dictionary of Philosophy,* Oxford: Blackwell, 1996, at p. 187.

[41] Herder, *supra* note 26.

[42] UNESCO has recently introduced the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005, entered into force 18 March 2007) as a means of safeguarding nations from international media. See Christoph Beat Graber, "The UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?" (2006) Journal of International Economic Law 9:3, pp. 553–574 for a discussion of how this policy relates to artistic practice. Similarly, Ziff and Rao attempt to

As pointed out in the introduction, Jeremy Waldron has suggested that the ideal of cultural isolation and distinctness is unnatural, and inauthentic. It involves ignoring the fact of our interconnected social structures, and of what anthropologists discuss in terms of the creolization of culture. He points out that indigenous communities in the United States, Canada and Australia make their claims for special provision within a broader international and national framework, and exist with a national framework that sustains them. While there may have been a time historically when we could live, either as individuals or communities, in splendid isolation, this is no longer the case. We are no longer self-sufficient, regardless of whether our view of the person is as an individual or the view of the community is as bounded.[43]

Waldron's argument needs some careful attention because it addresses an alternative means of spelling out the value of culture in human life. Waldron begins with two alternative ideals: the cosmopolitan, a person who refuses to think of themselves as defined by their location or ancestry or language, and the person who, like Herder, believes that people need to have a secure cultural foundation in order to flourish. The cosmopolitan

> may live in San Francisco and be of Irish ancestry, [but] does not take his identity to be compromised when he learns Spanish, eats Chinese, wears clothes made in Korea, listens to arias by Verdi sung by a Maori princess on Japanese equipment, follows Ukraine politics, and practices Buddhist meditation techniques.[44]

Waldron emphasizes that the cosmopolitan and ethnic ideals are not merely different lifestyles, but different conceptions of what is good for humans, or a human state of flourishing. If it is true that humans need secure cultural foundations, the cosmopolitan lifestyle cannot make any sense except as an impoverished form of existence. But if one supposes that it is possible to live a cosmopolitan lifestyle, and to consider that life to be "rich and creative", with "no more unhappiness than one expects to find anywhere in human existence", then one argument for the protection of minority indigenous cultures is undercut. This is because the indigenous lifestyle cannot be said to be a need. This,

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make much of diversity as a liberal value. "In a society in which diversity is the prized value, cultural appropriation may be of concern if it can be shown that appropriation erodes or degrades cultural identity and thereby threatens diversity" (see Ziff and Rao, *supra* note 21, at p. 10). In effect, they are arguing that we need to support restrictions on cultural expressions according to groups in order to preserve cultural diversity. Not only have they failed to come to grips with what the erosion or degradation of a culture might be, they fail to take seriously the anthropological argument that change within a culture is not a form of degradation, and they invest culture with some kind of inherent value, distinct from whether or not people wish to practice it.

43 Waldron, *supra* note 13, at p. 104.

44 *Ibid*. at p. 95.

Waldron concludes, leads the ethnic indigenous lifestyle to be on the same footing as the right to freedom of religion. We do not think people need to have religious faith or that "everyone must be sustained in the faith in which he was brought up". And "if a particular church is dying out because its members are drifting away, no longer convinced by its theology or attracted by its ceremonies, that is just the way of the world. It is like the death of a fashion or hobby, not the demise of anything that people really need".[45] This emphasis on need, on what it is to have a minimally good life, is what ties Waldron's arguments to human rights. The cosmopolitan does not deny the role of community, or of culture, in the constitution of human life, but questions the assumption that what we need is immersion in a single, coherent community, or a single coherent culture, to shape and give meaning to our lives.[46]

Philosophers such as Alasdair MacIntyre and Will Kymlicka have argued that cultural narratives, such as the stories that ethnic communities claim they "own", are not intrinsically valuable, but are valuable because they give meaning to our lives. MacIntyre emphasizes the role of narratives in the creation of a significant life. He writes:

> We enter human society … with one or more imputed characters – roles into which we have been drafted – and we have to learn what they are in order to be able to understand how others respond to us and how our responses are apt to be construed. It is through hearing stories about wicked stepmothers, lost children, good but misguided kings, wolves that suckle twin boys, youngest sons who receive no inheritance but must make their own way in the world and eldest sons who waste their inheritance on riotous living and go into exile to live with the swine, that children learn or mislearn both what a child and what a parent is, what the cast of characters may be in the drama to which they have been born and what the ways of the world are. Deprive children of stories and you leave them unscripted, anxious stutterers in their actions as in their words.[47]

So things like stories are important for us because they provide structure and meaning to our lives. Similarly, Kymlicka argues that we do not choose how to live by starting *de novo*, but examine ideals and forms of life that have been passed on to us. Our actions, understood as physical movements, have meaning to us within the context of a culture, it is this cultural framework that gives our actions significance. Kymlicka writes, "[w]e decide how to live our lives by situating ourselves in these cultural narratives, by adopting roles that have

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45 *Ibid*. at p. 100.
46 *Ibid*. at p. 105.
47 Alasdair MacIntyre, cited in Waldron, *supra* note 13, at p. 107.

struck us as worthwhile ones".[48] Kymlicka thinks it follows from this that liberals should be concerned with the fate of cultural structures because it is "only through having a rich and secure cultural structure that people can become aware […] of the options available to them, and intelligently examine their value".[49]

Waldron criticizes this argument by pointing out that Kymlicka moves from the assumption that each option must have a meaning to the conclusion that there must be one cultural framework in which that option is assigned meaning, so Kymlicka's argument moves too quickly when he suggests that some entity called our culture gives our actions significance. Moreover, he suggests that Kymlicka is not entitled to infer that there exist such things as "cultural structures" whose integrity must be guaranteed for people to make meaningful choices. All it shows, he thinks, is that people need cultural materials to make meaning of their life; it does not show that they require a rich and secure cultural structure. When we acknowledge that culture is important to people, we are not acknowledging the need of anything like a strong cultural or ethnic background. Waldron emphasizes his point by characterizing the stories we recognize in MacIntyre's explanation of the relationship between stories and the roles in our lives: stories from first century Palestine, Germanic folklore, the mythology of the Roman Republic; "they do not come from some thing called 'the structure of our culture'", he writes. "They are familiar to us because of the immense variety of cultural materials, various in their provenance as well as their character, that are in fact available to us".[50] In summary, "we need culture, but we do not need cultural integrity".[51]

What follows from this is that it is not necessary to protect indigenous cultures in order for art to give meaning and value to people's lives. We make meaning from our lives through a wide array of cultural sources. So even if we accept the premise that culture gives meaning and value to life, it does not follow that there is a right to "have" or possess rights to a specific culture. For Waldron, this suggests that membership in a culture, or the right to enjoy a culture, must be interpreted in the same way in which one has a right to enjoy a religion. We do not think that people need a religious affiliation, although we think it important that people should have a right to practice one. This right, however, does not mean that a government must "preserve" or protect minority religions.

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48 Will Kymlicka, cited in Waldron, *supra* note 13 , at p. 106.
49 *Ibid*.
50 Waldron, *supra* note 13, at p. 107.
51 Waldron, *ibid*. at p. 108.

I find Waldron's argument convincing. There can be no right to a stable culture structure, and the only way in which we can tell if a culture has value is if it has value for people. This does not make culture, understood as arts, a human right. Yet, it is not entirely convincing as an argument that indigenous people do not have rights to their cultures. The reason for this is that we are mistaken in assuming that "art" is the appropriate way of understanding the TCE of other cultures.

5. THE ESCAPE FROM DISNEYLAND: ART AND ITS VALUE

I am not intending to reopen the old wounds of the primitive arts debates. In those debates, to call something a folk art or primitive art was to describe it as something of lesser value than fine art. But, I want to suggest that in understanding what these arts that are "not fine art" are, we come to see that there are other values that make them deserving of protection. And there is room in this debate for a basic reevaluation of our categories of understanding, as categories do political work. This is why there can be such heat in debates like that about primitive art. It is this distinction between fine art and folk art or primitive art that justifies our intellectual property framework.

Let me return to Brown's discussion of information in "Heritage Trouble".[52] Brown suggested that the challenge for understanding cultural property in a digital age is a proper understanding of the notion of information. Brown's assumption that information answers to its own rules is problematic. Can, or indeed should, information be reduced to data as if it were its "natural state"? This is to think of information as a natural object that has its natural means of transmission and reproduction. It suggests that the natural means of reproduction is through finding "bits" of information, and copying them. This is a reduction of information to "a thing" made up of "bits". Information is not an object, but a relation of exchanges. The nature of these exchanges establishes patterns of social relations, and indeed, kinds of information. A national symbol, such as a coat of arms, cannot provide information about what is an authoritative statement by the government, and indeed cannot be a national symbol, unless it is used in certain ways. To call something sacred is to describe, or rather, prescribe, the manner in which it is used. Let me give you two examples: a song, and painting.

In his book "If This Is Your Land, Where Are Your Stories?", J. Edward Chamberlin describes how, during a court case in Canada, *Delgamuuku v.*

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52 Brown, *supra* note 6.

British Columbia,[53] the Gitksan were presenting their case for aboriginal territory before the court, and this involved telling the history of their people with the formal ritual it required. This included an elder, Antgulilibix (Mary Johnson), singing a song. Judge McEarchen was appalled, for from his perspective, singing in a courtroom flaunted its decorum. He asked the lawyer for the Gitskan if they could not simply write down the words, and avoid the performance.[54] This question of "why not just write it down?" fascinates Chamberlin. He writes, "[f]or the Gitksan, the *ada'ox* Mary Johnson performed was proof of the truth of the events it described: that is to say, the storytelling tradition itself, with its stylized language and its ceremonial protocol, was its own guarantor of truth. Whatever was done within that tradition, provided it was done *properly,* was true. The truth had to do with ceremony, not evidence".[55] Chamberlin states that, for First Nations peoples, the commitment to ceremony and protocol is significant. "This commitment to convention is part of a very old tradition of truthtelling". (He calls it truthtelling, not storytelling.)

> The story properly told, or the song properly sung, is true. Proprietary counts for everything on such occasions, as it does in ceremonies such as witnessing to faith in congregations or to facts in a court of law. Proper form is the key: the proprietaries in each are different […] but the conventions themselves are crucial for the truthtelling.[56]

On the information supplied in Chamberlin's version of events, it appears that Judge McEarchen was concerned about the relationship between truth and folk lore and oral history. Folk lore and oral history are deemed suspicious forms of evidence, because of the vagaries of memory, and because we consider "myth" to be a kind of falsehood. But I find myself disagreeing with Chamberlin's interpretation that the truth of the song had to do with ceremony, not evidence. This confuses different notions of "evidence". In oral cultures law must be recorded in some means other than writing. Song and music is a particularly resilient mnemonic device. The song was presented as evidence of legal title, not, or at least, not merely, history. History, at least in one popular theory, is true by virtue of facts that correspond with something that happened or existed in the world. But law is not true in the same way. If a law can be "true", it is not by virtue of correspondence, it is true because it is an institu-

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53 *Delgamuuku v. British Columbia* (1997) 153 DLR (4th) 193.

54 J. Edward Chamberlin, *If This Is Your Land, Where Are Your Stories? Reimagining Home and Sacred Space,* Cleveland: Pilgrim Press, 2004, at pp. 20–21.

55 *Ibid.* at p. 147.

56 *Ibid.* at pp. 147–148.

tional fact, or what is known as "validity".[57] Validity does not depend upon historical truth. Rosemary Coombe and I have argued elsewhere that First Nations songs do not merely record history and rights, but that correct performance, by a person with authority to perform the song, provides a rule for recognition for First Nation law.[58] Here the correct performance is a *sign* of the validity of the law. Indeed, the claim would be diminished if Mary Johnson had adapted the song or experimented with the music.

My second example is Yolngu ceremonial art. The Yolngu are a group of Aboriginal Australians, from Arnhem Land in the Northern Territory. Ceremonial designs are owned by clans, and handed down from generation to generation, but only certain people have the authority to paint them and to authorize their use. They connect people with specific places in the landscape. They show where a person comes from, and who they are. A painting may be painted onto a body for an important initiation ceremony, and may be painted on the casket of a deceased person so that the spirits know who he or she is. Paintings are also used on ceremonial objects, and as announcements for ceremonies to be held in the future on small models of the ceremonial objects that may be displayed before it occurs. The designs for ceremonies must be correct; there are rules setting out how an image is to be portrayed, and the image is considered to be "the same" painting, regardless of where it is painted, or even if painted in acrylic on canvas. Such paintings may look deceptively like contemporary art, yet they have more in common with heraldic devices and coats of arms. Like coats of arms, they show where a person comes from, their land. Think of the coat of arms of Australia, or of Switzerland. The Queen of England's arms show she is from England. Aristocratic coats of arms are frequently worn on the body during a ceremony, and a flag may be draped over their casket at a funeral. Although owned by the royal family, and handed down from generation to generation, only specific people may authorize their use. Coats of arms are produced according to strict rules; these may be recorded in writing, or according to visual instructions.[59] Once we start thinking of Yolngu paintings as coats of arms, then we begin to see an entirely different pattern of ethical issues arising from the unauthorized production, and artistic adaptation of such paintings. To use a coat of arms without authority is fraud, in the same way that the unauthorized use of an individual's signature is fraud. To produce it without permission is forgery. In fact, the idea of the sign being a sign of a group, or of a person or of a nation,

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57 Hart, *supra* note 16, at pp. 92–93.

58 Burns Coleman and Coombe, *supra* note 28.

59 See Elizabeth Burns Coleman, *Aboriginal Art, Identity and Appropriation,* Aldershot: Ashgate, 2005 for a full description.

is only possible because there are rules about who may use it and under what circumstances. These rules also create the syntax for understanding what the sign is doing at any particular point in time – whether it is showing that a building is property, or whether the report is an authoritative statement of the government.

If we were to replace these kinds of art forms with the claims for cultural rights so artfully dismissed by Waldron, a very different picture would appear. For these "artworks" are precisely the tools we require to interact with other people and other groups in the world. We need title deeds and signatures, and a means of verifying the validity of law. It appears that people making claims that they cannot be used by anyone, and must be produced in certain ways, are not in Disneyland, but the real world.

We misrepresent these things if we call them songs or stories or paintings in the same way we understand art. They are those things, but they are also much more. The Australian coat of arms does not provide information about kangaroos and emus, although it does depict them, and it is not "a picture". To see it as a picture is to fail to see what it is doing or what it means in a specific context. And we misrepresent them when we understand these cultural forms to be within the public domain, because, as a folksong or story, or primitive art, they are therefore lacking in the creativity that makes fine arts deserving of protection. As cultural forms, they are far more dynamic than art.

6. THE NORMS OF PURITY AND AUTHENTICITY

If the art is an insignia, like a coat of arms, or if it is a record of law, then we will be concerned with its authority and authenticity. There is a real difference between the artistic appropriation and adaptation of Western folk music or stories, which do not (or no longer) serve an important function in the maintenance of legal or social institutions, and the artistic appropriation of First Nations song or the music of other indigenous societies in which music plays a similar social role. Whether artistic appropriation and adaptation is morally acceptable, therefore, depends on the values and social role of music in the society from which it is appropriated.[60]

Now if what I have said about the importance of these cultural forms is true, then it appears that our focus on "cultural degradation" is on the purity of forms, rather than on the purity of the cultures. For symbols to play these roles, they need to be more than conventional symbols of certain things, they

[60] For an extended discussion, see Burns Coleman and Coombe, *supra* note 28.

need to be able to be read as signs of authority. Hence, there are rules about who may use them, and the ways in which they may be produced. Purity of form may act as one of these signs. Thus, the understanding of the harm of cultural appropriation that I am adopting concerns harm to the object itself (rather than cultural degradation or wrongful benefit). I suggested that this was not a sufficient ground for a human right – because the harm is not to a human.

There is, however, a connection between the purity of artistic forms where they play these kinds of social roles and the maintenance of social structures. The reason for this was intimated in my introductory observations about the relationship between authenticity and power. There I drew connections between some of Brown's observations to conclude that the authority over cultural objects, their authenticity, and the social structure are not unrelated. Authenticity supports power, just as power creates authenticity. This itself, however, shows that the specific norms surrounding the use of these art forms cannot be universalized, as the norms against adaptation are culturally specific, and relative to that culture, and the wrong will always be specific to the group. If the cultural form does not play a specific role within a culture, then the norms I have been discussing will not apply.

There is a sense in which these norms can be universalized, for instance, at an abstract level the norm of not committing fraud seems to be at the same level of norm as not lying. We can identify the norm independently of the cultural form that needs protecting, but we cannot generalize from the norm to the kind of cultural form that needs protecting. But even if we could create an international law to cover this kind of situation, this level of norm governing interpersonal relationships is not what we would generally regard as the subject of a human right.

While the norms concerned with the protection of authenticity of cultural forms that maintain social structure may not be sufficient reason to establish a right to culture, if a justified argument that indigenous people have a right to live in cultural groups can be established, we will be concerned to protect these sorts of cultural forms, and to respect their purity. To argue this is beyond the scope of this paper. But regardless of whether a right to live in cultural groups can be established, we have sufficient reason to respect the purity of these cultural forms, and to be concerned about their degradation, without establishing the existence of a right to culture. This is because we can see *why* the purity of such forms is important to specific groups of people, and we can recognize that this concern for purity may not be so different to our own concerns about authority and authenticity, for example, when we are concerned about the validity of law, or the authenticity of insignia.

7. CONCLUSION

It is commonplace to equate human rights claims to intellectual property in culture with Disneyland's claims for its artistic creations. The arguments in justification of such rights rely on an assertion about the value of culture as giving meaning to human lives. The problem here is not that this claim is incorrect, but that it does not lead to the conclusion that cultural forms need to be protected and that indigenous people have a right to live in their own culture. The value of artistic forms is that they do give meaning to lives, but we do not need one secure cultural structure to give meaning to our lives, and we do not need rights to culture to protect our stories and songs. But when we look at indigenous art forms we find the role they play in those societies is far more dynamic than fine arts. They serve as title deeds to land, and as insignia. Here the purity of form matters. The ethics of purity, and the authority by which symbols are produced can be understood as the tools for maintaining social structures forming interrelationships with other groups. Accordingly, there is no need to think that indigenous groups making claims that these are important cultural forms are living in a kind of cultural Disneyworld. Acknowledging that some cultural forms are necessary for the maintenance of social structure does not amount to a claim that *all* indigenous culture must be owned by indigenous people, so it does not amount to the kind of strong claim to ownership set out in the report "Protection of the Heritage of Indigenous Peoples".[61]

Arts, as we know them in Western cultures, cannot establish a human right to live in the culture in which one was born. While we need "culture" (as arts) to make meaning of our lives, we do not need these arts to have a single cultural origin. While interpretations of cultural degradation in terms of the authenticity or "purity" of indigenous "arts" are not sufficient to establish a human right to culture, they are clearly connected to the maintenance of social groups. If it can be established that people have a right to live in indigenous cultural groups, then it will be necessary to recognize the importance of purity in relation to these cultural forms. However, even if such a right cannot be established, we have good moral reasons to be concerned about the purity of indigenous art forms, and to be careful about what we appropriate. Their concerns with authenticity and authority are the same as ours.

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61 *Supra* note 2.

4. Human rights, cultural property and intellectual property: three concepts in search of a relationship

Fiona Macmillan

1. INTRODUCTION

A concern with the concept of "human rights" has become the great millennial obsession. This is not to suggest that any major steps have been made with respect to the improved recognition or enforcement of some of the most basic rights generally recognised as falling within the "human rights" camp. However, we have emerged from one of the bloodiest and most violent centuries of human history with a renewed respect for the *idea* of human rights. In a wide range of literature, academic and activist, this plays itself out by regarding the characterisation of something as a human right as a "trump card", that is, as the end to all arguments. This may be a worthy phenomenon, but it carries with it implicit dangers. If everything that seems a good or fair or morally defensible thing automatically becomes a "human right" then every so-called human right is reduced to the symbolic and legal significance of the most banal and the very idea of "human rights" as the unsurpassable moral high ground, the trumps of trumps, disappears. This is a particularly undesirable state of affairs in a world where it is already the case, at least in the context of international legal governance, that human rights are not a trump card.[1]

[1] See Robert Howse, "Human Rights in the WTO: Whose Rights, What Humanity?" (2002) European Journal of International Law 13:3, pp. 651–659; Fiona Macmillan, "International Economic Law and Public International Law: Strangers in the Night" (2004) International Trade Law and Regulation 10, pp. 115–124; Fiona Macmillan, "Looking Back to Look Forward: Is there a Future for Human Rights in the WTO?" (2005) International Trade Law and Regulation 6, pp. 163–180; Fiona Macmillan, "Copyright, the World Trade Organization and Cultural Self-Determination" in Fiona Macmillan (ed.), *New Directions in Copyright Law*: Vol. 6, Cheltenham, UK: Edward Elgar, 2007, pp. 307 *et seq*.; Anne Orford, "Beyond Harmonization: Trade, Human Rights and the Economy of Sacrifice" (2005) Leiden Journal of International Law 18:2, pp. 179–213.

It may be the case, then, that there are rights or interests which are worthy of protection despite the fact that it seems overblown (and dangerous) to describe them as "human" rights. Intellectual property interests, which are best justified on the basis that they confer advantages on society as a whole,[2] might be a good example of such rights. Another possible candidate for such rights or interests are rights to culture and, in the particular context of this work, rights in the traditional cultural expressions and knowledge of indigenous peoples. On the other hand, it may be that it is more appropriate to protect such rights, or some aspects of such rights, on the basis that they are human rights. Following on from this are two points of significance to the argument in this chapter. The first is that there seems no overriding reason why the protection of culture, or of traditional culture and expressions, should depend upon them being characterised as human rights. Secondly, the reason for protecting an interest, including the question of whether or not it should properly be categorised as a human right, should have some connection to the form of its legal protection.

In order to investigate the connection between human rights, rights to culture and intellectual property rights, this chapter focuses on three issues. First, the chapter considers the nature of the rights to culture and the extent of the protection of cultural rights in international legal instruments. Secondly, the chapter considers whether there should be a right to culture and/or cultural self-determination. Thirdly, assuming that legal regimes should recognise some concept of a right to culture or cultural self-determination, the chapter turns to an examination of the nature of that right. This part of the chapter concerns itself, in particular, with the question of the relationship between cultural property and intellectual property. It is not premised on the idea that the mere fact that there may be good, if different, reasons for protecting both cultural property and intellectual property – reasons falling short of a justifiable claim to the status of "human rights" – suggests the necessity of a connection in legal form between cultural property and intellectual property.

2. IS THERE A "RIGHT TO CULTURE"?

2.1. International Legal Instruments

There are three UNESCO Conventions that bear directly on the question of

[2] See e.g. Neil Weinstock Netanel, "Copyright and a Democratic Civil Society" (1996) Yale Law Journal 106:2, pp. 283–388; Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) Chicago-Kent Law Review 68:2, pp. 841–888; William A. van Caenegem, "Copyright, Communication and New Technologies" (1995) Federal Law Review 23:2, pp. 322–347.

"the right to culture" (if there is one). These Conventions are: the World Heritage Convention of 1972; the Convention for the Safeguarding of Intangible Cultural Heritage, which entered into force on 20 April 2006; and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions, which entered into force on 18 March 2007.[3] Of course, it seems highly irregular to have mentioned the first of these Conventions in the present context. This is, perhaps, because the persistent connection between some types of cultural rights and intellectual property rights has tended to suggest that what might be described as "tangible culture" is an entirely different order of things to more intangible forms. The final section of this chapter questions this taxonomy, but I am nevertheless in thrall to it with the result that this section will have more to say about the other two UNESCO Conventions. However, in the context of an examination of where human rights start and end in this disputed territory and what their significance to it might be, before focusing on the UNESCO Conventions it is necessary to consider their international legal background.

Prior to the entry into force of these Conventions, international legal obligations with respect to culture, cultural self-determination and cultural diversity could only be gleaned from the composite effect of a range of provisions found in the human rights Covenants to the Charter of the United Nations.[4] The provisions of these Covenants that may be argued to operate together in order to create a right to cultural self-determination are Articles 1,[5] 19, and 27 of the Covenant on Civil and Political Rights (CCPR) and Article 15 of the Covenant on Economic Social and Cultural Rights (CESCR). When these provisions are analysed it can be seen that it is probably more appropriate to characterise their composite effect as creating, if anything, a right to cultural self-determination, which in turn suggests the valorisation of cultural diversity.

The general right to self-determination is laid down in Article 1(1) CCPR, which provides: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development."

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[3] There is also the Convention on the Protection of Underwater Cultural Heritage, which entered into force 2 November 2001, but this Convention is not considered in this chapter.

[4] For an analysis of these provisions, see Christoph Beat Graber, "Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights" in Fiona Macmillan (ed.), *New Directions in Copyright Law: Vol. 5*, Cheltenham, UK: Edward Elgar, 2007, pp. 45–71, at pp. 57–65.

[5] See also Article 1 International Covenant on Economic, Social and Cultural Rights, concluded 16 December 1966, entered into force 3 January 1976, 993 U.N.T.S. 3 (CESCR).

As can be seen, this right is conferred on "[p]eoples" rather than individuals and, obviously, it leaves open the somewhat delicate question of how such entities might be identified or defined. While "peoples" may, presumably, be constituted by the citizens and residents of a particular nation state, it is also clear from Article 1(3) that this is not the only method of constituting a "people".[6] On the other hand, it appears to be the case that ethnic, religious or linguistic groups are not necessarily "peoples" for the purpose of Article 1(1) since Article 27 confers a range of somewhat more limited rights on such groups:

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their religion, or to use their own language.

The rights belonging to all persons that contribute to this composite right of cultural self-determination are laid out in Article 19 CCPR:

(1) Everyone shall have the right to hold opinions without interference.
(2) Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

These are complemented by Article 15 CESCR:

(1) The States Parties to the present Covenant recognize the right of everyone:
    (a) To take part in cultural life;
    (b) To enjoy the benefits of scientific progress and its applications;
    (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
(2) The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

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[6] Article 1(3) International Covenant on Civil and Political Rights, concluded 16 December 1966, entered into force 23 March 1976, 999 U.N.T.S. 171 (CCPR) provides: "The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations."

(3) The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
(4) The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

As is not infrequently the case with provisions of this sort in international instruments, the exact ambit of the provisions in CCPR and CESCR are far from clear. One example of this is the right in Article 15(1)(a) "[t]o take part in cultural life", which is obviously of some significance in the context of a right to cultural self-determination. However, Article 27 CCPR and Article 15(1)(c) CESCR have attracted particular debate. This is because it is frequently argued that these provisions support the characterisation of intellectual property rights as human rights. Article 27 CCPR is said to ground the grant of intellectual property rights to protect traditional and Indigenous cultural expressions and knowledge. Article 15(1)(c) CESCR is said to ground intellectual property rights, in general, on a human rights basis. A similar argument is frequently made with respect to the precursor of Article 15(1)(c) CESCR – Article 27(2) of the Universal Declaration of Human Rights (UDHR). This is not surprising since Article 15(1) CESCR is clearly based upon Article 27 UDHR, which provides:

(1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.
(2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

It is evident that none of Article 27(2) UDHR, Article 15(1)(c) CESCR or Article 27 CCPR necessarily mandate intellectual property protection in the form in which it currently prevails. It is also clear that whatever means are chosen to implement the rights contained in these Articles, those rights must be balanced against the other rights laid down in Articles 27 UDHR, Article 15 CESCR, and in the Covenants as a whole.

These somewhat diffuse and loose-fitting provisions of the UDHR, the CCPR and CESCR form the backdrop to the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage and the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Both Conventions appear to give some structure to the rights in the preexisting human rights instruments. It is also evident from the Preambles and operative provisions of both Conventions that they firmly lodge themselves within the

human rights camp, even if neither goes so far as to create a new human right. The Convention for the Safeguarding of Intangible Cultural Heritage states in the second paragraph of its Preamble that it is "*Referring* to existing human rights instruments" and then cites in particular those instruments considered above. The Convention on the Protection and Promotion of the Diversity of Cultural Expressions pushes the human rights envelope considerably further than its older sibling,[7] which is perhaps a consequence of the current obsession with the language of human rights. As far as the Preamble is concerned, amongst an enormous list of other things, it declares itself to be, in the words of the first five paragraphs:

> *Affirming* that cultural diversity is a defining characteristic of humanity,
> *Conscious* that cultural diversity forms a common heritage of humanity and should be cherished and preserved for the benefit of all,
> *Being aware* that cultural diversity creates a rich and varied world, which increases the range of choices and nurtures human capacities and values, and therefore is a mainspring for sustainable development for communities, peoples, and nations,
> *Recalling* that cultural diversity, flourishing within a framework of democracy, tolerance, social justice and mutual respect between peoples and cultures, is indispensable for peace and security at the local, national and international levels,
> *Celebrating*, the importance of cultural diversity for the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights and in other universally recognized instruments.

The location of the Convention within the stable of human rights instruments, which is suggested in the Preamble, is reinforced by a number of the operative provisions of this Convention. Two such provisions are of particular note in this respect. One is the first of the Convention's so-called guiding principles in Article 2(1), which provides:

> Cultural diversity can be protected and promoted only if human rights and fundamental freedoms, such as freedom of expression, information and communication, as well as the ability of individuals to choose cultural expressions, are guaranteed. No one may invoke the provisions of this Convention in order to infringe human rights and fundamental freedoms as enshrined in the Universal Declaration of Human Rights or guaranteed by international law, or to limit the scope thereof.

The other relevant article, however, provides the clearest invocation of the authority and relevance of the preexisting human rights instruments. This is Article 5(1), which is concerned with the obligations of the parties to the Convention:

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[7] For an assessment of the relationship between the UNESCO Convention and existing international human rights obligations, see Christoph Beat Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?" (2006) Journal of International Economic Law 9:3, pp. 553–574, at pp. 560–563.

> The Parties, in conformity with the Charter of the United Nations, the principles of international law and universally recognized human rights instruments, reaffirm their sovereign right to formulate and implement their cultural policies and to adopt measures to protect and promote the diversity of cultural expressions and to strengthen international cooperation to achieve the purposes of this Convention.

2.2. Relationship between the UNESCO Conventions, Intellectual Property Rights, and the World Trade Organization Agreements

Neither UNESCO Convention has much to say about intellectual property rights. The Convention for the Safeguarding of Intangible Cultural Heritage mentions intellectual property rights in the context of providing, in its Article 3(b), that nothing in the Convention affects "the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties". The only reference to intellectual property in the Convention on the Protection and Promotion of the Diversity of Cultural Expressions occurs in its Preamble, which recognises "the importance of intellectual property rights in sustaining those involved in cultural creativity". The Conventions do not suggest that these rights are critical to realising their objectives, and only the Convention for the Safeguarding of Intangible Cultural Heritage appears to give any recognition to the potential of intellectual property rights to interfere with those objectives. The absence of much in the way of references to intellectual property rights as a mode for the realisation of Convention objectives is, at least, notable in relation to the Convention for the Safeguarding of Intangible Cultural Heritage. On the other hand, it seems particularly odd that the Convention on the Protection and Promotion of the Diversity of Cultural Expressions is so little concerned with the negative effects of intellectual property rights.[8] The original UNESCO Declaration,[9] upon which the Convention was based, included in its action plan the need to ensure the protection of copyright but "at the same time

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[8] Although it would be unwise to ignore the potential negative effects of intellectual property rights on the protection of intangible cultural heritage: see e.g. European Communities, Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, WT/DS/290/R, 15 March 2005, see also Michael Blakeney, "Biotechnology, TRIPs and the Convention on Biological Diversity" (1998/1999) Bioscience Law Review 4, pp. 144–150; Michael Blakeney, "Protection of Plant Varieties and Farmers' Rights" (2002) European Intellectual Property Review 24:1, pp. 9–19; G.E. Evans and Michael Blakeney, "The Protection of Geographical Indications after Doha: Quo Vadis?" (2006) Journal of International Economic Law 9:3, pp. 575–614, at pp. 582–586.

[9] UNESCO Universal Declaration on Cultural Diversity, adopted by the 31st Session of UNESCO's General Conference, Paris, 2 November 2001.

upholding a public right of access to culture, in accordance with Article 27 of the Universal Declaration of Human Rights".[10] The Declaration also drew a parallel in its Article 1 between biological diversity and cultural diversity. In the light of this, it is interesting to note that the framers of the Convention on Biological Diversity were far more anxious about the role of intellectual property in securing biological diversity. Its Article 16(5) provides:

> The Contracting Parties, recognizing that patents and other intellectual property rights may have an influence on the implementation of this Convention, shall cooperate in this regard subject to national legislation and international law in order to ensure that such rights are supportive of and do not run counter to its objectives.

By contrast, the UNESCO Convention seems to envisage no conflict. This would not matter in the least, but for the fact that the operation of the international copyright system has a negative impact on cultural diversity.

The threat that the international copyright system poses to cultural diversity and self-determination is a consequence of the process by which it commodifies and instrumentalises the cultural outputs with which it is concerned.[11] There are five interdependent aspects of copyright law that have been essential to this process.[12] The first and most basic tool of commodification is the alienability of the copyright interest. A second significant aspect of copyright law making it an important tool of trade and investment is its duration. The long period of copyright protection increases the asset value of individual copyright interests.[13] Thirdly, copyright's horizontal expansion means that it is progressively covering more and more types of cultural production. Fourthly, the strong commercial distribution rights,[14] especially those which give the

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[10] *Ibid.* Main Lines of an Action Plan for the Implementation of the Universal Declaration on Cultural Diversity, at para. 16.

[11] For an account of the overlaps between the concepts of culture with which the UNESCO Convention is concerned, and the subject matter of copyright law, see Macmillan, "Copyright, the World Trade Organization, and Cultural Self-Determination", *supra* note 1.

[12] For a fuller version of this argument, see Fiona Macmillan, "Copyright and Culture: A Perspective on Corporate Power" (1998) Media and Arts Law Review 3:2, pp. 71–81; Fiona Macmillan, "Copyright and Corporate Power" in Ruth Towse (ed.), *Copyright in the Cultural Industries*, Cheltenham, UK: Edward Elgar, 2002, pp. 99–118; Fiona Macmillan, "The Cruel ©: Copyright and Film" (2002) European Intellectual Property Review 24, pp. 483–492.

[13] See Ruth Towse, "Copyright, Risk and the Artist: An Economic Approach to Policy for Artists" (1999) Cultural Policy 6, pp. 91–107.

[14] See especially Articles 11 and 14(4) TRIPs, which enshrine rental rights in relation to computer programs, films and phonograms; Article 7 WIPO Copyright Treaty (1996), and Articles 9 and 13 WIPO Performances and Phonograms Treaty (1996).

copyright holder control over imports and rental rights, have put copyright owners in a particularly strong market position, especially in the global context. Finally, the power of the owners of copyright in relation to all those wishing to use copyright material has been bolstered by a contraction of some of the most significant user rights in relation to copyright works, in particular fair dealing/fair use and public interest rights.

Viewed in isolation from the market conditions that characterise the cultural industries, copyright's commodification of cultural output might appear not only benign, but justified by both the need for creators to be remunerated in order to encourage them to create[15] and, in particular, the need for cultural works to be disseminated in order to reap the social benefits of their creation.[16] However, viewed in context the picture is somewhat different. Copyright law has contributed to, augmented, or created a range of market features that have resulted in a high degree of global concentration in the ownership of intellectual property in cultural goods and services. Five such market features, in particular, stand out.[17] First, is the internationally harmonised nature of the relevant intellectual property rights.[18] This dovetails nicely with the second dominant market feature, which is the multinational operation of the corporate actors who acquire these harmonised intellectual property rights while at the same time exploiting the boundaries of national law to partition and control markets. The third relevant feature of the market is the high degree of horizontal and vertical integration that characterises these corporations. Their horizontal integration gives them control over a range of different types of cultural products. Their vertical integration allows them to control distribution, thanks to the strong distribution rights conferred on them by copyright law.[19] The fourth feature is the progressive integration in the ownership of rights over content and the ownership of rights over content-carrying

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15 See, however, Ruth Towse, *Creativity, Incentive and Reward: An Economic Analysis of Copyright and Culture in the Information Age*, Cheltenham, UK: Edward Elgar, 2001, especially Chapters 6 and 8, in which it is argued that copyright generates little income for most creative artists. Nevertheless, Towse suggests that copyright is valuable to creative artists for reasons of status and control of their work.

16 For arguments about the importance of copyright in securing communication of works, see van Caenegem, *supra* note 2 and Netanel, *supra* note 2.

17 For a fuller discussion, see Fiona Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance" in Birgitte Andersen (ed.), *Intellectual Property Rights: Innovation, Governance and the Institutional Environment*, Cheltenham, UK: Edward Elgar, 2006, pp. 46–69.

18 Through e.g. the Berne Convention for the Protection of Literary and Artistic Works of 1886, Articles 9–14 TRIPs, the WIPO Copyright Treaty, and the WIPO Performances and Phonograms Treaty.

19 For a discussion of the way in which the film entertainment industry conforms to these features, see Macmillan, "The Cruel ©", *supra* note 12.

technology. Finally, there is the increasing tendency since the 1970s for acquisition and merger in the global market for cultural products and services.[20] Besides being driven by the regular desires (both corporate and individual) for capital accumulation,[21] this last feature has been produced by the movements towards horizontal and vertical integration, and integration of the ownership of rights over content and content-carrying technology.

As far as cultural diversity and self-determination are concerned, the consequences of this copyright facilitated aggregation of private power over cultural goods and services on the global level are not happy ones. Through their control of markets for cultural products the multimedia corporations have acquired the power to act as a cultural filter, controlling to some extent what we can see, hear and read.[22] Closely associated with this is the tendency towards homogeneity in the character of available cultural products and services.[23] This tendency, and the commercial context in which it occurs, has been well summed up by the comment that a large proportion of the recorded music offered for retail sale has "about as much cultural diversity as a Mcdonald's menu".[24] It makes good commercial sense in a globalised world to train taste along certain reliable routes, and the market for cultural goods and services is no different in this respect to any other.[25] Of course, there is a vast market for cultural goods and services and, as a consequence, the volume of production is immense. However, it would obviously be a serious mistake to confuse volume with diversity.

The vast corporate control over cultural goods and services also has a constricting effect on what has been described as the intellectual commons or

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[20] See Ronald V. Bettig, *Copyrighting Culture: The Political Economy of Intellectual Property*, Boulder: Westview Press, 1996, at pp. 37 *et seq*. See also Joost Smiers, "The Abolition of Copyrights: Better for Artists, Third World Countries and the Public Domain" in Towse, *supra* note 12, pp. 119–139.

[21] Bettig, *ibid.* at p. 37.

[22] See further Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", *supra* note 17, and in relation to the film industry, see Macmillan, "The Cruel ©", *supra* note 12, at pp. 488–489. See also Ann Capling, "Gimme shelter!" (1996) Arena Magazine, February/March, pp. 21–24; Richard L. Abel, *Speech and Respect*, London: Stevens and Son/Sweet and Maxwell, 1994, at p. 52; Richard L. Abel, "Public Freedom, Private Constraint" (1994) Journal of Law and Society 21, pp. 374–382, especially at p. 380.

[23] See also Bettig, *supra* note 20.

[24] Capling, *supra* note 22, at p. 22.

[25] See Theodore Levitt, "The Globalisation of Markets" (1983) Harvard Business Review 61:3, pp. 92–102. See also John Gray, *False Dawn: The Delusions of Global Capitalism*, New York: New Press, 1998, at pp. 57–58. However, Gray's view seems to be that diversity stimulates globalisation, which must be distinguished from the idea that globalisation might stimulate diversity.

the intellectual public domain.[26] The impact on the intellectual commons manifests itself in various ways.[27] For example, private control over a wide range of cultural goods and services has an adverse impact on freedom of speech. This is all the more concerning because control over speech by private entities is not constrained by the range of legal instruments that have been developed in Western democracies to ensure that public or governmental control over speech is minimised.[28] The ability to control speech, arguably objectionable in its own right,[29] facilitates a form of cultural domination by private interests. This may, for example, take the subtle form of control exercised over the way we construct images of our society and ourselves.[30] But this subtle form of control is reinforced by the industry's overt and aggressive assertion of control over the use of material assumed by most people to be in the intellectual commons and, thus, in the public domain. The irony is that the reason people assume such material to be in the commons is that the copyright owners have force-fed it to us as receivers of the mass culture disseminated by the mass media. The more powerful the copyright owner the more dominant the cultural image, but the more likely that the copyright owner will seek to protect the cultural power of the image through copyright enforcement. The result is that not only are individuals not able to use, develop or reflect upon dominant cultural images, they are also unable to challenge them by subverting them.[31] Rosemary Coombe describes this corporate control of the

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[26] This is a concept that has become, unsurprisingly, a central concern of intellectual property scholarship. See e.g. Charlotte Waelde and Hector MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain*, Cheltenham, UK, Edward Elgar, 2007.

[27] See further Macmillan, "The Cruel ©", *supra* note 12; Macmillan, *supra* note 17; Fiona Macmillan, "Commodification and Cultural Ownership" in Jonathan Griffiths and Uma Suthersanen (eds), *Copyright and Free Speech: Comparative and International Analyses*, Oxford: Oxford University Press, 2005, pp. 35–65.

[28] See further Fiona Macmillan Patfield, "Towards a Reconciliation of Copyright and Free Speech" in Eric Barendt (ed.), *Yearbook of Media Law and Entertainment Law*, Oxford: Clarendon Press, 1996, pp. 199–233; Macmillan, *supra* note 27.

[29] See e.g. the discussion of the justifications for the free speech principle in Eric Barendt, *Freedom of Speech*, 2nd edn, Oxford: Oxford University Press, 2005.

[30] See further e.g. Rosemary Coombe, *The Cultural Life of Intellectual Properties*, Durham and London: Duke University Press, 1998, at pp. 100–129, which demonstrates how even the creation of alternative identities on the basis of class, sexuality, gender and race is constrained and homogenised through the celebrity or star system.

[31] See e.g. *Walt Disney Prods v. Air Pirates*, 581 F 2d 751 (Ninth Cir, 1978), *cert denied*, 439 US 1132 (1979). On this case, see Jeremy Waldron, "From Authors to Copiers: Individual Rights and Social Values in Intellectual Property" (1993) Chicago-

commons as monological and, accordingly, destroying the dialogical relationship between the individual and society.[32] Some remnants of this dialogical relationship ought to be preserved by copyright's fair dealing/fair use right. It is, after all, this aspect of copyright law that appears to be intended to permit resistance and critique.[33] Yet the fair dealing defence is a weak tool for this purpose and becoming weaker.[34]

These constrictions of the intellectual commons (or public domain) affect its vibrancy and creative potential. They also tend to undermine the utilitarian/development justification for copyright, which is increasingly seen as the dominant justification for copyright protection, especially in jurisdictions reflecting the Anglo-American bias on these matters. As is well known, the general idea underlying this justification is that the grant of copyright encourages investment in the production and dissemination of the cultural works, which is essential to the development process.[35] However, the consequences of copyright's commodification of cultural goods and services, as described above, seem to place some strain on this alleged relationship between copyright and development. This argument may be illustrated by reference to the World Commission on Culture and Development's concept of development as being about the enhancement of effective freedom of choice of individuals.[36] Some of the things that matter to this concept of development are "access to the world's stock of knowledge, […] access to power, the right to participate in the cultural life of the community"[37] – all ideas that are reprised by

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Kent Law Review 68:3, pp. 841–888; Macmillan, *supra* note 17. See also Margaret Chon, "Postmodern 'Progress': Reconsidering the Copyright and Patent Power" (1993) DePaul Law Review 43:1, pp. 97–146; Dorean M. Koenig "Joe Camel and the First Amendment: The Dark Side of Copyrighted and Trademark-Protected Icons" (1994) Thomas M. Cooley Law Review 11:3, pp. 803–838; Macmillan, *supra* note 28.

[32] Coombe, *supra* note 30, at p. 86.

[33] See Jane M. Gaines, *Contested Culture: The Image, the Voice and the Law*, Chapel Hill and London: University of North Carolina Press, 1991, at p. 10.

[34] See further Macmillan, *supra* note 17.

[35] For a good example of a statement of this rationale, see WIPO, Guide to the Berne Convention for the Protection of Literary and Artistic Works, Geneva: WIPO, 1978, at Preface. For a discussion of this rationale, see e.g. Waldron, *supra* note 31, at pp. 850 *et seq*. and Fiona Macmillan Patfield, "Legal Policy and the Limits of Literary Copyright" in Patrick Parrinder and Warren Chernaik (eds), *Textual Monopolies: Literary Copyright and the Public Domain*, London: Arts and Humanities Press, 1997, pp. 113–132.

[36] World Commission on Culture and Development, *Our Creative Diversity*, 2nd edn, Paris: UNESCO, 1996. For a detailed and persuasive account of this approach to development, see Amartya Sen, *Development as Freedom*, New York: Anchor Books, 1999.

[37] World Commission on Culture and Development, *supra* note 36, at Introduction. See further Macmillan, "Copyright and Culture: A Perspective on Corporate Power"; Macmillan, "Copyright and Corporate Power", both *supra* note 12.

UNESCO in one form or another in its subsequent Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The edifice of private power that has been built upon copyright law has deprived us all to some extent of the benefits of this type of development. As Waldron comments, "[t]he private appropriation of the public realm of cultural artifacts restricts and controls the moves that can be made therein by the rest of us."[38]

None of these problems has been alleviated by the fact that the international copyright system has been embedded in the World Trade Organization as a result of its Agreement on Trade-Related Intellectual Property Rights (TRIPs Agreement).[39] In fact, there are good reasons for thinking that the TRIPs Agreement and the WTO agreements more generally have exacerbated these problems.[40] So far as the TRIPs Agreement is concerned, the reification of intellectual property rights as trade rights, capable of enforcement through a system of trade retaliation, seems to be emphasising certain aspects of the international copyright landscape at the expense of others. This perception is reinforced by two further factors. The first is that the TRIPs Agreement has shown itself to be a useful uniform basis upon which to negotiate bilateral investment treaties, which may strengthen the oligopolistic nature of the market for cultural goods and services.[41] Indeed, wrapped up in this observation, is the further suggestion that the TRIPs Agreement might be even better characterised as an investment agreement than as a trade agreement.[42] (Either way, its capacity to nourish cultural self-determination and diversity seems rather limited.) The second factor reinforcing the nature of the change in the international copyright landscape is that the interpretation and enforcement of international copyright law is now in the hands of trade law experts, who are not necessarily experts in intellectual property law or practice.

However, the problems that copyright law operating in accordance with the TRIPs Agreement might pose for the protection of cultural diversity or

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38 Waldron, *supra* note 31, at p. 885.

39 Article 9(1) TRIPs incorporates Articles 1–21 Berne Convention, except Article 6*bis* (moral rights) by reference. Articles 10–14 TRIPs add some further obligations. In particular, Articles 11 and 14(4) broaden the exclusive rights of the copyright holder by the addition of rental rights in relation to computer programs, films and phonograms. However, neither of these provisions are unique in international copyright law. See Article 7 WIPO Copyright Treaty, and Articles 9 and 13 WIPO Performances and Phonograms Treaty.

40 For a fuller version of this argument, see Macmillan, "Copyright, the World Trade Organization, and Cultural Self-Determination", *supra* note 1.

41 See Peter Drahos, "BITS and BIPs: Bilateralism in Intellectual Property" (2001) Journal of World Intellectual Property 4:6, pp. 791–808.

42 Macmillan, "Looking Back to Look Forward: Is There a Future for Human Rights in the WTO?", *supra* note 1.

self-determination are only the beginning of the threat that the WTO agreements might pose to the protection of cultural rights. The reasons for this lie in the fact that, unlike the TRIPs Agreement, the other WTO multilateral agreements are dedicated to reducing national barriers to trade using three main tools, which are the reduction of tariffs, the reduction of non-tariff barriers, and "the elimination of discriminatory treatment in international trade relations".[43] The elimination of discriminatory treatment is effected through the principles of national treatment and most favoured nation (MFN) treatment.[44] Taken together, these two principles provide that a WTO Member may not create a trade disadvantage vis à vis domestic goods and services for like goods or services coming from another WTO Member, nor may they discriminate between like goods and services coming into their jurisdiction from more than one other Member.[45] The WTO agreements laying down obligations pursuant to the principles of national treatment and MFN treatment are subject to a range of exceptions allowing governments to take steps that would amount to breaches of these principles, in some cases involving pressing national priorities, but the exceptions are limited and narrowly drawn.

In terms of the picture painted above of cultural domination by private actors, a national government may wish to take steps at the national level to ameliorate the effects of the oligopolistic markets for cultural goods and services. For example, it may wish to attempt to prevent the swamping of local culture as the result of the homogenising effect of global media and entertainment oligopolies by providing for quotas, local content restrictions or subsidies for local cultural production.[46] All these sorts of devices run the risk of falling foul of WTO rules. The Agreement which has the capacity to be the particular culprit is the General Agreement on Trade in Services

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[43] See the Preamble to the Agreement Establishing the World Trade Organization, 15 April 1994.

[44] In fact, both these principles make an appearance in TRIPs, Articles 3 (MFN) and 4 (national treatment), but their significance in this context appears to be limited to the requirement that national legal entities (human or artificial) are all to be regarded as being alike.

[45] Consistently with the WTO's somewhat inconsistent approach, WTO law and practice embrace a number of derogations from these principles. The GATS (General Agreement on Trade in Services, 1994) permits, for instance, measures that are inconsistent with MFN: see Article II GATS, while the exceptions for customs unions in Article XXIV GATT (General Agreement on Tariffs and Trade, 1994 [1947]) and Article V GATS, involve inconsistencies with both the principles of MFN and national treatment.

[46] That is, some of the types of devices envisaged by Article 6 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

(GATS).[47] Due to the somewhat unusual nature of the GATS as a bottom-up liberalising agreement, WTO Members are only bound by the liberalising provisions of GATS if and to the extent that they have accepted obligations in the relevant sector.[48] There is not yet any general agreement or protocol on liberalisation of obligations in the audio-visual sector,[49] which is the sector in which the cultural effects of the copyright-induced oligopolies are most keenly experienced.[50] However, some WTO Members have undertaken relevant obligations and there is considerable international political pressure for more liberalisation in this sector.[51]

In the context of a discussion of international instruments affecting the protection of cultural rights, the important thing about the WTO agreements, including the TRIPs Agreement, is not just that they have the capacity to adversely affect some cultural rights, but also that they famously contain no "cultural exception". This means that there is almost no space in the WTO system for a consideration of cultural interests or rights.[52] The only clear exception to this absence of a cultural exception occurs in relation to some types of tangible cultural property under the provisions of the General Agreement on Tariffs and Trade.[53] The question of the cultural exception in

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47 Although the GATT and the WTO Agreement on Subsidies and Countervailing Measures (1995) may also have a part to play. The difficulties posed by these agreements are comparable, if not identical, to those posed by the GATS. In relation to the GATT, it should be noted that it has, in Article IV, a special regime in relation to films permitting internal quantitative measures, however, pressure has been applied by the US to force other WTO Members to abandon Article IV regimes: see Michael Hahn, "A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law" (2006) Journal of International Economic Law 9:3, pp. 515–552, at pp. 522–523.

48 Articles VI and XVI GATS. In relation to the process of progressive liberalization, see Article XIX GATS.

49 Compare the GATS Annexes on Air Transport Services, Financial Services, Negotiations on Maritime Transport Services, Telecommunications, and Negotiations on Basic Telecommunications.

50 See e.g. Graham Dunkley, *The Free Trade Adventure: The WTO, the Uruguay Round and Globalism – A Critique*, London and New York: Zed Books, 2001, at pp. 183–187; Macmillan, "The Cruel ©", *supra* note 12; Macmillan, "Public Interest and the Public Domain in an Era of Corporate Dominance", *supra* note 17; Bill Grantham, "*Some Big Bourgeois Brothel": Contexts for France's Culture Wars with Hollywood*, Luton: University of Luton Press, 2000.

51 See further Graber, *supra* note 7, at pp. 569–570; Dunkley, *supra* note 50; Grantham, *supra* note 50; Hahn, *supra* note 47, at p. 526.

52 For a fuller version of this argument, see Macmillan, "Copyright, the World Trade Organization and Cultural Self-Determination", *supra* note 1.

53 See Article XX(f) GATT, which provides an exception for measures "imposed for the protection of national treasures of artistic, historic or archaeological value".

the WTO was, however, long debated[54] and it can hardly be a surprise that those countries that lost this debate strongly supported the conclusion of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions.

3. SHOULD THERE BE A RIGHT TO CULTURE OR CULTURAL SELF-DETERMINATION?

There are a variety of reasons that might militate in favour of the international legal protection of cultural rights. One of these might be their possible characterisation as human rights. However, it is not clear that such a characterisation, or lack of such a characterisation, is of much assistance in resolving the problem. Besides anything else, if intellectual property rights can also be said to be grounded in human rights[55] and they conflict with cultural property rights, only a stalemate can follow. In the end, to argue that only some aspects of a right to culture constitute human rights, properly defined, is interesting but does not resolve the question of which, if any, cultural rights should be subject to legal protection. There may be reasons for protecting a range of cultural rights other than the fact that they are human rights. These might include the arguments that the safeguarding of cultural heritage, cultural diversity and cultural self-determination are, to borrow the language of the UNESCO Conventions, "a guarantee of sustainable development",[56] "of general interest to humanity",[57] and "a common heritage of humanity".[58] In light of these fairly good reasons for protecting cultural rights, perhaps it is unnecessary to do more damage, as suggested in the introduction to this chapter, to the symbolic and moral significance of the concept of human rights by attempting to load too much of the baggage of cultural rights (or intellectual property rights) onto its bandwagon.

In any case, as a tool of international law-making, human rights have also been somewhat compromised. The international human rights instruments are,

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54 For an account of the history of the debate in the WTO over the absence of a cultural exception, see Hahn, *supra* note 47; Graber, *supra* note 7, at pp. 554–555.

55 An argument with which I disagree, but certainly not an uncommon one.

56 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (adopted 17 October 2003, entered into force 21 April 2006), at Preamble. See also UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, at Preamble.

57 Article 19(2) UNESCO Convention for the Safeguarding of Intangible Cultural Heritage.

58 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, at Preamble.

of course, part of the system of public international law that grew out of the Dumbarton Oaks negotiations. Growing up next to this system is the system of international economic law, inaugurated at Bretton Woods, but acquiring a new significance with the advent of the WTO in 1994. The point about these systems is that they are sealed in the sense that they contain no meaningful legal mechanisms for interacting with each other.[59] This has, of course, led to a fragmentation of international law-making.[60] The fact that there is very little space in WTO law for the protection of human rights,[61] let alone cultural rights, is a reflection of this fragmentation. Consequently, the question of whether cultural rights are human rights is not germane in the context of a consideration of WTO law. This might not matter too much, but for the strongly arguable proposition that with its strong enforcement procedures, the system of WTO law has become the preeminent international legal system.[62] In light of the failure of WTO law to give consistent protection to human rights or cultural rights, many would not regard its systemic preeminence as a comforting state of affairs.

It is not easy to know the best way to approach a solution to this problem. One possible approach is the alteration of WTO law so that its putative focus on open and efficient world markets takes due account of important countervailing interests such as human rights and cultural rights. However, despite arguments to the contrary,[63] one might wonder whether it is sensible or desirable to see the trade liberalisation agenda as incorporating the human rights

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59 See Macmillan, "International Economic Law and Public International Law: Strangers in the Night", *supra* note 1.

60 Martti Koskenniemi, Chairman of the Study Group of the ILC, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, UN Doc. A/CN.4/L.682, 1-256, 18 July 2006, and UN Doc. A/CN.4/L.702, 1–25, 13 April 2006.

61 An attempt might be made to argue that the exception for "measures necessary to protect public morals", which appears in Article XX(a) GATT and Article XIV(a) GATS, allows the penetration of human rights norms into the WTO. However, the argument is not strong: see Macmillan, "Copyright, the World Trade Organization, and Cultural Self-Determination", *supra* note 1.

62 See further David Kennedy, "The International Style in Postwar Law and Policy: John Jackson and the Field of International Economic Law" (1995) American University Journal of International Law and Policy 10:2, pp. 671–716; Macmillan, "International Economic Law and Public International Law: Strangers in the Night", *supra* note 1.

63 See e.g. Ernst-Ulrich Petersmann, "Time for a United Nations 'Global Compact' for Integrating Human Rights into the Law of Worldwide Organizations: Lessons from European Integration" (2002) European Journal of International Law 13:3, pp. 621–650; Joel P. Trachtman, "Institutional Linkage: Transcending 'Trade and …'" (2002) American Journal of International Law 96:1, pp. 77–93.

agenda. Such an argument is, in Philip Alston's words, "a form of epistemological misappropriation".[64] The WTO is not an appropriate body to oversee the protection of human rights, nor of rights relating to cultural diversity and self-determination.[65] This creates some difficulties in relation to suggestions that a link might be created by inserting a cultural exception into the WTO agreements,[66] or even the ingenious device of a procedural clause in the form of a WTO Ministerial Decision.[67] Another choice would be to pit the political power of human rights and cultural rights law and rhetoric against the WTO system. As far as human rights are concerned, this might be regarded as problematic. There are two reasons for this. One of these is concerned with the damage that has been done to the symbolic power of the concept of human rights by its overuse. The other depends on the very nature of human rights: the hollowed out concept of the human, stripped of race, religion, ethnic affiliation, the empty "human" essential to the universality of the human in human rights laws, seems a weak and meaningless abstraction to pit against the powerful concept of the global market delivering economic benefits to all.[68] Perhaps, however, there is still enough vitality in the more specific concept of cultural rights to offer a political and legal counterbalance to the power of the WTO system. The UNESCO Conventions concluded this century might be thought to demonstrate this proposition. Nevertheless, the question of how we make cultural rights strong enough and specific enough to confer proper legal protection remains.

4. CULTURAL RIGHTS AND INTELLECTUAL PROPERTY RIGHTS?

This brings us back to the question of the relationship between cultural property and intellectual property. There has been a remarkable persistence in claims to connect cultural rights and intellectual property rights. This is despite the fact, as this chapter has sought to demonstrate, that the system of

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64 Philip Alston, "Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann" (2002) European Journal of International Law 13:4, pp. 815–844, at p. 826.

65 See further Macmillan, "International Economic Law and Public International Law", *supra* note 1.

66 Even if this was politically viable in the current international climate, which seems unlikely, given the opposition of the US to the conclusion of the UNESCO Convention: see e.g. Graber, *supra* note 7, at p. 560; Hahn, *supra* note 47, at pp. 522–525.

67 See Graber, *supra* note 7, at pp. 572–573.

68 See Orford, *supra* note 1.

intellectual property rights is in conflict with many of the rights that might be described as cultural rights. This section, which attempts to interrogate the relationship between intellectual property and cultural property, and between intellectual property rights and cultural rights, is based upon a claim that what is common to intellectual property and cultural property is that both make an appeal to the preservation or reservation of property rights in cultural artefacts in some form. In order to demonstrate this claim, I am using the concept of cultural property broadly to include both tangible and intangible cultural property.

Legally speaking, claims to cultural property are claims by a state or by a community (somehow defined) to certain property rights. As already noted, these rights are recognised in international legal instruments, in particular the World Heritage Convention, the Convention for the Safeguarding of Intangible Cultural Heritage, and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions. Consequently, they are also widely recognised in various forms in national law. Where international law recognises these rights as belonging to community then it often identifies that community as global, or as humanity in general. Nevertheless, as is the nature of international law, these global rights and rights of humanity are to be enforced through the agency of states. The protection of world heritage sites under the World Heritage Convention is an example of this. In this case, the type of property right asserted is generally a right of preservation and sometimes a right of access. National laws often make similar claims to artefacts falling within the general rubric of "heritage". In these cases a wide range of rights are asserted, from full state ownership, through rights of preservation exercised by the state, to rights vested in the state to control physical movement of artefacts. The last is often particularly important in state regimes relating to tangible cultural property. States may, for example, attempt to prevent certain artefacts leaving their territories on the ground of their significance as "heritage".[69] Obviously, some of these types of rights do not map onto intangible cultural property. Nevertheless, whether cultural property is tangible or intangible the essential features of cultural property are: first, that it is "owned" in common or, at least, publicly; secondly, that the ownership rights focus on preservation, access and the sharing of benefits associated with it; and thirdly, that the role of cultural property rights is to prevent or limit the privatisation of cultural property.

Claims to intellectual property are, of course, quite different[70] since they focus on a private property right. Further, unlike cultural property, they are

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[69] As already noted, one of the few species of cultural rights recognised by WTO law, see *supra* note 51.

[70] See further Graber, *supra* note 4, at pp. 56 and 68.

never claims to tangible property, but rather claims to intangible rights (albeit claims that often implicate tangible objects).[71] In general this means that although there may be tangible objects that simultaneously attract claims for intellectual property rights and cultural property rights, we are rarely in danger of confusing or eliding the two types of property claims. Things are otherwise, however, in the realm of intellectual or intangible space. Here, the dangers of confusing, eliding and overlapping cultural rights and intellectual property rights are considerable. In the imaginations of intellectual property scholars, intellectual or intangible space tends to consist of two parts, the public domain and the private domain. Much has been made of the intellectual public domain.[72] It has been reified, and then valorized, as the place where community and culture are protected from "property", meaning privately owned property, and where creativity consequently flourishes. Thus, the relationship between the intellectual public domain and the intellectual private domain looks something like the relationship between raw materials and manufactured products. Since, at least theoretically, cultural property is publicly owned, it would seem to fall within the intellectual public domain. This suggests that the division between cultural property and intellectual property in the intangible domain looks very much like the divisions between knowledge and innovation, idea and expression, and (most perplexingly) nature and culture. Under these circumstances, the main role of cultural property rights must surely be to protect the public domain from the encroachments of the private domain, not to mimic those encroachments.

This would all sound beautifully convincing were it not for two issues. The first is the claim to some sort of hybrid space in the intellectual domain in which cultural property, owned on a communal basis, is protected through a property device that mimics, or is, (private) intellectual property. This is, of course, the basis for the claim of the protection of traditional cultural expressions and knowledge through intellectual property-like devices. These claims, being claims by a community forming less than the public as a whole, to cultural property in the form of intellectual property, strike right at the heart of the hidden or obscured relationship between intellectual property and cultural property. They are founded on the assertion that this cultural property can only be preserved through its transformation into private property. An examination of these claims casts some light on the second outstanding issue, which is the more general question of the appropriate role of cultural property rights in

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71 In fact, the relationship between intellectual property and tangible objects is often problematic. The most obvious example of this relates to the intellectual property protection of works of visual art: see Fiona Macmillan, "Is Copyright Blind to the Visual?" (2008) Visual Communication 7, pp. 1–22.

72 See *supra* note 26.

preserving and maintaining cultural property into the intangible realm. This issue is addressed in the final paragraphs of this chapter.

Turning first then to the question of the protection of traditional cultural expressions and knowledge: Intellectual property law has experienced considerable technical difficulties in re-shaping itself to protect communal interests in traditional cultural expressions and knowledge.[73] This is doubtless partly a reflection of the technical distinctions between cultural property and intellectual property. There has also been a marked lack of political will for the development of intellectual property like-rights in traditional cultural expressions and knowledge, both at the national and international level,[74] which one might suspect is a consequence of the linkage between this agenda and a wider agenda concerned with political, social and cultural self-determination for Indigenous peoples. (The legal and political reluctance are surely related. Suffice it to say that the seemingly endless capacity for reinvention that intellectual property has displayed in, for example, the context of the digital revolution seems to have been singularly lacking in the context of traditional cultural expressions and knowledge.) However, the present focus is less on the question of legal and political modalities and more on the danger of confusing the roles of cultural and intellectual property.

As already noted, claims to communal intellectual property rights in traditional cultural expressions and knowledge are, at least so far as they are concerned with preserving cultural property, premised on the argument that the best defence to the cultural threat posed by private intellectual property rights encroaching on those cultural rights is to turn those traditional cultural rights into private rights. This argument has an intrinsic appeal. Moreover, the post-colonial political context of these claims is not easy to ignore. However, if we recognise traditional cultural property as intellectual property, do we do some damage to the preservation of that property – that is, to the preservation of culture and heritage of a particular group or community? Michael Blakeney has argued that, treating cultural property as intellectual property means corralling it into the shape of Western intellectual property law.[75] If the item of cultural property is a story, music, or artwork, then it has to be fitted into copyright law; designs and symbols must fit into the netherworld of the relationship between copyright, designs and trade marks; knowledge about local

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[73] See e.g. Michael Blakeney, "The Protection of Traditional Knowledge under Intellectual Property Law" (2000) European Intellectual Property Law Review 22:6, pp. 251–261.

[74] See Michael Blakeney, "Protecting Traditional Cultural Expressions: The International Dimension" in Fiona Macmillan and Kathy Bowrey (eds.), *New Directions in Copyright Law: Vol. 3*, Cheltenham, UK: Edward Elgar, 2006, pp. 3–14.

[75] See Blakeney, *supra* note 73.

flora and fauna must be fitted somewhere into patent law, plant breeders' rights, geographical indications. This will mean that different levels of protection will apply to different types of traditional knowledge and culture. In short, as Peter Fitzpatrick and Richard Joyce argue, the end result is that occidental intellectual property law comes to constitute traditional, or non-Western, culture and heritage.[76] In so doing, it changes the shape of that heritage in ways that are not necessarily the consequence of the reflexive cultural practice that in fact constitutes so-called traditional cultural expressions and knowledge.[77] This seems to be inimical to the very purpose of protecting cultural property.

5. CONCLUSION

The brief examination of non-Western forms of cultural and/or intellectual property poses two questions: Do we leave cultural property, widely defined, in the intellectual public domain where it can be freely mined as raw material for intellectual property, but where it might not be adequately conserved or preserved as cultural property? Or, do we privatise it through intellectual property rights and progressively destroy its distinctive character as cultural property and heritage? These questions are, of course, part of a much larger problem about the preservation and conservation of intangible cultural property in the intellectual domain. It almost goes without saying that, in intellectual space, the problem of the relationship between cultural property and intellectual property is unresolved by law. Consequently, the question of preserving or conserving cultural property in intellectual space remains inadequately addressed. The suggestion that the best method of preservation and conservation of intangible cultural property is by its privatisation in the form of intellectual property does, however, seem naive. As this chapter has sought to argue, not only is intellectual property ill-equipped to protect cultural rights, it is clearly implicated in the constriction and possible destruction of some cultural rights.

We need to solve this problem by a much more complex articulation of the intellectual or intangible domain. Specifically, I think we need to start moving

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[76] Peter Fitzpatrick and Richard Joyce, "Copying Right: Cultural Property and the Limits of (Occidental) Law" in Fiona Macmillan (ed.), *New Directions in Copyright Law: Vol. 4*, Cheltenham, UK: Edward Elgar, 2007, pp. 171–192.

[77] As Fitzpatrick and Joyce (*ibid*. at pp. 171–173) argue, so-called "traditional knowledge and culture" would never have survived if it had not been "dynamically generative and relational" and "capable of being utterly responsive, comprehensively self-transgressive".

away from the simplified binary divide of the intellectual public domain and the intellectual private domain of intellectual property law. Or, at least, away from the notion that the intellectual public domain is some undifferentiated concept equating to the "commons" in Roman law.[78] Let us start, instead, to give some much more complex legal architecture to the public domain of intellectual space. A blueprint for such architecture might include:

- a notion of the difference between what is publicly owned in intellectual space and what is in the commons – that is, unowned – in intellectual space and thus ripe for appropriation;
- an associated recognition that some things can never be owned, at least privately, because of their cultural significance;
- development of the concept of group and communal rights, belonging to less than the public as a whole, bounded by property on the outside, but inside promoting freedom and space for creativity, innovation, invention, and cultural conservation.[79]

Failure to develop the same complex architecture in intellectual or intangible space as that which we have developed in tangible space for the preservation of heritage and cultural property, only invites constant encroachment by the type of private propertisation in intellectual space that undermines and destroys claims to cultural property in that space. The power of intellectual property rights in the context of the ascendant system of WTO law makes this an urgent political and legal project.

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[78] See further Carol M. Rose, "Romans, Roads and Romantic Creators: Traditions of Public Property in the Information Age" (2003) Law and Contemporary Problems 66:1–2, pp. 89–110.

[79] On each of these points, see further Fiona Macmillan, "Altering the Contours of the Public Domain" in Waelde and MacQueen, *supra* note 26, pp. 98–117.

5. Using human rights to tackle fragmentation in the field of traditional cultural expressions: an institutional approach

Christoph Beat Graber*

1. INTRODUCTION: THE CHALLENGE OF DOUBLE FRAGMENTATION

Academic scholarship and international policy making related to developing legal safeguards for traditional forms of knowledge and creativity are faced with and challenged by double fragmentation. The first type of fragmentation is caused by collisions between competing regimes trying to develop legal disciplines for effective protection of traditional knowledge and cultural expressions. Manifold multilateral institutions and initiatives are engaged in the protection of indigenous peoples' cultural and intellectual property (IP), including the World Intellectual Property Organization (WIPO) and in particular its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), the United Nations Environment Programme (UNEP), the Convention on Biological Diversity, the Food and Agriculture Organization of the United Nations (FAO), the United Nations Working Group on Indigenous Populations, the United Nations Educational, Scientific and Cultural Organization (UNESCO), the International Labour Organization (ILO), the World Health Organization (WHO), the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), the United Nations Development Programme (UNDP), and the Open-ended Ad Hoc Intergovernmental Panel on Forests.[1] The international community has shown

* The author thanks Elizabeth Burns Coleman, Mira Burri-Nenova, Marion Panizzon and Gunther Teubner for comments on earlier drafts, and Thomas Steiner for research assistance. The support of the Ecoscientia Foundation is gratefully acknowledged.

[1] WIPO, Intellectual Property Needs and Expectations of Traditional

no coherence in its approaches to traditional cultural expressions (TCE) and lacks sufficient coordination. In addition, a multiplicity of regional and national endeavours to protect different aspects of TCE complicates the picture. Finally, fragmentation is further deepened by the various statements and declarations made by indigenous peoples themselves, for instance, in the regions of New Zealand, Australia, the South Pacific and the Amazon Basin.[2]

We have analysed this type of fragmentation elsewhere[3] and emphasised that even the work of WIPO and UNESCO, the two most important fora, lacks a comprehensive and sufficiently coherent approach. Although a successful first effort at cooperation between WIPO and UNESCO resulted in the Model Provisions 1982,[4] cooperation between the two fora has not been continued – with the exception of the jointly organised World Forum 1997 and the regional consultations of 1999.[5] A major reason for this failure is the differences in purpose, competences and identity between the two organisations that translate into dissension at the level of the individual States regarding the attribution of responsibilities among governmental departments (i.e. those responsible for IP protection against those responsible for cultural policy).[6] Today, exchanges between WIPO's IGC and UNESCO are limited to sending observers to one another's conferences.[7]

The second type of fragmentation results from a collision between traditional cultures and global communication systems such as the law or the economy. Essentially, these collisions occur between modern IP law and the

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Knowledge Holders, WIPO Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva: WIPO, 2001, pp. 49–55.

2 For an overview, see Michael Blakeney, "Hans Christian Andersen and the Protection of Traditional Cultural Expressions" in Helle Porsdam (ed.), *Copyright and Other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity*, Cheltenham, UK: Edward Elgar, 2006, pp. 108–128, at pp. 111–114.

3 Christoph Beat Graber and Martin Girsberger, "Traditional Knowledge at the International Level: Current Approaches and Proposals for a Bigger Picture that Include Cultural Diversity" in Hansjörg Seiler and Jörg Schmid (eds), *Recht des ländlichen Raums. Festgabe der Rechtswissenschaftlichen Fakultät der Universität Luzern für Paul Richli zum 60. Geburtstag*, Zurich: Schulthess, 2006, pp. 243–282; Christoph Beat Graber, "Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights" in Fiona Macmillan (ed.), *New Directions in Copyright Law: Vol. 5*, Cheltenham, UK: Edward Elgar, 2007, pp. 45–71, at pp. 51–57.

4 UNESCO and WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions) of 1982, Geneva: WIPO, 1985.

5 See WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, 2 May 2003, at para. 86.

6 See also Wend B. Wendland's contribution to this volume.

7 See Graber and Girsberger, *supra* note 3, at pp. 274–275. See also Martin A. Girsberger's contribution to this volume.

traditional knowledge forms and patterns of social organisation.[8] This fragmentation has been analysed in an earlier publication[9] and we limit ourselves here to identifying the three areas in which such collisions are most striking:

(1) First, modern copyright law is not able to protect effectively secret and sacred or very old TCE due to concepts of individual ownership, limited terms of protection, fixation requirements,[10] and, more profoundly, because IP-type instruments presuppose acceptance of methodological concepts of reification and commoditisation. Similar objections can be raised against UNESCO's documentation-based approach to TCE preservation. With regard to the Convention on Intangible Cultural Heritage,[11] the drawing up of inventories enumerating precisely what the important intangible heritage is, presupposes that this heritage has been identified and fixed. This is not in the interest of communities wanting to keep their TCE secret.[12]

(2) Second, customary laws of indigenous peoples collide with claims of contemporary indigenous artists based on modern copyright law when a clan contests an individual artist's authority to reproduce, license or sell secret and sacred or other community "owned" traditional expressions. A classroom example of a clash of interests between a clan and an individual Aboriginal artist is the *Yumbulul* case.[13] In *Yumbulul*, the Reserve Bank of Australia reproduced a "Morning Star Pole" on an Australian ten dollar banknote, without due authorisation. Morning Star Poles are totemic artefacts having a crucial function in sacred aboriginal rituals commemorating the deaths of important

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[8] See also the contribution of Gunther Teubner and Andreas Fischer-Lescano to this volume.

[9] For a legal sociology analysis of collisions between modern copyright law and Australian Aboriginal knowledge forms and patterns of social organisation, see Christoph Beat Graber, "Can Modern Law Safeguard Archaic Cultural Expressions? Observations from a Legal Sociology Perspective" in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, The Hague: Kluwer Law International, 2008.

[10] Fixation requirements exist in certain common law countries although, according to Article 2.2 Berne Convention, national laws need not provide that fixation is a general condition for protection. See WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, Background Paper No. 1, Geneva: WIPO, 2003, at pp. 41–42.

[11] UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage (CIH), adopted 17 October 2003, entered into force 21 April 2006.

[12] Silke von Lewinski (ed.), *Indigenous Heritage and Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore,* The Hague: Kluwer Law International, 2004, at p. 393; Michael F. Brown, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property" (2005) International Journal of Cultural Property 12:1, pp. 40–61, at pp. 48–49.

[13] *Yumbulul v. Reserve Bank of Australia*, I.P.R. 21 (1991) 481.

members of the clan.[14] The artefact was created by the Australian aboriginal artist Terry Yumbulul under the authority given to him as a member of the Galpu clan.[15] Terry Yumbulul had licensed the right to reproduce the Morning Star Pole to the Aboriginal Artists Agency, who sublicensed the Reserve Bank of Australia. The Galpu clan, however, criticised Yumbulul's licensing as exceeding the authority which had been given to him.[16]

(3) Third, the difficulty encountered by WIPO's IGC of agreeing on a definition of TCE or expressions of folklore reveals differences between the modern and the traditional view. A modern view, such as that expressed by the WIPO Secretariat in its Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore,[17] suggests a distinction between verbal, musical, physical and tangible expressions of folklore or TCE and is centred on "works of art and literature", a concept commonly used in modern copyright instruments. Those who take a traditional view, however, object that it is a mistake to separate cultural expressions from other forms of traditional knowledge and emphasise the crucial relationship between indigenous peoples and their land, because the land is the basis of their spiritual world.[18]

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[14] See Michael Blakeney, "*Milpurrurru & Ors. v. Indofurn Pty Ltd & Ors.* – Protecting Expressions of Aboriginal Folklore under Copyright Law" (1995) Murdoch University Electronic Journal of Law 2:1 (unpaginated).

[15] The Morning Star Pole created by Terry Yumbulul is currently exhibited at the Australian Museum in Sydney.

[16] As a result of the clan's criticism, Yumbulul sued the Aboriginal Artists Agency claiming that his licence was invalid since only the Galpu clan would have had the power to assign copyrights to the bank. The judge dismissed the case and decided that, "Australia's copyright law does not provide adequate recognition of aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin". From the judge's statement, it seems that he was aware of a collision between Australia's modern copyright law and Aboriginal custom. Modern law's classic response to this type of collision is to impose its rule and it is no surprise that indigenous communities often see such imposition as a colonisation of their traditional patterns of social organisation.

[17] See WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/8/4, 8 April 2005, at Annex, Article 1 (unaltered in WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, WIPO/GRTKF/IC/12/4(c), 6 December 2007, and reproduced in the Annex of this volume).

[18] Erica-Irene Daes, Discrimination against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, Document of the UN Commission on Human Rights, E/CN.4/Sub.2/1993/28, 28 July 1993, at paras. 21, 31 and 164. Representatives of indigenous communities have been critical, taking the view that TCE should encompass a much broader range of cultural expres-

The question is how this double fragmentation could be overcome. Although we do not claim that human rights are able to establish the unity of the fragmented global law on a *meta* level, in this chapter we explore how recourse to a human rights approach might contribute to a more coherent methodological framework for the protection and promotion of TCE. We first identify the human rights relevant for TCE in the framework of the obligations approach of the International Bill of Rights. Second, we argue that cultural human rights are effective not only as individual rights, but also on an institutional level. In a third step, a procedural strategy for interfacing global law and local traditions is derived from this institutional theory.

2. HUMAN RIGHTS PERTINENT FOR THE PROTECTION OF TCE[19]

An analysis of the political and scientific work undertaken in the field of TCE protection reveals that the human rights dimensions of TCE are often insufficiently taken into account.[20] It is the objective of this chapter to compensate for this oversight and shed more light on the pertinent issues. The following sections will first identify the relevant human rights provisions and then attempt to conceptualise the private and public aspects of TCE protection and promotion in a more coherent theoretical framework.

Since we are focusing on the international level here, our analysis of relevant human rights law for TCE protection and promotion is centred on the so-called International Bill of Rights that comprises the Universal Declaration of Human Rights (UDHR),[21] the International Covenant on Civil and Political Rights (CCPR)[22] and the International Covenant on Economic, Social and Cultural Rights (CESCR).[23] Although the UDHR is a non-binding instrument of international law, it has strongly influenced the CCPR and the CESCR,

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sions including traditional beliefs, scientific views and the substance of legends or practical traditions. See Blakeney, *supra* note 2, at p. 110.

[19] An earlier version of parts of this section has been reproduced in Graber, 2007, *supra* note 3.

[20] With regard to WIPO activities, see Hans Morten Haugen, "General Comment No. 17 on 'Authors' Rights'" (2007) The Journal of World Intellectual Property 10, pp. 53–69, at p. 64.

[21] The Universal Declaration of Human Rights was adopted and proclaimed by the United Nations in General Assembly Resolution 217A(III), U.N. Doc. A/810, 10 December 1948.

[22] International Covenant on Civil and Political Rights, 999 U.N.T.S. 171, concluded 16 December 1966, entered into force 23 March 1976.

[23] International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3, concluded 16 December 1966, entered into force 3 January 1976.

which are both binding upon the parties.[24] As we shall see below, the UDHR provisions relevant to TCE are almost identical to those contained in both the CCPR and the CESCR.

It is indeed debatable whether the CCPR and the CESCR should be conceived of as two separate treaties protecting distinct categories of human rights, or as a single system. In 1952, it was the influence of the Western States that led the UN General Assembly to adopt a resolution calling upon the UN Commission on Human Rights to draft two separate covenants rather than a single one, as originally planned.[25] Asbjørn Eide holds that some of the assumptions underlying this decision were ill founded.[26] According to one of these controversial assumptions, civil and political rights have a different nature from that of social, economic and cultural rights. "Civil and political rights were considered to be 'absolute' and 'immediate', whereas economic, social and cultural rights were held to be programmatic, to be realized gradually, and therefore not a matter of rights."[27] It was emphasised that civil and political rights have a direct effect in the sense that they can be directly applied by courts in contrast to social, cultural and economic rights, which must be implemented and thus have a more political nature.

Without doubt some States may find it more difficult than others to make available the necessary means for implementation. However, difficulties with regard to the "justiciability" of social, economic and cultural rights do "not relate to their validity but rather to their applicability".[28] That is, the problems States may face in making available the necessary financial means do not alter their obligations under the CESCR. According to Article 2(1) CESCR, each State is obliged "to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means,

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[24] As of 20 September 2007, 160 states were parties to the CCPR and 156 were parties to the CESCR.

[25] Asbjørn Eide and Allan Rosas, "Economic, Social and Cultural Rights: A Universal Challenge" in Asbjørn Eide, Catarina Krause and Allan Rosas (eds.), *Economic, Social and Cultural Rights*, 2nd revised edn, The Hague: Kluwer Law International, 2001, pp. 3–7, at p. 3, referring to General Assembly Resolution 543(VI) of 5 February 1952. The latter resolution reverses General Assembly Resolution 421(V) of 4 December 1950, which stressed the interrelatedness of all human rights and opted for a single treaty.

[26] Asbjørn Eide, "Economic, Social and Cultural Rights as Human Rights" in Eide *et al*., *supra* note 25, pp. 9–28, at p. 10.

[27] *Ibid*.

[28] Martin Scheinin, "Economic, Social and Cultural Rights as Legal Rights" in Eide *et al*., *supra* note 25, pp. 29–54, at p. 29.

including particularly the adoption of legislative measures". This provision has been further clarified in the so-called "Limburg Principles", which state that those provisions of the CESCR that cannot be made justiciable immediately, "can become justiciable over time".[29]

All in all, it follows from this brief structural overview that human rights should be conceived as being interrelated rather than separated into two categories. This view has been emphasised in many UN fora[30] and found its most telling expression in the Declaration adopted at the 1993 World Conference on Human Rights, which states that, "all human rights are universal, indivisible and interdependent and interrelated".[31]

Looking more closely at the individual provisions of the CCPR and the CESCR, we find that Article 15 CESCR is the provision most directly relevant to TCE. Further provisions with potential importance for our subject are Article 27 CCPR (minority rights), Article 19 CCPR (freedom of expression), Article 1 CCPR and Article 1 CESCR (self-determination of peoples).

Of particular interest for the TCE issue is Article 15(1)(c) CESCR recognising the right of everyone "[t]o benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author". This paragraph is a literal reproduction of the text contained in Article 27(2) UDHR. According to a recent interpretation, the *Right to Benefit* (Article 15(1)(c) CESCR) provides for a linkage between copyright and indigenous cultural expressions. This follows from General Comment No. 17 on Article 15(1)(c) CESCR, which the Committee on Economic, Social and Cultural Rights (CESCR Committee)[32] adopted in November 2005.[33]

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[29] See the Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, U.N. Doc. E/CN.4/1987/17, reproduced as Annex 4 in Eide *et al*., *supra* note 25. See also Eide, *supra* note 26, at pp. 25–26.

[30] Eide and Rosas, *supra* note 25, at p. 4.

[31] UN General Assembly, World Conference on Human Rights: Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, Part I, at para. 5.

[32] For an analysis of the function and importance of the CESCR Committee, see Matthew Craven, "The UN Committee on Economic, Social and Cultural Rights" in Eide *et al*., *supra* note 25, pp. 455–472.

[33] Committee on Economic, Social and Cultural Rights, General Comment No 17 (2005), adopted 21 November 2005, E/C.12/GC/17, 12 January 2006. General Comments of the CESCR Committee (and the Human Rights Committee) are an important means to provide the States parties to the Covenant with guidance as to the Covenant's meaning and the nature of the obligations resulting from it. See Haugen, *supra* note 20, at pp. 54–55. Another important instrument to ensure that States parties discharge their obligations is the periodic State reports on the implementation of the

Paragraph 32 of that Comment reads as follows:

> With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned, the oral or other customary forms of transmission of scientific, literary or artistic production and, where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.

This paragraph of the comment emphasises the obligation of the States parties to the CESCR to ensure the effective protection of the scientific, literary and artistic productions of indigenous peoples. With a view to gaining a precise understanding of this paragraph, it is necessary to recall that the rights provided by the International Bill of Rights are all *individual* rights rather than *group* rights. Thus, at their centre must be individuals in their capacity as members of indigenous peoples. As we shall show below, however, this does not preclude human rights from enshrining a collective aspect as well.

According to established human rights theory and practice, recognition of human rights imposes three levels of obligation on the States parties: "the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide".[34] This obligations approach to human rights underlies the whole of the International Bill of Rights.[35] The CESCR Committee (and the Human Rights Committee, HRC) has also used it as a blueprint for its Comments.

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obligations held. These reports and the subsequent discussions in the Committee bring possible breaches of the Covenants to the attention of all parties and exert political pressure on the nonconforming States parties to comply with their obligations. See generally Human Rights Committee, General Comment No. 31 (2004), adopted 29 March 2004, CCPR/C/21/Rev.1/Add.13, 26 May 2004, at para. 2.

[34] Committee on Economic, Social and Cultural Rights, General Comment No. 12 (1999), adopted 12 May 1999, E/C.12/1999/5, 12 May 1999, at para. 15. See also Eide, *supra* note 26, at p. 23.

[35] Walter Kälin and Jörg Künzli, *Universeller Menschenrechtsschutz*, Basel: Helbing and Lichtenhahn, 2005, at p. 101.

The *obligation to respect* is essentially an obligation of the State not to interfere with the freedom at issue. This obligation is mirrored by an entitlement of the human rights holder to object to any State intervention infringing the rights afforded. Accordingly, this obligation is also called a "negative duty".[36] Regarding the Right to Benefit, the question is whether the obligation to respect would prohibit a State party from drawing up legislation designed to protect the copyrights of persons who had misappropriated cultural heritage in the public domain in a way that is offensive to traditional communities.

The *obligation to protect* is a positive duty. It is a requirement that the State should take any legislative measures necessary to protect indigenous peoples from illicit interference by third persons. The entire paragraph 32 of Comment No 17 appears to deal with the duty to protect. It spells out this obligation by highlighting the need to protect not only material, but also moral interests and stressing that not only individual, but also collective ownership is covered, recalling the principle of prior informed consent and recognising the importance of IP rights as means of protection. A key question that remains open in this respect is how to deal with the cultural heritage of indigenous peoples who do not conceive TCE in terms of property at all.

Finally, the *obligation to fulfil* consists of a positive duty of the States parties to take "all necessary steps within their available resources",[37] which are required to ensure effective protection of the human rights of individuals. According to paragraph 34 of General Comment No 17, "[t]he obligation to *fulfil* (provide) requires States parties to provide administrative, judicial or other appropriate remedies in order to enable authors to claim the moral and material interests resulting from their scientific, literary or artistic productions and to seek and obtain effective redress in cases of violation of these interests." As clarified in the following sentence of paragraph 34, such "appropriate remedies" may also include financial measures. In the context of TCE, one may think, for example, of governmental measures facilitating the formation of agencies assisting indigenous right holders in taking legal action against unauthorised appropriation of their cultural heritage by third parties.

Article 1 CCPR, which is formulated in language identical to that of Article 1 CESCR,[38] guarantees self-determination of peoples including cultural self-

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36 *Ibid*.

37 *Ibid*. at para. 46.

38 On the right of self-determination see Human Rights Committee, General Comment No. 12 (1984), adopted 13 March 1984; Thomas D. Musgrave, *Self Determination and National Minorities*, Oxford: Oxford University Press, 1997; Allan Rosas, "The Right of Self-Determination" in Eide *et al*., *supra* note 25, pp. 111–118.

determination.[39] With regard to cultural expressions of indigenous peoples, however, several obstacles hinder the application of this provision. Firstly, it is still not clear whether Article 1 is merely a vague political principle or a genuine right.[40] Secondly, it is disputed whether the concept of "peoples" would also include minorities, such as indigenous communities. Finally, the HRC itself insists on a clear distinction between Article 1 and Article 27 CCPR, which explicitly protects minority rights.[41]

Cultural issues have been addressed by the HRC in relation to Article 27 CCPR, safeguarding the rights of persons belonging to ethnic, religious or linguistic minorities.[42] The HRC has used Article 27 as the basis for protecting the "cultural identity" of individuals in their capacity as members of an indigenous people.[43] The HRC held that only individuals may invoke Article 27,[44] and has denied ethnic groups and other collectives the right to file a complaint.[45] Safeguarding indigenous peoples' cultural identity "may make it necessary that they control their land and other resources and to ensure their standard of living in ways which correspond to their own traditions".[46] Accordingly, the HRC applies a broad definition of culture, which also includes land use patterns such as fishing or hunting.[47]

In this regard, it is noteworthy that, since 1982, a Draft Declaration of the Rights of Indigenous Peoples has been deliberated within a Working Group on Indigenous Populations of the UN Human Rights Commission.[48] The discussion was however blocked in the Commission, which was unable – over more

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[39] Article 1 CCPR reads as follows: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and *cultural development*" (emphasis added). Self-determination of peoples also appears in the Charter of the United Nations.

[40] Musgrave, *supra* note 38, at p. 90.

[41] See Human Rights Committee, General Comment 23 (1994), CCPR/C/21/Rev.1/Add.5, 8 April 1994, at para. 2.

[42] Article 27 CCPR reads as follows: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own *culture*, to profess and practise their own *religion*, or to use their own *language*" (emphasis added).

[43] For an overview of the HRC's case law, see S. James Anaya, *Indigenous Peoples in International Law*, 2nd edn, Oxford: Oxford University Press, 2004, at pp. 134–137.

[44] Human Rights Committee, *supra* note 41.

[45] Kälin and Künzli, *supra* note 35, at pp. 117–118.

[46] Eide, *supra* note 26, at p. 20.

[47] See Human Rights Committee, *supra* note 41, at para. 7.

[48] See Rodolfo Stavenhagen, "Cultural Rights: A Social Science Perspective" in Eide *et al*., *supra* note 25, pp. 85–109, at p. 105.

than ten years – to agree on the Draft Declaration, as contained in the annex to Resolution 1994/45 of the Sub-Commission on the Protection and Promotion of Human Rights of 26 August 1994.[49] It was only recently, on 23 June 2006, that the newly founded Human Rights Council consented to submit a recommendation to the UN General Assembly to consider and adopt the Declaration on the Rights of Indigenous Peoples.[50] On 13 September 2007, the UN General Assembly adopted the Declaration during its 61st session.[51] Article 31 of the Declaration provides that, "[i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions".[52] Moreover, according to Article 11, "indigenous peoples have the right to practice and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature." Finally, Article 13 provides for a right of indigenous peoples "to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures". These provisions may be of particular importance for indigenous peoples, who treat their cultural heritage as effectively

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[49] Draft Declaration on the Rights of Indigenous Peoples, prepared by the Sub-Commission on the Promotion and Protection of Human Rights, UN Doc. E/CN.4/Sub.2/1994/2/Add.1 (1994). See also Draft Principles and Guidelines for the Protection of the Heritage of Indigenous People, Final Report of the Special Rapporteur Erica-Irene Daes, E/CN.4/Sub.2/1995/26, 21 June 1995, at Annex.

[50] See Human Rights Council, UN Doc. A/HRC/1/L.3, 23 June 2006. The draft Declaration adopted by the Human Rights Council is an amended version of the 1994 Draft. A working group for the elaboration of a Draft UN Declaration on the Rights of Indigenous Peoples, established by Commission on Human Rights resolution 1995/32 of 3 March 1995, met for 11 sessions between 1994 and 2006 to further review the original draft. See Report of the working group, UN Doc. E/CN.4/2006/79, 22 March 2006. The report reveals that the draft that was adopted is a compromise text, since it was not possible to obtain consensus on fundamental issues including self-determination, lands and resources, and the nature of collective rights (*ibid*. at para. 29).

[51] 143 UN members voted in favour, 11 abstained and four – Australia, Canada, New Zealand and the United States – voted against the text. See UN General Assembly Press Release, available at http://www.un.org/ga/61/news/news.asp?NewsID=23794.

[52] In this context, one should also take note of ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries, adopted 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session, entered into force 5 September 1991, ILM 28 (1989), 1384. Article 8(2) ILO Convention 169 provides that indigenous peoples "shall have the right to retain their own customs and institutions, where these are not incompatible with internationally recognised human rights". However, the legal impact of ILO Convention 169 is slight, since it has been ratified by only 17 States.

"un-owned".[53] As highlighted above, an IP-based approach to TCE does have some shortcomings in this respect. The Declaration may thus be perceived as an effort of the UN Human Rights system to compensate for this deficiency of the IP-based approach. Although the Declaration is not a binding instrument of international law, one will henceforth have to take this declaration into account when interpreting Articles 27 CCPR and 15(1)(c) CESCR. The problems posed by the concept of group rights, which is the fundament of the Declaration, are addressed in Section 3 below.

Finally, the freedom of expression and information, as safeguarded by Article 19 CCPR, is a further provision with potential relevance for TCE. Article 19(2) CCPR protects the right of everyone "to seek, receive and impart information and ideas of all kinds [...], either orally, in writing or in print, in the form of art, or through any other media of his choice". This wording indicates a broad scope of the freedom of expression and information (also including expressions of art, such as literature, music, painting and dance).[54] According to Asbjørn Eide, "[t]he right to freedom of expression and information includes a right to cultural expressions and access to and dissemination of cultural activities".[55] Freedom of expression and information has also been interpreted as a human rights basis for the protection and promotion of the diversity of cultural expressions.[56] However, the UN human rights bodies have not dealt with TCE-related issues directly[57] under Article 19 CCPR. By contrast, the UNESCO Convention on the Diversity of Cultural Expressions (CCD) emphasises in its preamble that, "freedom of thought, expression and information, as well as diversity of the media, enable cultural expressions to flourish within societies".[58]

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53 See Laurence Helfer, "Towards a Human Rights Framework for Intellectual Property" (2007) University of California Davis Law Review 40, pp. 971–1020, at p. 983.

54 In a communication regarding an individual complaint against South Korea, the HRC held in 2004 that paintings fall "within the scope of the right of freedom of expression protected by article 19, para. 2" CCPR. See Communication No. 926/2000: Republic of Korea. CCPR/C/80/D/926/2000, 19 March 2004.

55 Asbjørn Eide, "Cultural Rights as Individual Human Rights" in Eide *et al*., *supra* note 25, pp. 289–301, at p. 292.

56 See Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO*, Berne: Staempfli, 2003, at pp. 102–107 and 114–119; Christoph Beat Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO?" (2006) Journal of International Economic Law 9:3, pp. 553–574, at pp. 562–563.

57 In General Comment No 17, the CESCR Committee states that the enjoyment of Article 15(1)(c) CESCR is dependent on other human rights guaranteed in the International Bill of Rights, including freedom of expression and information (Committee on Economic, Social and Cultural Rights, *supra* note 33, at para. 4).

58 UNESCO, Convention on the Protection and Promotion of the Diversity of

In conclusion, it is important to reiterate that the CESCR and the CCPR ought not to be perceived as two separate covenants but rather as integral parts of a single international system of "universal, indivisible, interdependent and interrelated" human rights. This is also true for the human rights protecting the productions and cultural identity of indigenous communities. Articles 15(1)(c) CESCR and 27 CCPR are the most relevant provisions of the International Bill of Rights safeguarding TCE. In addition, Article 19 CCPR is a provision that could potentially be further clarified by the HRC with respect to States parties' obligations in the context of freedom of expression and information. The CESCR Committee emphasised in paragraph 4 of General Comment No. 17 that the realisation of Article 15(1)(c) CESCR is dependent on the enjoyment of other human rights guaranteed in the International Bill of Rights, including Article 27 CCPR with respect to minority rights, and Article 19 CCPR providing "freedom of expression including the freedom to seek, receive and impart information and ideas of all kinds". The interrelatedness and interdependence of CCPR and CESCR is further highlighted on a methodological level by the fact that the HRC and the CESCR Committee both follow an obligations approach to human rights distinguishing States parties' obligations to respect, protect and fulfil.[59]

3. INSTITUTIONAL ASPECTS OF HUMAN RIGHTS

We argued at the outset that double fragmentation in the field of TCE is caused by (1) a lack of cooperation between competing regimes and (2) collisions between global law and local traditions. Since this study aims at exploring how a human rights framework could contribute to providing a more coherent concept of TCE protection and promotion at the international level, the question is how this could be achieved within the obligations approach to human rights. A major difficulty here is caused by the individualistic methodology underlying the interpretation of the International Bill of Rights.

As mentioned earlier, human rights theory and practice do perceive human rights as individual rights.[60] This is also true for the so-called "cultural rights" in the narrow sense of the word, i.e. Article 27 CCPR and Article 15(1)(c) CESCR.[61] It is established that the Right to Benefit provides for a human

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Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005, entered into force 18 March 2007.

59 Human Rights Committee, *supra* note 33. See generally Kälin and Künzli, *supra* note 35, at pp. 100–102.

60 See e.g. Eide, *supra* note 55, at pp. 290–291 and 300–301.

61 See *ibid.* at pp. 289–290.

rights basis for protecting the literary and artistic rights of *individual* authors. Similarly, the minority rights provided by Article 27 CCPR are rights of *individuals* in their capacity as members of a minority. By contrast, indigenous peoples, seconded by several scholars of social sciences, have been claiming *collective* cultural rights.[62] Communitarian political philosophers have been arguing that any attempt to provide legal protection for cultural minorities will be insufficient, as long as it is not based on a concept of group rights.[63] In a similar vein, Rodolfo Stavenhagen, a social scientist, argues that a concept of collective or communitarian rights would be a necessary complement to the individualistic understanding of the rights of cultural minorities.[64] A group rights approach has also been advocated in recent law-making projects at the international level. As highlighted above, the Declaration on the Rights of Indigenous Peoples is founded on the idea that indigenous peoples have collective rights.[65]

Chandran Kukathas has famously criticised claims for group rights from a philosophical point of view.[66] From a legal perspective, a concept of collective rights, in the sense of rights that can only be exercised by the group rather than by its individual members, must be rejected primarily because of the unclear relationship between the rights of the group and the rights of its individual

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62 See Stavenhagen, *supra* note 48, at p. 102.

63 For a philosophical defence of group rights, see Vernon van Dyke, "The Individual, the State, and Ethnic Communities in Political Theory" in Will Kymlicka (ed.), *The Rights of Minority Cultures*, Oxford: Oxford University Press, 1995, pp. 31–56: "The requirements of logic and the long-term requirements of universal justice commend the idea of accepting communities as right-and-duty-bearing units. It is quite illogical to take the view that only states, nations and 'peoples' are entitled to be treated as entities and that lesser groups are not. It is illogical to jump from the state, nation, or 'people' on the one side, to the individual on the other, and to say that the ethnic communities that exist in-between do not deserve consideration. Not only is it illogical, it is also unjust. It is unjust to accept or assume status and rights for states, nations, and 'peoples', but to reject them for ethnic communities that are also historically constituted" (*ibid.* at p. 54). See also Darlene Johnston, "Native Rights as Collective Rights: A Question of Group Self-Preservation" in Kymlicka, *ibid.* pp. 179–201. For a discussion and influential critique of the distinction between individual and group rights, see Will Kymlicka, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Clarendon Press, 1996, at pp. 46–48.

64 Stavenhagen, *supra* note 48, at pp. 100–109.

65 See *supra* note 49. Article 1 of the Declaration provides: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."

66 Chandran Kukathas, "Are There Any Cultural Rights?" in Will Kymlicka, *supra* note 63, pp. 228–256, at p. 236. See also Elizabeth Burns Coleman's contribution to this volume.

members.[67] Group rights would pose the danger of taking away the individual human rights of the powerless group members and exposing them to pressures from the powerful ones.[68] Group rights, writes Mary Ann Glendon, "tend to pit group against individual, one group against another, and group against state."[69] A better solution, which has been adopted in recent human rights theory and practice, is to recognise that most individual human rights may have a collective dimension without thus becoming collective rights.[70] This has been exemplified above in respect of Article 27 CCPR, protecting the cultural rights of individuals in their capacity as members of an indigenous people. With regard to the Right to Benefit, the CESCR Committee, in paragraph 32 of Comment No 17, implicitly addressed the problematic relationship between individual and collective rights in two ways.[71] First, States parties are invited to recognise not only individual but also collective authorship. Collective authorship is a concept that is common to most municipal copyright acts. It applies to situations (e.g. in the areas of film, multimedia, theatre or opera), in which several persons have jointly created a copyright-protected work. Since it usually provides that such works may be used only under the condition that all authors give their prior consent, this may be a concept that could contribute to a more effective protection of indigenous cultural property in some cases. However, it should be recalled that TCE are usually the product of the contributions of many consecutive generations rather than "co-productions".[72] Secondly, the CESCR Committee requires States parties to provide, where appropriate, "for the collective administration by indigenous peoples of the benefits derived from their productions".[73] This second reference may have important implications as a human rights basis for proposals suggesting that use be made of concepts of collective rights management[74] or *domaine public payant* for resource transfer to indigenous communities.[75]

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67 See Brown, *supra* note 12, at p. 51.

68 An example of such a conflict is the discrimination against women, including arranged marriages or female circumcision.

69 Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse*, New York: Free Press, 1991, at p. 137.

70 See Kälin and Künzli, *supra* note 35, at pp. 117–118.

71 Committee on Economic, Social and Cultural Rights, *supra* note 33, at para. 32.

72 Mihály Ficsor, *The Law of Copyright and the Internet*, Oxford: Oxford University Press, 2002, at para. 10.68, and Michael F. Brown, *Who Owns Native Culture?*, Cambridge, MA: Harvard University Press, 2003, at p. 64.

73 Committee on Economic, Social and Cultural Rights, *supra* note 33, at para. 32.

74 Brown, *supra* note 72, at p. 239.

75 See Blakeney, *supra* note 2, at p. 123, Agnès Lucas-Schloetter, "Folklore" in Lewinski, *supra* note 12, at pp. 341–342 and 366, and Ficsor, *supra* note 72, at para. 10.69.

Comment No. 17 suggests that the CESCR Committee acknowledges a collective dimension of the Right to Benefit. In our view, however, one should go one step further and learn from legal sociology[76] that the rights provided by Article 15(1)(c) CESCR (and Article 27 CCPR) encompass, as do other human rights including freedom of (artistic) expression,[77] an *institutional* dimension. An institutional approach to human rights emphasises that not only individual but also *discursive* interests must be considered when interpreting certain human rights in the area of communication. It is the advantage of an institutional approach to human rights that it allows cultural processes to be acknowledged as "legal entities", whose interests must be adequately represented within a balancing of interests.[78]

From anthropological research, we know that TCE are functionally different from modern art.[79] Whereas modern art is an autonomous system of society, TCE fulfil indicative and liturgical functions and are closely related to landscape, ancestors and custom.[80] This is well documented for Australian Aboriginal art but also holds true for artefacts of other indigenous peoples.[81]

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[76] For an influential theoretical foundation of an institutional approach to human rights, see Niklas Luhmann, *Grundrechte als Institution. Ein Beitrag zur politischen Soziologie*, 3rd edn, Berlin: Duncker and Humblot, 1986 (1st edn, 1965); Helmut Willke, *Stand und Kritik der neueren Grundrechtstheorie. Schritte zu einer normativen Systemtheorie*, Berlin: Duncker and Humblot, 1975, in particular at pp. 111–156.

[77] For an institutional approach to freedom of artistic expression, as protected both by Article 19(2) CCPR and Article 15(3) CESCR, see Christoph Beat Graber and Gunther Teubner, "Art and Money: Constitutional Rights in the Private Sphere?" (1998) Oxford Journal of Legal Studies 18, pp. 61–73, at p. 67; for freedom of expression and information, see Christoph Beat Graber, "Copyright and Access – a Human Rights Perspective" in Christoph Beat Graber, Carlo Govoni, Michael Girsberger and Mira Nenova (eds), *Digital Rights Management: The End of Collecting Societies?*, Berne: Staempfli, 2005, pp. 71–110, at pp. 82–83; Graber and Girsberger, *supra* note 3, at pp. 271–272.

[78] See also the contribution of Gunther Teubner and Andreas Fischer-Lescano to this volume.

[79] On TCE in Aboriginal Australia, see Ronald M. Berndt and Catherine H. Berndt, *Aboriginal Australian Art*, Sydney: Methuen, 1982, Ronald M. Berndt and Catherine H. Berndt, *The World of the First Australians – Aboriginal Traditional Life: Past and Present*, Canberra: Aboriginal Studies Press, 1996, at pp. 367–446, Howard Morphy, *Aboriginal Art*, London: Phaidon, 1998.

[80] For a discussion of differences between modern art and traditional artefacts in a context of IP law, see Graber, *supra* note 9.

[81] For literature on situations outside Australia, see Russel L. Barsh, "How Do You Patent a Landscape? The Perils of Dichotomizing Cultural and Intellectual Property" (1999) International Journal of Cultural Property 8:1, pp. 14–47; Brown, *supra* note 12; Rosemary J. Coombe, "Protecting Cultural Industries to Promote Cultural Diversity: Dilemmas for International Policy-Making Posed by the Recognition of Traditional Knowledge" in Keith Maskus and Jerome Reichman (eds),

In the view of Australian Aboriginals, "land is inseparable from any aspect of Aboriginal culture. Therefore rights in land create rights in everything else, including ideas, design styles, rituals, and even biological species."[82] According to Berndt and Berndt, works of art often stand for ancestral beings, "symbolize them or evoke them"[83] and thus play a central role in their spiritual life and religious ceremonies.[84] The artist is seen as a "re-activator" of the spiritual world: "Virtually everything he painted or carved or constructed was an act of creation, revivifying the spiritual, transforming it into a tangible, visible focus of ritual behaviour."[85] The rights of an artist to create or perform works of art are inherited authority and follow from "rights in the land itself".[86] They vary according to the relationship between the artist and the spiritual ancestors and depend on the artist's "knowledge of [the land's] spiritual and mythological significance".[87] The authority to become an artist is received from the clan through initiation and in a special relationship of trust.[88] The knowledge necessary to create artwork is learned through close collaboration with elder artists and practised to preserve the cultural heritage of the clan.[89] Customary law provides for strict rules regarding technique and content of the artwork and a clan may perceive mistakes as offensive.[90] Brown emphasises that "Aboriginal artists whose work is misused by outsiders may be barred from participation in ceremonies, denied permission to paint traditional clan images, or forced to pay damages to local authorities."[91]

Consequently, in contrast to modern art, the production, dissemination and preservation of TCE in Aboriginal societies in Australia and elsewhere must be understood within a polycontextual *discursive* relationship encompassing

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International Public Goods and Transfer of Technology Under a Globalized Intellectual Property Regime, Cambridge: Cambridge University Press, 2005, pp. 599–614.

82 Brown, *supra* note 72, at p. 209.

83 Berndt and Berndt, 1982, *supra* note 79, at p.24.

84 Berndt and Berndt, 1996, *supra* note 79, at p. 429.

85 Berndt and Berndt, 1982, *supra* note 79, at p. 24.

86 Morphy, *supra* note 79, at p. 107.

87 ibid., at p. 108.

88 Christoph Antons, "Folklore Protection in Australia: Who is Expert in Aboriginal Tradition?", in Elke Kurz-Milcke and Gerd Gigerenzer (eds), *Experts in Science and Society*, New York: Kluwer, 2004, pp. 85–103, at p. 91, referring to Justice von Doussa of the Federal Court of Australia in the case of *John Bulun Bulun & Anor v. R. & T. Textiles Pty. Ltd*., 1082 FCA (1998). See also Brown, *supra* note 72, at p. 46.

89 Coombe, *supra* note 81, at p. 601.

90 For more information on the relationship between the Aboriginal artist's customary rights to make or perform artworks and his or her knowledge of the landscape's spiritual and mythological significance, see the references in Graber, *supra* note 9, at para. 2.1.

91 Brown, *supra* note 72, at p. 93.

both human and spiritual spheres. The discursive polycontextuality of TCE is of particular importance in situations where the rights of a TCE-holding clan collide with those of one of its members, claiming to be authorised to reproduce and sell his or her works on the grounds of modern IP law, as occurred, for example, in the *Yumbulul* case.[92] Taking into account the institutional aspect of the Right to Benefit would require defining the rights of a contemporary Aboriginal artist within the discursive matrix of indigenous knowledge and spirituality, landscape and custom. Since the contemporary indigenous creator is essentially the "product" of this discourse, the institutional aspect of the Right to Benefit would also impose certain limitations on his or her individual freedom requiring consideration of the specific social relationship within an indigenous community.[93]

In paragraph 35 of Comment No. 17, the CESCR Committee clarified that the right provided by Article 15(1)(c) CESCR "cannot be isolated from the other rights recognized in the Covenant".[94] The Committee stressed therewith that States parties must strike a balance between the various rights at issue.[95] "In striking this balance, the private interests of authors should not be unduly favoured and the public interest in enjoying broad access to their productions should be given due consideration."[96]

Again, in the specific context of TCE, an institutional approach to the Right to Benefit would require going beyond a balancing of individual/private and collective or public interests and considering also the legal fragmentation caused by collisions between modern IP law and traditional custom. Hence, the balancing commitment should translate into a requirement to define the rights of contemporary indigenous "authors" in terms of their specific role as

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[92] See *supra* note 13.

[93] Graber and Girsberger, *supra* note 3, at p. 269, quoting Michael Blakeney, *supra* note 14, and Daniel Wüger, "Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws" in J. Michael Finger and Philip Schuler (eds), *Poor People's Knowledge, Promoting Intellectual Property in Developing Countries*, Washington: World Bank and Oxford: Oxford University Press, 2004, pp. 183–206, at p. 185.

[94] A collective dimension of TCE safeguards may also be found in the obligations of Article 15(1)(a) CESCR, which are related to the right to participate in cultural life. The relationship to this obligation has not been spelled out in General Comment No. 17 (*supra* note 33). However, the CESCR Committee stressed that these obligations together with the obligations contained in paras 1(b) and 3 of Article 15 CESCR will be fully explored in separate general comments.

[95] See Robert D. Anderson and Hannu Wager, "Human Rights, Development, and the WTO: The Cases of Intellectual Property and Competition Policy" (2006) Journal of International Economic Law 9:3, pp. 707–747, at p. 724.

[96] Committee on Economic, Social and Cultural Rights, *supra* note 33, at para. 35.

custodians of the tribe's or traditional group's cultural heritage, to take account of the special importance of landscape in traditional forms of social organisation and to be sensitive to the interests of future generations.[97]

What has been said so far applies to artists living in a traditional context and relates mostly to secret and sacred TCE. It is a fact, however, that contemporary Aboriginal artists regularly find themselves in situations of gradual shift from a traditional to a modern form of social organisation.[98] Due to the implications of a digital networked environment, indigenous communities today are more heavily exposed to the global economy and art market. Consequently, it will be difficult for these communities to continue their traditional forms of social practice. However, it would be wrong to see social change as simply a threat to local identities. On the contrary, some communities may want to take advantage of economic globalisation and trade certain artwork in order to secure an income for the individual artist or the community.[99] Conversely, traditional communities will continue to have a strong interest in protecting their secret and sacred artefacts and keeping them off the art market. As will be further elaborated in the next section, the institutional approach to cultural rights offers a flexible framework for interfacing traditional and modern patterns of social organisation.

4. INTERFACING MODERN LAW AND LOCAL TRADITIONS PROCEDURALLY

We have argued above that cultural human rights should be trans-individualised and that the discursive relationship between the indigenous artist, landscape, ancestral beings and custom should be accorded a strong position within an institutional approach to these rights. The question now arises how this could be implemented to practically resolve collisions between modern law and traditional forms of expression and social organisation.

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[97] Rosemary J. Coombe, "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2003) DePaul Law Review 52, pp. 1171–1191, at p. 1185; Thomas Heyd, "Rock Art Aesthetics and Cultural Appropriation" (2003) The Journal of Aesthetics and Art Criticism 61:1, pp. 37–46, at p. 42.

[98] Most radically detached from local traditions are the so-called "urban Aboriginals", i.e. Aboriginal artists living in big Australian cities. They use Aboriginal symbolism in their work without being bound by traditional values. See Antons, *supra* note 88, at p. 89, and Brown, *supra* note 72, at p. 66.

[99] See also the contributions of Miriam Sahlfeld and Christoph Antons to this volume.

Chandran Kukathas argued from the perspective of liberal philosophy that indigenous communities must be able to live according to their traditional cultural practices. To resolve collisions between such practices and State law he has been advocating a strong freedom of association (as a human-rights type principle), while rejecting the idea that indigenous communities have collective cultural rights. In his judgement, the wish of indigenous peoples to live according to their traditional cultural practices has to be respected "not because the culture has the right to be preserved but because individuals should be free to associate: to form communities and to live by the terms of those associations."[100] Kukathas conceives the right of the individual to leave the community as a corollary of freedom of association. He is aware that most traditional communities are not voluntary associations, since membership is "determined by birth rather than by deliberate choice".[101] Whereas the association should be free to object to the entry of persons born outside, he considers the individual member's right to dissociate to be crucial. Hence, in Kukathas's view, the moral legitimacy of the group consists in "the acquiescence of individuals with its cultural norms".[102]

Kukathas's theory of the individual's freedom of association gives considerable authority and power to the indigenous community.[103] "It imposes no requirement on those communities to be communities of any particular kind. It does not require that they become in any strong sense 'assimilated', or even 'integrated' into the mainstream of modern society."[104] It leads to accepting the request of indigenous communities to "leave us alone to live according to our ways of life".[105] The strength of Kukathas's theory lies in its realism, since it "sees a liberal society as one that need not be made up of liberal communities"[106] and thus is sensitive to the existence of different mutually closed worlds of meaning and social practices. The weak point of this carte blanche type approach, however, is that it does not acknowledge the primacy and universality of international human rights standards. Those individuals who wish not to leave their community, automatically renounce the "rights recognized by the wider society but not by their culture".[107] This view neglects the fact that it is the global legal and political order that asserts the validity of the

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100 Kukathas, *supra* note 66, at p. 238.
101 *Ibid*.
102 *Ibid.* at p. 239.
103 *Ibid*. at p. 248.
104 *Ibid*. at p. 238.
105 *Ibid*., quoting from the manifesto of the Indians, who in 1978 made the Longest Walk.
106 *Ibid*. at p. 249.
107 *Ibid*. at p. 247.

freedom of association (of indigenous communities) as part of a comprehensive human rights regime. Accordingly, Kukathas's view is unable to cope with collisions between freedom of association and a number of limitations, which are necessary in a democratic society. Certain practices of indigenous peoples (including honour killing, female circumcision or spearing and other physical punishment)[108] are gross violations of the international human rights standard and must not be tolerated. In this important respect Kukathas's theory is too vague. To simply recognise the individual's right to be free to leave does not do justice to minorities within a group and is not a sufficient guarantee that indigenous communities will voluntarily abide by liberal norms forbidding inhuman, degrading or cruel treatment.[109]

When designing a theory on the interface between modern law and indigenous custom, it is necessary to clarify at the outset that such a theory must be developed within a quasi-constitutional framework of modern human rights law. Consequently, any reference to indigenous custom has to fit into the overall system of human rights. In the International Bill of Rights, freedom of association is protected under Article 22 CCPR. Pursuant to Article 22(2), freedom of association is subject to limitations, which are "prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others." Hence, when faced with the need to resolve a conflict between local traditions and global law, a judge interpreting and applying human rights (on any level of the legal system according to its specific procedural rules) will have to find a balance between the freedom involved (be it freedom of association or any of the other freedoms discussed above) and the limitations that are "necessary in a democratic society". The judge's task will be to interpret and apply the law according to established rules and principles and his argumentation will read as a self-perpetuating series of distinctions and selections. The law's fiction is that the outcome of this argumentation will be just. Gunther Teubner has described the quest for legal justice as "the recursive application of legal operations to the results of legal operations".[110] The law's fiction of justice thus consists of equating the result of an asymptotic process with justice in a strong sense. A deconstructive analysis, however, reminds us of the paradox that is hidden behind such a concept of self-referential justice. The judge's argumentation

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108 On spearing, see Heather McRae, Garth Nettheim, Laura Beacroft and Luke McNamara, *Indigenous Legal Issues, Commentary and Materials*, 3rd edn., Sydney: Thomson, 2003, at pp. 549–551.

109 *Ibid*. at p. 249.

110 Gunther Teubner, *Self-subversive Justice: Contingency or Transcendance Formula of Law*, manuscript.

will inevitably come to the point where he or she will need to hide the impossibility of reaching a just decision behind an argumentative mystification.

Similarly, in collisions between local traditions and global law, the judge's argumentation will eventually need to obfuscate the insurmountable difference between distinct idiosyncratic worldviews and patterns of social organisation. The judge's blind spot is that he or she is scrutinising traditional social practices through the eyes of modern law. From the perspective of the indigenous community involved, such an imposition of modern legal rationality will often be perceived as a colonisation of traditional rationality. Hence, at the interface between global law and local traditions we are confronted with two mutually exclusive claims: the human right's claim of primacy and universality on the one hand and indigenous peoples' claim that their idiosyncratic social practices be respected.

How could one bridge this hiatus and improve modern law's responsiveness to local traditions in the specific case of TCE without denying the primacy of human rights? Our suggestion is to break up the infinite chain of argumentative self-reference through a re-entry of indigenous custom into modern law. This could be achieved through temporarily delegating the litigation to the indigenous community involved. The community would deliberate on the problem at issue according to its own custom and social practice and then inform the judge of its findings.[111] In contrast to Kukathas's approach, this delegation to indigenous custom would not be definitive but rather temporary. The indigenous groups' finding would be an intermediate step comparable to taking the advice of an external expert. This procedural loop would be designed to raise the judge's sensitivity to traditional social processes and thus to improve justice in TCE litigation. The judge would incorporate the expression of indigenous custom into his or her argumentative weighing and balancing and, consequently, modern human rights law would not be denied its primacy and its universalist pretence. However, it would not be within the judge's discretion to decide whether or not to consider the indigenous community's finding. In a TCE litigation where claims based on IP law collide with claims based on local tradition, the advice expressed by the indigenous community would receive the status of a presumption that the cultural expressions involved are "extra commercium" and thus cannot be appropriated. Consequently, in cases of uncertainty (e.g. regarding an indigenous artist's authority to reproduce TCE) the burden of proof would be with the party

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[111] In many communities, a council of elders will have a decisive role. See Antons, *supra* note 88, at p. 91, and with regard to the Philippines, Christoph Antons, "Traditional Knowledge, Biological Resources and Intellectual Property Rights in Asia: The Example of the Philippines" (2007) Forum of International Development Studies 34, pp. 1–18, at p. 11.

claiming property rights based on modern IP law. Such a presumption could be rebutted only on the condition that this party proves the contrary.

Thomas Cottier and Marion Panizzon have suggested a burden-of-proof based approach to balance the interests of indigenous communities and corporate industry in conflicts regarding patent rights in traditional knowledge (TK).[112] They suggest that a presumption in favour of the TK-holding community shall operate "once the TK is publicly registered".[113] In the field of TCE, UNESCO promotes the drawing up of inventories within the framework of the Convention on Intangible Cultural Heritage.[114] The drawback of such a solution would be that a public registration of TCE is unacceptable to an indigenous community wishing to keep its sacred TCE secret.[115] A second disadvantage would be that inventories are static and entail a reification of TCE, whereas TCE are produced in incremental processes involving minor changes over many consecutive generations and often lack fixation.[116] Conversely, neither inventories, nor registration would be required in the discursive approach outlined above and no reification would occur. To rely on the outcome of a deliberation within the indigenous community regarding the status of a TCE would furthermore be flexible enough to cope with social change. Communities may want to distinguish on a case-by-case basis between sacred TCE that must be kept secret and TCE that can be traded to secure an income for the community or an individual artist. Consequently, this proposal would respond very well to an institutional approach to cultural human rights since the discursive relationship involving the artist, ancestral beings, the landscape and custom would become the linchpin of the balancing process.

5. CONCLUSIONS

The above quoted references to Comment No 17[117] have shown the tendency of the CESCR Committee to think of private and collective interests in TCE

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112 Thomas Cottier and Marion Panizzon, "A New Generation of IPR for the Protection of Traditional Knowledge in PGR for Food, Agricultural and Pharmaceutical Uses" in Susette Biber-Klemm and Thomas Cottier (eds.), *Rights to Plant Genetic Resources and Traditional Knowledge: Basic Issues and Perspectives*, Wallingford, UK: CABI Publishing, 2006, pp. 203–238, at pp. 229–230.

113 *Ibid*. at 229.

114 *Supra* note 11. See also Graber, *supra* note 3, at pp. 56–57.

115 See *supra* Section 1. In principle, it would be possible not to make the register accessible to the public and to limit it to internal use. However, it is difficult to see how a confidential register could fulfil its publicity functions.

116 Ficsor, *supra* note 72, at para. 10.68.

117 See *supra* note 96.

within one coherent setting of cultural human rights as State obligations. They may be perceived as a contribution to overcoming the first type of fragmentation described in the introduction – at least as far as the division of tasks between WIPO and UNESCO is concerned. It is WIPO's task, and constitutes its identity, to further intellectual property as *private property rights*. Within this approach, public interests are taken into account merely as limitations of IP rights. UNESCO's task and identity, however, is to safeguard *public interests* rather than private ones.[118] UNESCO's new Conventions on Intangible Cultural Heritage[119] and Diversity of Cultural Expressions[120] protect cultural diversity as a *global public good* through policy measures on the national and international levels. Quite symptomatically, the negotiations leading to the CCD have shown that most UNESCO members see IP rights as rather detrimental to achieving these public goods interests.[121]

In our view, a human-rights-informed perspective (such as the one taken by the CESCR Committee in Comment No. 17) would lead to the conceptualisation of private and public aspects of TCE as two sides of the same coin. Accordingly, WIPO and UNESCO should be more mindful that they are pursuing complementary rather than exclusive approaches and that close coordination of tasks is necessary in order to protect and promote TCE comprehensively. As a practical consequence, it would be very important that

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118 See WIPO, Traditional Cultural Expressions/Expressions of Folklore: Legal and Policy Options, WIPO/GRTKF/IC/6/3, 1 December 2003, at paras 52–53; WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/10/4, 2 October 2006, at para. 15.

119 See *supra* note 11.

120 See *supra* note 58.

121 The preliminary draft prepared by the international group of 15 independent experts appointed by UNESCO's Director-General assigned high priorities to a strong protection of IP rights and effective measures against piracy (see Preliminary draft of a convention on the protection of the diversity of cultural contents and artistic expressions, CLT-2004/CONF.201/CLD.2, Paris, July 2004). Accordingly, Article 7(2)(b) of the Preliminary Draft provided that States Parties "shall ensure that intellectual property rights are fully respected and enforced according to existing international instruments, particularly through the development or strengthening of measures against piracy". However, this view was not shared by the contracting states and in the course of the negotiations just about all IP-related provisions were removed from the draft. See Preliminary Report of the Director-General containing two preliminary drafts of a Convention on the protection of the diversity of cultural contents and artistic expressions, CLT/CPD/2005/CONF.203/6, 3 March 2005 and Report of the Director-General on the progress achieved during the third session of the intergovernmental meeting of experts on the Preliminary Draft Convention on the protection of the diversity of cultural contents and artistic expressions, 172 EX/20, 11 August 2005. The text that was finally adopted refers to IP rights briefly near the end of the twenty-one paragraph preamble. See also Helfer, *supra* note 53, at pp. 1004–1006.

government delegations sent to WIPO and UNESCO meetings dealing with TCE should be composed of both delegates from the IP department and from the culture department.

With regard to the second type of collisions, we have pointed out that an institutional approach to human rights, including *inter alia* the Right to Benefit, would offer an adequate setting for balancing traditional and modern conceptions of and interests in TCE. An institutional theory of human rights allows the transcendence of prevailing individualistic methodology without adopting a group rights approach. Emphasising the institutional aspect of the Right to Benefit permits an assessment of the status of the TCE involved within a discursive matrix of indigenous knowledge, landscape and custom and a juxtaposition of the trans-individual and the individual interests in TCE within a comprehensive balancing procedure. This approach is also suitable for taking account of dynamic contexts of social shift, i.e. where Aboriginal creators gradually move away from their traditional role as "initiated custodians" of a clan's cultural heritage towards a more modern role as "artists" interested in exhibiting their works in public and selling them on the art market.

In cases of conflict between the TCE-owning collective and a "modernised" Aboriginal artist a human-rights-informed procedural approach to interfacing modern law and local traditions is proposed. In contrast to a solution based on a strong freedom of association giving the indigenous community the authority and power to impose its rule on its members (as long as they do not dissociate), we suggest temporarily delegating the litigation to the indigenous community involved. In a litigation regarding the status of a TCE (i.e. the question whether it is secret and sacred), it would be up to the community to deliberate the case in accordance with indigenous custom and practice. If the indigenous group comes to the conclusion that the TCE involved is secret and sacred it must be treated as *res extra commercium* by the judge, provided that an interested third person does not rebut the presumption. This is a re-entry of indigenous custom into modern law that does not sacrifice the primacy and universality of international human rights standards.

PART THREE

Intellectual property law and policy

6. Legal protection of traditional cultural expressions: a policy perspective

Martin A. Girsberger*

1. INTRODUCTION

> Every nation claiming to be a part of the civilized world is proud of its cultural heritage. Folklore is probably the most important and well-acclaimed component of the cultural heritage of a nation. It can reflect the essentials of a nation's cultural attributes as in a mirror and is recognized as a basis for its cultural and social identity. Nations all over the world are quite possessive about this valuable heritage and express very strong sentiments about the management of the rich resource.[1]

For several decades now, traditional cultural expressions (TCE) and their legal protection have been discussed at the international level.[2] A number of international fora are involved in these discussions and several international instruments have been adopted to date, including legally binding agreements, conference resolutions and model provisions. Despite this progress, many issues – even very fundamental ones – remain unresolved.

TCE entered the international debate for various reasons. These include the call for an increased recognition of indigenous peoples and their rights, such as the right to self-determination; the loss of TCE and the apparent need for their preservation;[3] cases of perceived or actual misappropriation of TCE; and

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* The views expressed herein are the views of the author and do not necessarily coincide with the views of the Swiss Federal Institute of Intellectual Property or any other Swiss government agency.

[1] WIPO, A Study on the Protection of Expressions of Folklore, WIPO/GRTKF/STUDY/1, 25 November 2002, at p. 1.

[2] See e.g. UNESCO and WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions) of 1982, Geneva: WIPO, 1985.

[3] According to the Tulalip Tribes of Washington State, US, "[i]ndigenous peoples were trying to adapt in a holistic manner to many changes in their economies, cultures and environment that imperil their traditional ways of life. Many are engaged in desperate battles for cultural survival, with loss of and threats to their ancestral homelands, the loss of cultural resources necessary to [...] practice their traditions and maintain their cultures, and the degradation and loss of TK, tribal integrity and tribal

the international discussions on intellectual property rights (IPRs). Additionally, "the protection of [TCE] touches also upon other important policy areas. These include the safeguarding and preservation of cultural heritage; freedom of expression and religious freedom; respect for the rights, interests and claims of indigenous peoples and other traditional communities; recognition of customary law, protocols and practices; access to knowledge and the scope of the 'public domain'; addressing the challenges of multiculturalism; and promoting cultural diversity, including linguistic diversity, and access to a diversity of cultural expressions".[4] The debate on TCE thus needs to be seen in a larger context, which includes the North–South relationship, cultural and biological diversity, human rights, access and benefit sharing with regard to genetic resources and traditional knowledge (TK), trade, intellectual property (IP), and globalization.

The legal protection of TCE raises complex legal, social, anthropological, economic and scientific issues. These need to be addressed at the international, national and sub-national levels. Adding further complexity is the dual nature of TCE, that is, the fact that TCE can be simultaneously cultural and economic assets. On one hand, "[t]raditional music, designs, rituals, performances, oral narratives, symbols and signs communicate a community's beliefs and values, embody skills and know-how, reflect a community's history, and define its cultural identity. [TCE] are therefore valuable cultural assets of the communities who maintain, practice and develop them".[5] On the other hand, TCE can be economic assets. As such, not only can they be marketable creations and innovations, but may also inspire other creators and innovators to derive new creations and innovations. Moreover, the stakeholders involved in the debate – namely developed and developing countries, indigenous peoples, consumers, scientists, private industry and non-governmental organizations (NGOs) – express greatly diverging views, adding political controversy to the issues at stake.

The various international fora involved in the discussion on the protection of TCE generally address the issues arising from differing perspectives and with specific emphases. This is a reflection of the current international order and the differing legal and technical expertise and competence of these fora,

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identity" (WIPO, Revised Draft Report, Tenth Session, WIPO/GRTKF/IC/10/7Prov. 2, 25 April 2007, at para. 38).

[4] WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/11/4(c), 26 April 2007, at para. 14 (the revised objectives and principles have been annexed also to WIPO/GRTKF/IC/8/4, 8 April 2005, WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/12/4(c), 6 December 2007 and are reproduced in the Annex of this volume).

[5] *Ibid*. at para. 12.

namely in the areas of culture, human rights, IP, trade, environment, and agriculture. In light of this, indigenous communities have expressed the concern that "one could not simply divide different aspects of cultural heritage into categories or parts and try to individually protect each aspect, because in this case, the sum of the parts did not equal the whole. Rather than protect the whole, [...] such a process could jeopardize the whole, was reductionist and actually threatened rather than safeguarded the indigenous peoples' cultural heritage".[6]

The question thus arises whether the current international efforts to protect TCE adequately take into account their holistic nature,[7] and whether they

> recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity.[8]

This article first clarifies important terminology and provides an overview of the relevant international fora and the current state of play in the international discussions on the legal protection of TCE. It then analyses whether the present international efforts and instruments are of a fragmented or coherent nature. The final part of the article discusses the key issues arising in this regard, namely terminology, policy objectives and guiding principles of the protection of TCE, the meaning of "protection", possible legal and non-legal mechanisms available, and the level at which the protection of TCE needs to be addressed.

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6 WIPO, *supra* note 3, at para. 134.

7 In its comments on TK and TCE, the WIPO Secretariat explicitly takes into account this holistic nature: "[T]he draft materials are prepared in the understanding that for many communities these are closely related, even integral, aspects of respect for and protection of their cultural and intellectual heritage. The two sets of draft provisions are therefore complementary and closely coordinated. Taken together, they do form a holistic approach to protection. This reflects existing practice at the international and national levels. Some jurisdictions protect both traditional cultural expressions and traditional knowledge in a single instrument. Others use a range of laws and instruments to address the two areas distinctly. Some laws also address specific aspects of these two areas, such as biodiversity-related TK or indigenous arts and crafts. The draft objectives and principles acknowledge those diverse choices and facilitate a holistic approach" (WIPO, Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge: Comment on Program Activities, available at http://www.wipo.int/tk/en/consultations/draft_provisions/draft_ provisions.html).

8 WIPO, *supra* note 4, Annex, at p. 3, objective (i).

The article concludes that all international fora involved in the discussions on the protection of TCE should closely cooperate and coordinate their efforts. Furthermore, a holistic approach is necessary, requiring, among other things, that the protection of TCE is complementary to and mutually supportive of other relevant international efforts, including in particular the protection of TK. In order to find effective solutions, it is necessary to ensure that all international efforts are coherent in nature and that any undesirable fragmentation is overcome.

2. WHAT ARE TCE?

2.1 An Overview

The international fora and instruments addressing TCE and related matters include the United Nations Educational, Scientific and Cultural Organization (UNESCO); the World Intellectual Property Organization (WIPO), in particular its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC), and the WIPO Performances and Phonograms Treaty (WPPT); the World Trade Organization (WTO); the Convention on Biological Diversity (CBD); the International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA) of the Food and Agriculture Organization of the United Nations (FAO); and human rights fora such as the International Labour Organization (ILO).

With regard to the subject matter of this paper, different terms and definitions are used in the international discussions and in the literature. Terms used include "folklore",[9] "traditional cultural expressions", "expressions of folklore",[10] "expressions of traditional culture", "cultural expression", and "traditional creativity".[11] A closer analysis reveals that some of the terms and their definitions overlap, while others may conflict with one another. Furthermore, some terms are used interchangeably.[12]

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[9] See e.g. WTO, Doha Ministerial Declaration, WT/MIN(01)/DEC/1, 20 November 2001, at para. 19. Furthermore, one of the committees of WIPO – namely the "Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore" – uses the term "folklore" in its title.

[10] See e.g. UNESCO and WIPO, *supra* note 2, and Article 2(a) of the WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva, 20 December 1996.

[11] WIPO, Traditional Knowledge – Operational Terms and Definitions, WIPO/GRTKF/IC/3/9, 20 May 2002, at para. 22.

[12] See e.g. WIPO, Traditional Cultural Expressions/Expressions of Folklore. Legal and Policy Options, WIPO/GRTKF/IC/6/3, 1 December 2003, at para. 16:

2.2 Characteristics of TCE

Even though no internationally agreed terminology and definitions exist, a number of common characteristics of TCE can be identified. In general, TCE:

- are handed down from one generation to the next, either orally or by imitation, but rarely in writing;
- reflect the cultural and social identity of a community or group;
- consist of characteristic elements of the heritage of this community or group;
- are constantly evolving, developing and being recreated within this community or group;
- are made by unknown authors, artists or artisans; by communities and groups; and/or by individual members of these communities and groups communally recognized as having the right, responsibility or permission to make the TCE; and
- are often not created for commercial purposes, but rather as vehicles for religious and cultural expression.[13]

> Traditional cultural expressions, often the product of inter-generational and fluid social and communal creative processes, reflect and identify a community's history, cultural and social identity, and values. While lying at the heart of a community's identity, cultural heritage is also "living" – it is constantly recreated as traditional artists and practitioners bring fresh perspectives to their work. Tradition is not only about imitation and reproduction; it is also about innovation and creation within the traditional framework. Therefore, traditional creativity is marked by a dynamic interplay between collective and individual creativity.[14]

2.3 Overview of Terminology and Definitions Applied at the International Level

Due to their past and present efforts and their legal and technical competence, WIPO and UNESCO and their corresponding instruments are in the foreground with regard to the topic of this article. Depending on the terminology applied, other international fora and instruments may also come into play, including in particular the CBD and FAO's IT-PGRFA. The following describes in greater detail the terminology and definitions used.

"[T]he terms 'traditional cultural expressions' and 'expressions of folklore' are both used together or interchangeably in this document and are regarded for present purposes as synonymous".

[13] See also WIPO, Intellectual Property and Traditional Cultural Expressions/Folklore, Booklet No 1, WIPO Publication No. 913, at p. 5.

[14] *Ibid*.

2.3.1 UNESCO-WIPO Model Provisions (1982)

Section 2 of the Model Provisions defines "expressions of folklore" as:

> productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community of [name of the country] or by individuals reflecting the traditional artistic expectations of such a community, in particular:
>
> (i) verbal expressions, such as folk tales, folk poetry and riddles;
> (ii) musical expressions, such as folk songs and instrumental music;
> (iii) expressions by action, such as folk dances, plays and artistic forms or rituals whether or not reduced to a material form; and
> (iv) tangible expressions, such as: (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; (b) musical instruments; [(c) architectural forms].[15]

2.3.2 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (2003)

Article 2(1) of the Convention defines "intangible cultural heritage" as:

> the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.[16]

According to Article 2(2), this intangible cultural heritage "is manifested *inter alia* in the following domains: (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage; (b) performing arts; (c) social practices, rituals and festive events; (d) knowledge and practices concerning nature and the universe; (e) traditional craftsmanship".[17]

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[15] UNESCO and WIPO, *supra* note 2.

[16] UNESCO, Convention for the Safeguarding of the Intangible Cultural Heritage (CICH), adopted 17 October 2003, entered into force 21 April 2006.

[17] *Ibid*.

2.3.3 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005)

Article 4(1) defines cultural diversity as referring "to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies,"[18] while Article 4(3) defines cultural expressions as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content".[19]

2.3.4 WIPO's Intergovernmental Committee (IGC)

The documents of WIPO's IGC distinguish between TK *lato sensu*[20] and TK *stricto sensu*.[21] The former is a broad and diverse concept and an umbrella term used to refer to a wide range of subject matter, encompassing TK *stricto sensu*[22]

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[18] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE), adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005, entered into force 18 March 2007.

[19] *Ibid*.

[20] Traditional knowledge *lato sensu* can be defined as referring "to tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries; designs; marks, names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields. 'Tradition-based' refers to knowledge systems, creations, innovations and cultural expressions which: have generally been transmitted from generation to generation; are generally regarded as pertaining to a particular people or its territory; and, are constantly evolving in response to a changing environment. Categories of traditional knowledge could include: agricultural knowledge; scientific knowledge; technical knowledge; ecological knowledge; medicinal knowledge, including related medicines and remedies; biodiversity-related knowledge; 'expressions of folklore' in the form of music, dance, song, handicrafts, designs, stories and artwork; elements of languages, such as names, geographical indications and symbols; and, movable cultural properties. Excluded from this description of TK would be items not resulting from intellectual activity in the industrial, scientific, literary or artistic fields, such as human remains, languages in general, and other similar elements of 'heritage' in the broad sense" (WIPO, *supra* note 11, at para. 25).

[21] In this regard, indigenous communities "expressed concerns about the deliberate and separate treatment of TCEs and TK and added that an expression of culture did not come about without the TK to inspire such creativity" (WIPO, *supra* note 3, at para. 134).

[22] Traditional knowledge *stricto sensu* can be defined as referring "to the content or substance of knowledge resulting from intellectual activity in a traditional context, and includes the know-how, skills, innovations, practices and learning that form part of traditional knowledge systems, and knowledge embodying traditional lifestyles of indigenous and local communities, or contained in codified knowledge systems passed between generations. It is not limited to any specific technical field, and may include agricultural, environmental and medicinal knowledge, and knowledge associated with genetic resources" (WIPO, The Protection of Traditional Knowledge. Revised Objectives and Principles, WIPO/GRTKF/IC/11/5(c), 26 April 2007, Annex,

and TCE.[23] Furthermore, the documents of the IGC use the term TCE as synonymous with the term "expressions of folklore".[24] Article 1(a) of the draft revised substantive provisions for the protection of TCE and defines the subject matter for protection as follows:

> "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
> (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
> (ii) musical expressions, such as songs and instrumental music;
> (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances;
> (iv) whether or not reduced to a material form; and
> (v) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:
> (aa) the products of creative intellectual activity, including individual and communal creativity;
> (bb) characteristic of a community's cultural and social identity and cultural heritage; and
> (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.[25]

This definition is subject to the limitation of Article 1(b) of the draft revised substantive provisions, according to which "[t]he specific choice of terms to denote the protected subject matter should be determined at the national and regional levels".[26]

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at p. 19). This use of terms in the WIPO documents is not in line with some of the terminology and definitions advanced in the literature. According to one author, "[f]olklore encompasses all aspects of cultural heritage, including artworks, songs, dances, stories, customs, traditional medicinal knowledge, etc". (Kamal Puri, "Preservation and Conservation of Expressions of Folklore" (1998) Copyright Bulletin 32:4: 4, pp. 5–36). With this definition, folklore would be the umbrella term, which includes TK, contrary to WIPO's terminology, where TK *lato sensu* is the umbrella term, which includes TCE.

[23] WIPO, Overview of Activities and Outcomes of the Intergovernmental Committee, WIPO/GRTKF/IC/5/12, 3 April 2003, at para. 38.

[24] *Ibid*. at para. 37.

[25] WIPO, *supra* note 4, Annex, at p. 11.

[26] *Ibid*. This limitation is because "Member States and other stakeholders have called for flexibility in regard to terminology, amongst other things. Many international

2.3.5 Convention on Biological Diversity (1992)

The Secretariat of the CBD defines TK as referring

> to the knowledge, innovations and practices of indigenous and local communities around the world. Developed from experience gained over the centuries and adapted to the local culture and environment, traditional knowledge is transmitted orally from generation to generation. It tends to be collectively owned and takes the form of stories, songs, folklore, proverbs, cultural values, beliefs, rituals, community laws, local language, and agricultural practices, including the development of plant species and animal breeds. Traditional knowledge is mainly of a practical nature, particularly in such fields as agriculture, fisheries, health, horticulture, forestry and environmental management in general.[27]

This definition of TK is similar to WIPO's definition of TK *lato sensu*. According to this broad understanding of the term TK, the relevant provisions of the CBD – Article 8(j) and Article 10(c) – would also apply to TCE.[28]

2.3.6 Others

When applying the above-mentioned broad definitions of TK used by WIPO and the CBD, which include TCE, and taking into account the holistic approach of many indigenous communities, other international fora and instruments come into play – in particular, Article 9 of FAO's IT-PGRFA, and Article 23(1) of the ILO Convention 169 on Indigenous and Tribal Peoples.[29]

3. INTERNATIONAL FORA AND INSTRUMENTS: CURRENT STATE OF PLAY

3.1 UNESCO

UNESCO, as the specialized UN agency for culture, has been active in this area for several decades now. Since the 1950s, it has adopted a number of conventions, recommendations and declarations related in one way or another to culture. In 1982, UNESCO, together with WIPO, developed the above-mentioned "Model Provisions for National Laws on the Protection of

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IP standards defer to the national level for determining such matters. Hence, to allow for appropriate national policy and legislative development, consultation and evolution, the suggested sub-paragraph (b) recognizes that detailed decisions on terminology should be left to national and regional implementation" (*ibid*. at p. 14).

[27] Convention on Biological Diversity (CBD), adopted 5 June 1992, entered into force 29 December 1993.

[28] See *infra* Section 3.4.

[29] See *infra* Section 3.5.

Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions" (UNESCO-WIPO Model Provisions), a *sui generis* model for the IP-type protection of TCE. More recently, UNESCO adopted two conventions of interest to the topic of this paper, namely the Convention for the Safeguarding of the Intangible Cultural Heritage (CICH) in 2003,[30] and the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (CDCE) in 2005.[31]

3.2 WIPO

WIPO has been active in the area of TCE for several decades. Its efforts have resulted in the above-mentioned UNESCO-WIPO Model Provisions. In 1998–1999, WIPO carried out numerous fact-finding missions on IP issues related to TK and TCE, which involved a wide range of stakeholders, including indigenous and local communities, non-governmental organizations, governments, researchers and private industry.[32]

In 1996, WIPO Member States adopted the WPPT.[33] This Treaty provides, among other things, for the protection of performances of expressions of folklore. Article 2(a) WPPT defines the term "performers" as "actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore".[34]

In 2000, the 26th Session of the General Assembly of WIPO established the IGC, a special body mandated to address IP issues related to genetic resources, TK and folklore.[35] With specific regard to TCE, the more recent meetings of

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[30] The CICH entered into force 20 April 2006. At present, 78 States are party to this convention.

[31] The CDCE entered into force 18 March 2007. At present, 64 States and the European Community are parties to this convention.

[32] See generally WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders, Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva: WIPO, April 2001.

[33] The WPPT entered into force 20 May 2002, and has at present 61 Member States.

[34] WIPO, *supra* note 10. See generally WIPO, Handbook on Intellectual Property, WIPO Publication No 489(E), 2004.

[35] WIPO, Report of the 26th Session of the WIPO General Assembly, 25 September to 3 October 2000, WO/GA/26/10, 3 October 2000, at paras 27–71, particularly at para. 71. See generally WIPO, Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WO/GA/26/6, 25 August 2000. See also Wend B. Wendland, "Intellectual Property, Traditional Knowledge and Folklore: WIPO's Exploratory Program" (2002) International Review of Industrial Property and Copyright Law 33, pp. 485–504 (Part I) and pp. 606–621 (Part II).

the IGC have focused on draft objectives and principles of the protection of TCE.[36] Due to a lack of consensus among delegations on how to proceed with regard to these draft objectives and principles, it was decided, at the tenth session, held in 2006, to focus the IGC's future work on a list of ten issues.[37] These are as follows:

1. Definition of TCE/expressions of folklore (EoF) that should be protected.
2. Who should benefit from any such protection or (who) holds the rights to protectable TCE/EoF?
3. What objective is sought to be achieved through according IP protection (economic rights, moral rights)?
4. What forms of behaviour in relation to the protectable TCE/EoF should be considered unacceptable/illegal?
5. Should there be any exceptions or limitations to rights attaching to protectable TCE/EoF?
6. For how long should protection be accorded?
7. To what extent do existing IPRs already afford protection? What gaps need to be filled?
8. What sanctions or penalties should apply to behaviour or acts considered to be unacceptable/illegal?
9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
10. How should foreign rights holders/beneficiaries be treated?[38]

The written comments submitted on these ten issues were collated by the WIPO Secretariat.[39] The eleventh session of the IGC held in July 2007 discussed the list of issues in greater detail, but did not reach any final conclusions.

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[36] See e.g. WIPO, *supra* note 4.

[37] WIPO, Decisions of the 10th Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 8 December 2006, at para. 8; reproduced also in the Annex of this volume.

[38] *Ibid*. Annex.

[39] See WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Collation of Written Comments on the List of Issues, WIPO/GRTKF/IC/11/4(a), 30 April 2007.

3.3 TRIPS Agreement

The Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) of the WTO[40] does not contain specific provisions on TCE. Nevertheless, its provisions basically also apply to TCE, including in particular the provisions on copyright and related rights (Articles 9–14), geographical indications (Articles 23–24), industrial designs (Articles 25–26), and trade secrets (Article 39).

The issue of TCE (or "folklore" in WTO terminology) was explicitly included in the agenda of the TRIPS Council at the fourth Ministerial Conference of the WTO held in Doha in November 2001. In paragraph 19 of the Doha Ministerial Declaration, the Ministers instruct the TRIPS Council to examine, among other things, the protection of folklore.[41] Up to now, however, the main focus of the examination, as foreseen in paragraph 19, was on disclosure requirements under patent law,[42] whereas the issue of folklore has not been dealt with at all.

3.4 Convention on Biological Diversity

The CBD[43] and the Bonn Guidelines on Access to Genetic Resources and Fair

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[40] Adopted 15 April 1994, entered into force 1 January 1995. Currently, 151 States are Members of the WTO and thus bound by the TRIPS Agreement. According to Article 7 TRIPS, the protection and enforcement of IPRs "should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".

[41] WTO, *supra* note 9. Para. 19 of the Doha Ministerial Declaration reads as follows: "We instruct the Council for TRIPS, in pursuing its work program including under the review of Article 27(3)(b), the review of the implementation of the TRIPS Agreement under Article 71(1) and the work foreseen pursuant to para. 12 of this declaration, to examine, *inter alia*, [...] the protection of traditional knowledge and folklore. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension".

[42] See generally Martin Girsberger, "Transparency Measures Under Patent Law Regarding Genetic Resources and Traditional Knowledge: Disclosure of Source and Evidence of Prior Informed Consent and Benefit Sharing" (2004) Journal of World Intellectual Property 7, pp. 451–489.

[43] CBD, *supra* note 27. The CBD has, at present, 191 Contracting Parties. According to Article 1, the three objectives of the CBD are (1) the conservation of biological diversity, (2) the sustainable use of its components and (3) the fair and equitable sharing of the benefits arising out of the utilization of genetic resources.

and Equitable Sharing of the Benefits Arising out of Their Utilization (Bonn Guidelines)[44] cover not only genetic resources of plant, animal and microbial origin, but also TK.[45] In this regard, Articles 8(j)[46] and 10(c)[47] CBD are of primary interest.

The Conference of the Parties (COP), the CBD's superior body, decided in 2004 to mandate the Working Group on Access and Benefit Sharing to "elaborate and negotiate an international regime on access to genetic resources and benefit-sharing with the aim of adopting an instrument/instruments to effectively implement the provisions in Article 15 and Article 8(j) of the Convention and the three objectives of the Convention".[48] According to the terms of reference for this working group, the scope of the international regime should include "traditional knowledge, innovations and practices in accordance with Article 8(j)".[49] These negotiations are to be concluded no later than 2010.[50] Moreover, the Ad Hoc Open-ended Working Group on Article 8(j) addressed, among other issues, *sui generis* systems for the protection of TK.

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[44] To further elaborate on the rather general provisions of the CBD, and to assist its Contracting Parties in implementing their obligations at the national level, the legally non-binding Bonn Guidelines were adopted in April 2002 (Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising Out of Their Utilization, adopted 19 April 2002, as Annex to decision VI/24.)

[45] Article 8(j) CBD speaks of "knowledge, innovations and practices of indigenous and local communities […] relevant for the conservation and sustainable use of biological diversity" (CBD, *supra* note 27), and para. 9 of the Bonn Guidelines (*ibid.*) speak of TK associated with genetic resources. Additional provisions dealing with TK are paras. 11(j), 16(c)(i), 16(d)(ii), 31, 37, and 44(g).

[46] Article 8(j) CBD requires Contracting Parties, as far as possible and as appropriate, and subject to their national legislation, to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices" (CBD, *supra* note 27).

[47] Article 10(c) CBD requires Contracting Parties, as far as possible and as appropriate, to "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements" (*ibid.*).

[48] CBD, Decision VII/19, Access and Benefit-Sharing as Related to Genetic Resources (Article 15), adopted 20 February 2004, UNEP/COP/7/21/Part, 13 April 2004, Annex, pp. 298–303, Section D, at para. 1.

[49] *Ibid.* Annex, at para. (c)(ii).

[50] CBD, Decision VIII/4, Access and Benefit-Sharing, adopted 31 March 2006, UNEP/CBD/COP/8/31, pp. 52–62, Section A, at para. 6.

Applying the wide definition of the term TK advanced by the CBD Secretariat,[51] TCE would also be included in the scope of the CBD and the Bonn Guidelines. Accordingly, the work of the CBD's bodies on TK is also of relevance to the topic discussed in this article.

3.5 Human Rights Bodies and Instruments

A number of human rights bodies and instruments are relevant with regard to the protection of TCE. For example, according to Article 23(1) of the ILO Convention 169,

> [h]andicrafts, rural and community-based industries, and subsistence economy and traditional activities of the peoples concerned, such as hunting, fishing, trapping and gathering, shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development. Governments shall, with the participation of these people and whenever appropriate, ensure that these activities are strengthened and promoted.[52]

Article 23(2) furthermore states that upon the request of the indigenous and tribal peoples concerned, "appropriate technical and financial assistance shall be provided wherever possible, taking into account the traditional technologies and cultural characteristics of these peoples, as well as the importance of sustainable and equitable development".[53]

The Draft UN Declaration on the Rights of Indigenous Peoples (Draft Declaration) states in Article 29(1) that,

> [i]ndigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.[54]

Furthermore, in Article 29(2), the Draft Declaration calls on States, in conjunction with indigenous peoples, to take effective measures to recognize and protect the exercise of the rights enumerated in Article 29(1).

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[51] See http://www.biodiv.org/programmes/socio-eco/traditional/default.asp, and *supra* Section 2.3.5.

[52] ILO, Convention 169, Indigenous and Tribal Peoples Convention, adopted 27 June 1989.

[53] *Ibid*.

[54] UN, Draft United Nations Declaration on the Rights of Indigenous Peoples, A/HRC/1/L.3, 23 June 2006.

4. FRAGMENTATION VERSUS COHERENCE OF INTERNATIONAL EFFORTS AND INSTRUMENTS

The question arises as to whether the described international efforts have a fragmented or a coherent nature. This applies in particular to their relationship to other international instruments, the policy objectives of these instruments, and their respective scope of application. A prerequisite for any coherent international approach is that governments themselves express coherent positions in the various international fora involved.

4.1 Prerequisite: Coherent National Positions

Generally, the secretariats of the various international fora involved in the discussion on the protection of TCE and related matters cooperate in some way. This could, for example, take the form of drafting a common international instrument,[55] providing technical assistance in their field of expertise, submitting documents to meetings of other fora,[56] and joint publications. Furthermore, representatives of the secretariats of these fora often participate in each others' meetings, and report on the activities and outcomes of their own organization. In WIPO's IGC, for instance, this applies to representatives of UNESCO, the CBD, FAO and the WTO.[57]

Determining an international forum's policy is generally the task of its Member States or Contracting Parties. Therefore, whether the policies of the various fora active with regard to the protection of TCE are coherent or not, largely depends on the positions expressed by Member States or Contracting Parties in meetings and written submissions. To ensure coherence at the international level, it is thus necessary that all States adopt coherent positions in all relevant international fora. Otherwise, these States will express differing positions, which are likely to lead to fragmented international efforts and policies from these fora. Governments thus need to coordinate their positions within their administrations before expressing them at meetings or in written submissions. Since different government agencies, sometimes with conflicting interests and

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55 See e.g. UNESCO and WIPO, *supra* note 2.

56 See e.g. the report "Examination of Issues Regarding the Interrelation of Access to Genetic Resources and Disclosure Requirements in Intellectual Property Rights Applications", transmitted by the General Assembly of WIPO to the Conference of Parties of the CBD by the decision of the General Assembly at its 32nd Session, 26 September to 5 October 2005.

57 See e.g. WIPO, *supra* note 3, at para. 3, listing, among others, the CBD, FAO, UNESCO and the WTO as participating international organizations. See also CBD, List of Participants, UNEP/CBD/COP/8/INF/48, 31 March 2006, listing, among others, FAO, UNESCO, WIPO, and the WTO as participating international organizations.

objectives, represent one and the same State in the various international fora, ensuring a coherent position depends on adequately designed administrative procedures and also on the will of government officials and their political superiors to achieve such a position. Once the position of each State is coherent, the cooperation *between* States becomes a must.[58]

4.2 Relationship to Other International Instruments

When negotiating a new international instrument, an often controversial issue is the relationship of the new instrument with existing related international instruments. Different approaches are chosen, including (i) explicit statement on the mutual supportiveness, complementarity and non-subordination of the new instrument and existing instruments;[59] (ii) subordination of the new instrument to existing instruments;[60] (iii) diplomatic ambiguity;[61] or (iv) no

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[58] For example, Article 21 CDCE, addressing international consultation and coordination, states that, "Parties undertake to promote the objectives and principles of this Convention in other international forums. For this purpose, Parties shall consult each other, as appropriate, bearing in mind these objectives and principles" (UNESCO, *supra* note 18).

[59] With regard to the relationship to other treaties, the CDCE states in Article 20(1) that: "Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention. Para. 2 stresses further that, "[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties".

[60] Article 3(b) CICH states with regard to the relationship to other international instruments that, "[n]othing in this convention may be interpreted as [...] affecting the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights or to the use of biological and ecological resources to which they are parties" (UNESCO, *supra* note 16). Article 22(1) CBD on the relationship with other international conventions states that, "[t]he provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity" (CBD, *supra* note 27). Article 35 ILO Convention 169 states that, "[t]he application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements" (ILO, *supra* note 52).

[61] In the negotiations on FAO's International Treaty, the relationship with other international instruments proved to be one of the controversial issues. To find a diplomatic compromise, the finally adopted text of the Preamble was deliberately worded in

explicit provisions on the relationship between the new instrument and existing instruments.

The international instruments of relevance to TCE have chosen different approaches from the above options. Accordingly, no general statements with regard to the applicability of these instruments in case of overlap or conflict can be made. It is thus necessary to analyse the applicability of the different international instruments and their provisions on a case-by-case basis.[62]

4.3 Objectives and Scope of International Efforts and Instruments

The international efforts and instruments tackling diverse TCE issues advance different objectives.[63] These include in no particular order: (i) safeguarding the intangible cultural heritage;[64] (ii) protecting and promoting the diversity of cultural expressions;[65] (iii) ensuring respect for the intangible cultural heritage of the communities, groups and individuals concerned;[66] (iv) the fair and equitable sharing of the benefits arising;[67] (v) raising awareness, at the local, national and international levels, of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;[68] (vi) promoting

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"constructive ambiguity": "Recognizing that this Treaty and other international agreements relevant to this Treaty should be mutually supportive with a view to sustainable agriculture and food security; Affirming that nothing in this Treaty shall be interpreted as implying in any way a change in the rights and obligations of the Contracting Parties under other international agreements; Understanding that the above recital is not intended to create a hierarchy between this Treaty and other international agreements" (FAO, International Treaty on Plant Genetic Resources for Food and Agriculture (IT-PGRFA), adopted 3 November 2001, entered into force 29 June 2004).

62 Irrespective of the approach chosen by the different international instruments, the general rules of international law apply. See in particular, Articles 31–33 of the Vienna Convention on the Law of Treaties (8 ILM 679, adopted 23 May 1969, entered into force 27 January 1980).

63 See generally Article 1 CBD, Article 1 CICH, Article 1(h) CDCE, Article 7 TRIPS, and Article 1(1) IT-PGRFA.

64 Article 1(a) CICH.

65 Article 1(a) CDCE.

66 Article 1(b) CICH.

67 Article 1 CBD and Article 1(1) IT-PGRFA. According to the explicit wording of Article 1 CBD, this objective applies to genetic resources only. However, based on the provisions of Articles 8(j) and 10(c) CBD and the definition of the term "TK" advanced by the CBD Secretariat (see *supra* Section 2.3.5) one can argue that the objective of sharing the benefits as stated in Article 1 CBD, in principle, also applies to TCE, in particular TCE related to biological diversity. By analogy, the same applies with regard to Article 1(1) IT-PGRFA.

68 Article 1(c) CICH. Similarly, Article 1(e) CDCE states as one objective the "promot[ion of] respect for the diversity of cultural expressions and rais[ing] awareness of its value at the local, national and international levels" (UNESCO, *supra* note 18).

international cooperation;[69] (vii) reaffirming the sovereign rights of States;[70] and (viii) "[c]ontribut[ing] to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations".[71]

Although the scope of application of the relevant international instruments may differ considerably, these differences are not necessarily negative. As long as these scopes of application are mutually supportive and complementary, effective and efficient legal protection of TCE can be achieved.

Comprehensive protection of TCE necessitates a coherent approach, which adequately takes into account the holistic nature of TCE. This in turn necessitates that the objectives and scope of the various international instruments addressing the protection of TCE and related matters, whether already adopted or to be concluded in the future, are mutually supportive and complementary.

There is a need for a case-by-case basis analysis to determine whether the above-mentioned requirements are being met. Only such fact-based information will allow for any meaningful conclusions.

5. LEGAL PROTECTION OF TCE – ISSUES TO BE RESOLVED

5.1 Introduction

When discussing the protection of TCE, a considerable number of complex legal, social, political, economic and scientific issues need to be addressed. However, at the international level, many of these issues remain unresolved. They range from very fundamental issues, such as terminology and policy objectives of the protection, to more technical issues, such as determining the competent international forum and designing appropriate legal mechanisms.

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69 Article 1(d) CICH, and Article 1(i) CDCE.

70 Article 1(h) CDCE, and Articles 3 and 15(1) CBD.

71 Article 7 TRIPS Agreement (*supra* note 40). According to this provision, these are the objectives of the protection and enforcement of IPRs. The TRIPS Agreement does not contain specific provisions on TCE. However, its provisions also apply to TCE, including in particular the provisions on copyright and related rights (Articles 9–14), geographical indications (Articles 23 and 24), industrial designs (Articles 25 and 26), and trade secrets (Article 39), as well as the objectives as stated in Article 7 TRIPS. Moreover, para. 19 of the Doha Ministerial Declaration (*supra* note 9) mandates the TRIPS Council to examine the protection of folklore in the context of IPRs.

The following analyses several of the issues arising, namely: What are TCE? What is the meaning of "protection"? What are the policy objectives and guiding principles of the protection of TCE? What measures are to be taken and at what level?

As clearly revealed above, the results achieved at the international level so far make evident that much more analytical work is required and additional information is needed in order to find and implement measures for the effective and efficient protection of TCE. Furthermore, it will be necessary to ensure that any measures taken, whether of a policy, administrative or legal nature, duly take into account the holistic nature of TCE. Guaranteeing the complementarity and the mutual supportiveness of the diverse international instruments is also vital.

5.2 Terminology: What Are "TCE"?

As described above, no internationally agreed understanding of the concept of "TCE" exists. Nevertheless, at least a basic understanding of the subject matter is necessary in order to appropriately focus the discussions on the protection of TCE and to render them result-oriented. Accordingly, as a minimum, a working definition of the concept of TCE is required. Such a definition, however, would have to be sufficiently broad to cover the existing diversity of TCE.

5.3 What Is the "Protection" of TCE?

The various international efforts related to TCE, outlined above, generally aim at the "protection" of TCE. A closer analysis, however, reveals that "protection" may have different meanings, including:

- Safeguarding in a broad sense, that is, "measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and non-formal education, as well as the revitalization of the various aspects of such heritage";[72]
- Safeguarding in a more limited sense, that is, safeguarding TCE against inappropriate, unauthorized or illegitimate use or misappropriation by others, including commercial misappropriation and misuse that is derogatory or offensive to the holders of TCE.[73] This IP-style protection

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72 Article 2(3) CICH.

73 WIPO, *supra* note 4, at para. 16.

could, among other things, provide the means to prevent the misappropriation of TCE[74] or to control ways in which TCE are used beyond the customary and traditional context;
- Preserving TCE,[75] that is, preventing their loss or dissipation.[76] "Protection" in this sense could provide incentives for the continued creation, improvement and use of TCE as well as archiving, documenting and recording them;
- Preventing false or misleading claims as to the authenticity or origin of TCE;[77]
- Failing to acknowledge the source of TCE;[78]
- Respecting TCE;[79]
- Maintaining TCE;[80]
- Regulating access to TCE;
- Ensuring the fair and equitable sharing of the benefits arising from the commercial and other use of TCE;[81]
- Adopting measures "aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions".[82]

These differences in meaning have to be considered when discussing the "protection" of TCE, to avoid unnecessary misunderstandings. It is, however, important to note that the different meanings may not necessarily be mutually exclusive; this holds particularly true if "protection" is used in different ways in the same international instrument.[83] TCE can thus be protected by different measures in a complementary way.[84] Hence, if carefully designed, the

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74 WIPO's more recent work on the protection of TCE focused on the protection against misappropriation (see generally *ibid.*).

75 Article 8(j) CBD.

76 WIPO, *supra* note 23, at para. 17.

77 WIPO, *supra* note 12, at para. 6.

78 See e.g. Section 5(1) UNESCO and WIPO Model Provisions, which states that "[i]n all printed publications, and in connection with any communications to the public, of any identifiable expression of folklore, its source shall be indicated in an appropriate manner, by mentioning the community and/or geographic place from where the expression utilized has been derived" (UNESCO and WIPO, *supra* note 2).

79 Article 8(j) CBD.

80 *Ibid*.

81 WIPO, *supra* note 4, Annex, at p. 3, policy objective (iv).

82 Article 4(7) CDCE.

83 Article 4(7) CDCE defines "protection" as "the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions" (UNESCO, *supra* note 18). Article 8(j) CBD calls on States to "respect, preserve and maintain" TK (CBD, *supra* note 27).

84 WIPO, The Protection of Traditional Cultural Expressions/Expressions of

measures adopted by the different international fora involved can represent pieces of a larger puzzle resulting in a comprehensive protection of TCE. This requires that the relevant international fora adopt measures within their sphere of competence, which are designed to avoid contradictions with measures adopted by other fora. This is obviously a difficult task, since measures taken in one area are likely to have effects in other areas. This may, for example, apply to environmental measures which may also have effects on intellectual property or trade. As discussed previously, international fora are largely driven by their Member States or Contracting Parties. Accordingly, it is the prime responsibility of the national governments to ensure that they represent coherent national positions.

5.4 What Are the Policy Objectives and Guiding Principles of TCE Protection?

One fundamental issue to be addressed is the policy objectives of the protection of TCE, that is, the aims of such protection.[85] Depending on the meaning of "protection", different policy objectives may apply. The Secretariat of the WIPO IGC proposes 13 "policy objectives" for the protection of TCE, which "could set common general directions for protection and provide a consistent policy framework".[86] The proposed policy objectives are to:

(i) Recognize value;
(ii) Promote respect;
(iii) Meet the actual needs of communities;
(iv) Prevent the misappropriation of TCE/EoF;
(v) Empower communities;
(vi) Support customary practices and community cooperation;
(vii) Contribute to safeguarding traditional cultures;
(viii) Encourage community innovation and creativity;
(ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms;
(x) Contribute to cultural diversity;
(xi) Promote community development and legitimate trading activities;

Folklore. Draft Objectives and Principles, WIPO/GRTKF/IC/10/4, 2 October 2006, at para. 16.

[85] See generally the written replies submitted by the participants to WIPO's IGC to the question of what objective is sought to be achieved through according IP protection to TCE, as contained in WIPO, *supra* note 39, Annex, at pp. 24–32.

[86] See generally WIPO, *supra* note 4, at para. 11(i).

(xii) Preclude unauthorized IPRs;
(xiii) Enhance certainty, transparency and mutual confidence.[87]

In addition, the Secretariat of the WIPO IGC proposes nine "general guiding principles" for the protection of TCE, which are intended to ensure consistency, balance and effectiveness of the substantive provisions on the protection of TCE.[88] These are:

(a) Principle of responsiveness to aspirations and expectations of relevant communities;
(b) Principle of balance;
(c) Principle of respect for and consistency with international and regional agreements and instruments;
(d) Principle of flexibility and comprehensiveness;
(e) Principle of recognition of the specific nature and characteristics of cultural expression;
(f) Principle of complementarity with protection of TK;
(g) Principle of respect for rights of and obligations towards indigenous peoples and other traditional communities;
(h) Principle of respect for customary use and transmission of TCE/EoF;
(i) Principle of effectiveness and accessibility of measures for protection.[89]

5.5 What Measures Are to Be Taken?

The legal, administrative or policy measures available to protect TCE depend on the policy objectives to be achieved by the protection of TCE. If, for example, the objective is to prevent the further loss of traditional songs, writing down and recording these songs may present viable mechanisms, whereas the application of existing forms of IPRs is – at least by itself – unlikely to be sufficient. In contrast, if the objective is to stimulate the continued creative activities of traditional songwriters, applying copyright or a specifically designed *sui generis* form of such rights may serve to achieve this objective.

All measures available for the protection of TCE, however, have their benefits and shortcomings. Databases, for example, contain TCE as they existed at the time of recording and to be of continued use, they thus need to be updated regularly. Databases may make TCE more readily available to the public, a consequence not desirable for all stakeholders concerned.[90] In the case of

87 *Ibid.* Annex.
88 *Ibid.* at para. 11(ii).
89 *Ibid.* Annex, at p. 6.
90 See e.g. WIPO, *supra* note 3, at para. 38.

IPRs,[91] the applicable criteria for protection must be fulfilled. Accordingly, any TCE not fulfilling these criteria will be left without protection. As with any other rights, IPRs must be enforceable in order to be of value to their holders, thus depending on access of rights holders to a functioning judicial system. Furthermore, some indigenous representatives do not consider IP to be the primary body of law with regard to the protection of TCE.[92] These examples show that not all measures available are equally well-suited to protect TCE in all circumstances. The benefits and shortcomings of these mechanisms must thus carefully be considered when choosing the measure(s) to protect TCE.

The question arises as to whether a single measure will allow for the protection of TCE (a "one size fits all" solution) or whether a multitude of such measures is necessary. Considering the great diversity of TCE, the varying interests of their holders and the differing policy objectives their protection may have, a single measure is unlikely to be sufficient for the effective and efficient protection of TCE.[93] The same applies to approaches solely based on IPRs. In conclusion, it can be said that the protection of TCE should "draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *sui generis* extensions or adaptations of IP rights, and specially-created *sui generis* IP measures and systems, including both defensive and positive measures. Private property rights should complement and be carefully balanced with nonproprietary measures".[94]

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91 For example, according to Japan, "there is no clear justifiable reason why TCE [are] eligible for IP right protection. Japan is greatly concerned about extending IP right protection to TCE [...]. Use of TCE [...] that inflict mental suffering upon a community should be refrained from, as a matter of moral in general in the same way that derogatory expressions against certain race, religion or sex should be refrained from. However one should be careful in attempting to establish any system of IP rights or similar rights in order to deter such acts, as unnecessarily rigid regulation against expression could harm freedom of speech or development of culture" (WIPO, *supra* note 39, Annex, at p. 36).

92 For example, according to the Tulalip Tribes of Washington State, USA, IP law does "not reflect the primary motives of indigenous peoples for their practices and innovations in TK and TCE" (WIPO, *supra* note 3, at para. 38).

93 The IGC Secretariat concludes "that it is unlikely that any single 'one-size-fits-all' or 'universal' international template will be found to protect TCE comprehensively in a manner that suits the national priorities, legal and cultural environment, and needs of traditional communities in all countries" (WIPO, *supra* note 4, Annex, at p. 8). Similarly, the Four Directions Council, an indigenous organization, states that, "[a]ny attempt to devise uniform guidelines for the recognition and protection of indigenous peoples' knowledge runs the risk of collapsing this rich jurisprudential diversity into a single 'model' that will not fit the values, conceptions or laws of any indigenous society" (Four Directions Council, Forests, Indigenous Peoples and Biodiversity, Submission to the CBD Secretariat, 1996, *ibid.*).

94 WIPO, *ibid*.

5.6 At What Level Are Measures to Be Taken?

The question arises of the level at which measures to protect TCE are to be taken (local, national, regional, international) and by whom (indigenous and local communities, governments, international fora).

Local measures are already contained in local values, customs, traditions and laws, which regulate access to, use and handing down of TCE.[95] Accordingly, in the view of some stakeholders, "the primary directives should be protection and respect for customary law. Customary law [is] the law that most mattered for indigenous peoples and [is] inalienable from their identity and integrity. Their interpretation of the 'promotion' of TK and TCE [is] that measures should protect and reinforce their use and regulation by their owners".[96]

Measures taken at the national level allow the wide variety of TCE and the different needs and expectations of their holders to be taken into account. Thus, such measures and the underlying concepts and definitions can be tailored according to the particular situation in a country.[97]

Due to the international dimension of TCE, at least some internationally agreed measures seem necessary. These include voluntary guidelines, joint recommendations, legally binding international agreements, and databases. This leads to the question of which international forum should take these measures.

5.7 Additional Issues

Besides the issues briefly discussed in the previous sections, additional issues need to be resolved when comprehensively addressing the protection of TCE. Depending on the legal, administrative or policy measures taken, and their underlying policy objectives, these issues include the role of governments, the determination of the beneficiaries of the protection of TCE and the holders of

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95 See e.g. WIPO, *supra* note 32, at pp. 220–221.

96 WIPO, *supra* note 3, at para. 38.

97 This is acknowledged e.g. in Article 1(b) of the draft substantive provisions for the protection of TCE, which state that "[t]he specific choice of terms to denote the protected subject matter should be determined at the national and regional levels" (WIPO, *supra* note 4, Annex, at p. 11). This limitation is included because "Member States and other stakeholders have called for flexibility in regard to terminology, amongst other things. Many international IP standards defer to the national level for determining such matters. Hence, to allow for appropriate national policy and legislative development, consultation and evolution, the suggested sub-paragraph (b) recognizes that detailed decisions on terminology should be left to national and regional implementation" (*ibid.* at p. 14).

rights and obligations, the legal nature and contents of the rights granted, their territorial applicability, the term of protection, and the enforcement of these rights.[98]

The role of governments may be manifold. They can be responsible for implementing the provisions of international instruments at the national level. This may include the adoption of relevant laws, implementation of the administrative and judicial bodies and procedures necessary for the enforcement of any rights, and the designation of competent government authorities. Furthermore, governments can be involved in the establishment and maintenance of databases on TCE. It comes as no surprise that divergent views are expressed in this regard.

Divergent views are also expressed with regard to the beneficiaries of the protection of TCE.[99] Possible beneficiaries include: (1) the originators or custodians of TCE;[100] (2) indigenous peoples as well as traditional and other cultural communities who are the custodians of TCE and who maintain, use and develop these TCE; [101] (3) nations and governments;[102] and (4) authors

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[98] For an in-depth analysis of similar issues arising in the context of Farmers' Rights, see Martin Girsberger, *Biodiversity and the Concept of Farmers' Rights in International Law: Factual Background and Legal Analysis*, Berne: Peter Lang, 1999, at pp. 171–327.

[99] See generally the written replies submitted by the participants in WIPO's IGC to the question of who should benefit from the protection of TCE and who should hold the rights to protectable TCE, as contained in WIPO, *supra* note 39, Annex, at pp. 17–23.

[100] *Ibid*. at p. 17.

[101] Article 2 of the draft substantive provisions discussed in WIPO's IGC define the beneficiaries of the protection of TCE as follows: "Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities: (i) in whom the custody, care and safeguarding of the TCE/EoF are entrusted in accordance with their customary law and practices; and (ii) who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage" (WIPO, *supra* note 4, Annex, at p. 16). Similarly, according to Norway, the beneficiaries should be the custodians of the TCE in question, that is, the indigenous peoples or local communities which maintained, used and developed the TCE and continue to do so (WIPO, *supra* note 39, Annex, at p. 20).

[102] For example, in reply to the questions of who should benefit from any such protection and who should hold the rights to protectable TCE, Kyrgyzstan states that, "[o]wners of traditional cultural expressions (folklore) are as follows – nations, national persons and legal entities creating and preserving traditional cultural expressions (folklore). State shall benefit from use of traditional cultural expressions (folklore), which cultural heritage covers respective traditional cultural expressions (folklore)" (WIPO, *supra* note 39, Annex, at p. 17). In reply to this question, Tunisia similarly expresses the view that this should be governments, peoples and holders of such knowledge. (*ibid.* at p. 22)

and performers of the works performed.[103] Should, for example, the only beneficiaries be indigenous communities or ancestral peoples, TCE created, used and developed by other entities would be excluded from protection.

6. CONCLUSIONS

The legal protection of TCE is being addressed by a number of international fora, in particular WIPO, UNESCO, the WTO, the CBD and FAO, and various human rights bodies. Some of these fora have been active in this area for decades, whereas others became active only recently. Their efforts have resulted in a number of international instruments, such as conventions, declarations, recommendations, and model provisions. Nevertheless, a number of issues – even basic ones – remain unresolved, including: What are TCE? What is the meaning of "protection"? What are the policy objectives and guiding principles for the protection of TCE? What measures are to be taken and at what level? These and other issues still await clarification at the international level. Such clarification is indispensable to achieve the effective and efficient protection of TCE.

It is crucial that the ongoing international efforts regarding the protection of TCE adequately take into account the holistic nature of TCE and

> recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity.[104]

In order to protect TCE in a complete and comprehensive manner, and to overcome the current fragmentation of the international efforts, close cooperation and exchange of information among the international fora involved is indispensable. Furthermore, national governments need to express coherent positions in these fora.

Indigenous and local communities hold a considerable diversity of TCE. They are thus the primary stakeholders in the discussions on the protection of TCE and should accordingly be directly involved in these discussions. Several international fora have facilitated the participation of representatives of indigenous and local communities. WIPO, for example, established in 2005

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103 WIPO, *supra* note 39, Annex, at p. 21.
104 WIPO, *supra* note 4, Annex, at p. 3, objective (i).

the Voluntary Contribution Fund for Accredited Indigenous and Local Communities. This fund enables the participation of indigenous and local communities in the work of the IGC by providing the necessary funding for their representatives to attend the IGC meetings.

7. "It's a small world (after all)": some reflections on intellectual property and traditional cultural expressions

Wend B. Wendland*

I. INTRODUCTION

Exploring the intellectual property (IP) protection of traditional cultural expressions (TCE) and the cognate subject matter of "traditional knowledge" (TK)[1] has been described as "like trying to fit a round peg into a square hole".[2]

There are certainly deep-running divergences between the worldviews underpinning the conventional IP system and the customary legal systems, ways of life and traditional practices of indigenous and local communities. From an indigenous perspective, a song or story is not a commodity or a form of property but "one of the manifestations of an ancient and continuing relationship between people and their territory".[3] As a result of the unique nature

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* This article was written in the author's personal capacity and any views expressed in the article are those of the author, and not necessarily those of the WIPO Secretariat or any of WIPO's Member States.

1 In intellectual property discussions a distinction is usually drawn between the content or substance of traditional knowledge *per se* (traditional knowledge *stricto sensu*, "TK") and the tangible and intangible forms in which such knowledge is expressed, communicated or manifested (traditional cultural expressions, or "expressions of folklore", "TCE"). This distinction is criticized as artificial, as it certainly is in relation to the daily life of indigenous peoples in which technical know-how and artistic expressions form part of an integrated unitary heritage. However, the distinction facilitates an IP analysis of the issues and does not detract from the holism of knowledge and artistic expressions in the daily lives of indigenous peoples. WIPO's work on TK and TCE is closely complementary and coordinated.

2 James Tunney, "EU, IP, Indigenous People and the Digital Age: Intersecting Circles" (1998) European Intellectual Property Review 20:9, pp. 335–346, at p. 335.

3 Erica-Irene Daes, Special Rapporteur of the (then) Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chair of the Working Group on Indigenous Populations, Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, E/CN.4/Sub.2/1993/28, 28 July 1993, at para. 22.

of TCE and TK and particular experiences of indigenous peoples, IP as a body of law is seen as inherently inappropriate or dysfunctional in relation to the needs of indigenous peoples[4] – what is needed is not simply a different type of IP law but a completely different legal system based on and embodying customary legal systems.[5] The Mataatua Declaration,[6] adopted at the First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples held in 1993, calls upon indigenous peoples to "define for themselves their own intellectual and cultural property".

Doubts come from other corners too, such as those occupied by anthropologists, folklorists and legal scholars. Brown offers a deeply sceptical view of efforts to use copyright to control cultural appropriation,[7] while for others the application of IP principles to TCE is "arguably a potent modern reinvention of colonialism".[8] The American Folklore Society adds that IP regimes may affect negatively individuals and groups who actively maintain the dynamic cultural traditions that contribute to the world's knowledge and diversity.[9] It is also argued that whereas the protection of intangible heritage is conceived in terms of preserving the social processes, which have produced and continue to create traditional cultural expressions, IP inappropriately reduces intangible heritage to "things".[10]

Doubts extend beyond the application of IP tools to the very basis for claims that TCE require special protection. Arguing for the maintenance of

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4 Tunney, *supra* note 2, at p. 338.

5 Michael Dodson, Special Rapporteur and Member of the Permanent Forum on Indigenous Issues, Report of the Secretariat on Indigenous Traditional Knowledge, E/C.19/2007/10, 20 March 2007, at p. 8. See also, generally, Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Sydney: Michael Frankel and Company, 1998; Australian Copyright Council (ACC), *Protecting Indigenous Intellectual Property*, Sidney: ACC, 1998; Susan Scafidi, "Intellectual Property and Cultural Products" (2001) Boston University Law Review 81:4, pp. 793–842; Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" (1997) Connecticut Law Review 30:1, pp. 1–58.

6 Available at http://www.wipo.int/tk/en/folklore/creative_heritage/indigenous/link0002.html.

7 Michael Brown, "Can Culture Be Copyrighted?" (1998) Current Anthropology 39:2, pp. 193–222.

8 Tunney, *supra* note 2, at p. 338.

9 Statement by American Folklore Society to the Fourth Session of the WIPO IGC, available at http://www.wipo.int/tk/en/igc/ngo/afsstatement.pdf.

10 Lyndel V. Prott, "An International Legal Instrument for the Protection of Intangible Cultural Heritage?" in Claus Dieter Classen, Armin Dittmann, Frank Fechner, Ulrich M. Gassner and Michael Kilian (eds), *In einem vereinten Europa dem Frieden der Welt zu dienen. Liber amicorum Thomas Oppermann*, Berlin: Duncker and Humblot, 2001, pp. 657–686, at pp. 666 and 667.

local cultural vitality and traditional creativity as social practice, Dorothy Noyes cautions against the reification of "authentic" tradition as the heritage of imagined communities – "the criterion of authenticity turns culture into a scarce resource and a rival good", creating competition within and between communities.[11] For some, the claims of indigenous peoples are extravagant assertions of artificial cultural distinction. The concept of culture as "tradition" denies indigenous peoples a contemporary voice: "The capacity of peoples to live in history, and to creatively interpret and expressively engage historical circumstances using their cultural traditions to do so is now recognized as the very life and being of a culture, rather than as evidence of its death and destruction."[12] Cultures have a tendency to intermingle and borrow from each other. Some have also questioned a human rights approach based on an intuitive but otherwise vague and unprovable "right to culture". As Elizabeth Burns Coleman writes elsewhere in this volume, two different conceptions of what is good for humans – a cosmopolitan ideal and a communitarian ideal – are reflected in these various positions.

These diverse views are well set out elsewhere and it is not intended here to do more than simply provide a drive-by sampling. The concerns they embody are worthy of serious examination. They extend well beyond the relatively comfortable parameters of a conventional IP analysis and summon an introspection more profound, multidisciplinary and perhaps even interesting. Yet, it is within the frame of IP discourse that much thinking and discussion on these issues is taking place.

2. TCE WITHIN AN INTELLECTUAL PROPERTY DISCOURSE

It is from within this cauldron of complex cultural, social, human rights and economic questions that the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC) emerges into view.

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[11] Dorothy Noyes, "The Judgment of Solomon: Global Protections for Tradition and the Problem of Community Ownership" (2006) Cultural Analysis 5, pp. 27–56, at pp. 28 and 31.

[12] Rosemary Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Bruce Ziff and Pratima V. Rao (eds), *Borrowed Power: Essays on Cultural Appropriation*, New Brunswick: Rutgers University Press, 1997, pp. 74–96, at p. 85, quoted by Elizabeth Burns Coleman in this volume.

The WIPO IGC met for the first time in April 2001, following the establishment of a program at WIPO in 1998 for "new beneficiaries"[13] and an intervening important period of fact-finding, consultations and research. The WIPO IGC has since met 11 times. The general background to and history of the establishment of the WIPO IGC, as well as WIPO's earlier years of work, are described elsewhere.[14]

Discussions on IP and TCE have their roots in various attempts over the last 40 or so years to "protect" intangible cultural heritage at the United Nations Educational, Scientific and Cultural Organization (UNESCO) and WIPO. These origins include the 1967 amendment to the Berne Convention for the Protection of Literary and Artistic Works to provide protection for anonymous and unpublished works at the suggestion of India;[15] the adoption in 1976 of the Tunis Model Law on Copyright; the 1982 UNESCO-WIPO Model Provisions; an abortive treaty in 1984; UNESCO's Recommendation on the Safeguarding of Traditional Culture and Folklore of 1989; UNESCO's Convention for the Safeguarding of Intangible Cultural Heritage of 2003 and UNESCO's 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[16] The undertow tugging at these processes has been an inherent ambiguity in the meaning of "protect" and the need to clarify the distinction between the *preservation* of cultural heritage and the *legal protection* of creativity, including traditional creativity, against unauthorized use. This conceptual ambiguity continues to have a significant presence in the IGC's work (see further below), and this history provides an important context for understanding the specific relationship between IP and TCE. The immediate origins of the IGC lie in the relationship between patent law and access to and benefit-sharing in genetic resources and associated traditional knowledge,[17] and most of the IGC's participants have a background in these issues; unfortunately therefore, much of this history and context relevant to TCE is not widely known within the IGC.

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[13] WIPO, WIPO Program and Budget 1998–1999: Main Program 11, available at http://www.wipo.int/documents/en/document/govbody/wo_gb_ab/prg11.htm.

[14] Wend Wendland, "Intellectual Property and the Protection of Cultural Expressions: The Work of the World Intellectual Property Organization (WIPO)" in Molengraaf Institute for Private Law, Centre for Intellectual Property Law (CIER), Molengrafica Series, Utrecht: CIER, 2002.

[15] WIPO, Records of the Intellectual Property Conference of Stockholm, 11 June–14 July 1967, Geneva: WIPO, 1971, at paras. 126, 127, 249–253.

[16] For details on these instruments and initiatives, see Wendland, *supra* note 14, at pp. 102–108.

[17] For the immediate origins of the establishment of the IGC, see WIPO, Matters Concerning Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore – An Overview, WIPO/GRTKF/IC/1/3, 16 March 2001, at paras. 23–28.

The next section will provide a short overview of the relationship between TCE and IP, and an update as to where the WIPO IGC now finds itself, with an initial personal assessment of progress made so far. Thereafter, the article will briefly discuss two of the key issues now before the IGC, namely the scope of protectable subject matter and the scope of protection (the rights and exceptions and limitations that may be applied to TCE), with reference to draft provisions on IP and TCE being considered by the IGC.

2.1 TCE as Cultural and Economic Assets

Traditional music, designs, rituals, performances, oral narratives, names, symbols and signs communicate a community's beliefs and values, embody skills and know-how, reflect a community's history, and define its cultural identity. Traditional cultural expressions such as these are therefore valuable cultural assets of the communities who maintain, practice and develop them. They can also be economic assets – they are creations and innovations that can, if so wished, be traded or licensed for income-generation and local economic development. They may equally serve as an inspiration to other creators and innovators who can adapt the traditional expressions and derive new creations and innovations. Unfortunately, too often cultural products deeply rooted in the cultural heritage of developing countries and their communities have crossed borders and established significant market niches in industrialized countries, not benefiting adequately the countries and communities of origin.

In considering whether, and if so, how, to "protect" TCE in an IP sense, it is appropriate to reflect upon related policy objectives such as the protection of creativity, the preservation of cultural heritage and the promotion of cultural diversity. How would proposals for the "protection" of TCE affect achievement of these valued policy goals? The protection of expressions of traditional cultures also touches upon other important policy areas, such as freedom of expression, respect for the rights, interests and claims of indigenous and other traditional communities, recognition of customary laws, protocols and practices, "access to knowledge" and the scope of the "public domain", and the challenges of cultural pluralism and multiculturalism. These are some of the IP-related and broader policy issues that stake out the policy territory within which the relationship between IP and TCE could be considered.

2.2 Intellectual Property – Part of the Problem or Part of the Solution?

The conventional IP system has been identified by some as not only inadequate to comprehensively and appropriately protect TCE but as positively

harmful, in at least two directions. First, IP rules exclude many TCE from protection, consigning them to an unprotected "public domain". Second, follow-on innovations and creations derived from TCE receive protection as "new" IP, giving the IP rights holders the exclusive right to determine the conditions under which third parties (including the TCE holding communities themselves) may use and benefit from the IP. It has been said that conventional IP is, therefore, positively and negatively exclusionary.[18] As a result, many call for new *sui generis* ("special") systems to protect TCE, and several countries and regional organizations have already put in place national and regional *sui generis* laws and measures, such as Panama, Peru, Ghana, *l'Organization africaine de la propriété intellectuelle* (OAPI), the Andean Community, South Pacific island countries and New Zealand, to name only a few.[19]

The relationship between IP and TCE is also more nuanced and complex, however. For example, contemporary expressions of traditional cultures are protected by conventional copyright[20] and performances of TCE are already protected internationally.[21] Copyright and special protection also exists for compilations and databases of TCE. These possibilities do not necessarily address all the concerns of indigenous peoples, but they provide at least a partial response and possibly a complete one depending on the objectives indigenous peoples set for themselves. Certification trademarks and labels of authenticity have also been used by indigenous communities in Tonga,[22] Panama,[23]

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18 Tunney, *supra* note 2, at p. 336.

19 See WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions/Expressions of Folklore, Geneva: WIPO, 2003, at pp. 35–55 and Annex. See also WIPO TCE Laws Database, available at http://www.wipo.int/tk/en/laws/folklore.html.

20 See e.g. Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, Geneva: WIPO, 2003; WIPO, *supra* note 19, at pp. 35–44. For an application of these principles under Chinese law, see e.g. Beijing Higher People's Court, case No. 246, 2003, *The Local Government of Ethnic Hezhe Sipai Village, Heilongjiang Province v. Guo Song and Chinese Central Television and Beichen Shopping Centre of Beijing*.

21 WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva, 20 December 1996.

22 Malia Talakai, "Tongan Cultural Expressions and Its Intellectual Property Challenges: Findings from a Survey on Intellectual Property and Safeguarding Cultural Heritage in the South Pacific and from PhD Dissertation Fieldwork in Tonga", Presentation made at Tonga Research Association Conference, Nuku'Alofa, Tonga, July 2007, available at http://www.wipo.int/tk/en/folklore/culturalheritage/resources.html.

23 Luz Celeste Rios de Davis, "Regimen especial de derechos colectivas indigenas", Presentation made at the Fourth Session of the WIPO IGC, 9–17 December 2002, WIPO/GRTKF/IC/4/INF/4, 29 November 2002.

Fiji[24] and New Zealand[25] to curb the sale of fake traditional creative arts ("fakelore").[26] The Toi Iho "Maori Made" mark, for example, used in relation to authentic Maori creative arts, has stimulated the Maori cultural industry.[27] Trademarks and labels do not address all concerns. They do not, for example, prevent the copying of indigenous creative arts as such, but help identify genuine products in the marketplace – this might be adequate for certain indigenous communities. Copyright's resale right (*droit de suite*) could also be used as a benefit-sharing mechanism to funnel proceeds from the sale by auction houses of indigenous art to artists and their communities.

Existing IP measures can therefore be useful, especially for those communities whose primary aims are to prevent the unauthorized use of their creative productions and to exploit their creative arts and contemporary adaptations of their TCE in the marketplace. As a group of States has pointed out, "the resources offered by intellectual property have not been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them".[28]

While there are diverse views on the adequacy or otherwise of existing IP systems, there is wide consensus that TCE embody innovation, creativity and distinctiveness, and should not be misappropriated and misused. It follows that IP *principles* (more broadly conceived of than existing IP systems) would have some role to play. Indeed, there are values embedded within IP that respond directly to the needs and aspirations of indigenous and local communities in so far as TCE are concerned. It can be recalled that these values permit the prevention of misappropriation and misuse, prevent misrepresentation and "passing off", keep valuable secrets, recognize non-financial interests, entrench links between goods and their place of origin and value distinctiveness. As Rosemary Coombe *et al*. write, if appropriately employed as part of holistic development models, IP-related strategies may "empower local communities by engendering creative activity, revitalizing traditions and sustain or enhance local livelihoods".[29]

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24 "Defining Fiji's Art", *Living in Fiji*, September–November 2006.

25 See http://www.toiiho.com.

26 See generally, WIPO, *supra* note 19.

27 Aroha Mead, "Emerging Issues in Maori Traditional Knowledge, Can These Be Addressed by UN Agencies?", Paper delivered at International Technical Workshop on Indigenous Traditional Knowledge, organized by the Interagency Support Group on Indigenous Issues and UN Permanent Forum on Indigenous Issues, Panama City, Panama, 21–23 September 2005, available at http://www.un.org/esa/socdev/unpfii/documents/workshop_TK_mead.pdf.

28 GRULAC (Group of Countries of Latin America and the Caribbean), Position Paper submitted to the IGC, WIPO/GRTKF/IC/1/5, 16 March 2001, Annex II, at p. 2.

29 Rosemary Coombe, Steven Schnoor and Mosen Ahmed, "Bearing Cultural

The application of IP principles in the area of TCE need not therefore be at odds with the aspirations of indigenous peoples and local communities. At the heart of their aspirations is the wish to be able to have a say over if and how the innovation, creativity and distinctiveness embodied in their TCE are used by third parties – this is the very essence of IP-like protection.

To the extent, however, that conventional IP systems cannot address all the concerns of communities, it seems worthwhile to identify gaps in existing coverage as aligned with communities' needs and aspirations and explore how core IP principles and adaptations of them can be employed for the benefit of these "new beneficiaries" of IP.

This is far from suggesting, however, that IP offers a comprehensive response to the aspirations of indigenous peoples. IP-based tools provide legal remedies aimed at the prevention of the misappropriation of the creativity, distinctiveness and innovation embodied in TCE, subject to limitations and exceptions in the public interest. Indigenous peoples may derive benefit from such remedies, but their aspirations are also more profound and expansive. The protection of their cultural sovereignty, the restoration of dignity and cultural identity and the holistic preservation and promotion of their ways of life and cultures are likely to be found in a broader menu of options drawn from several policy and legal fields, including non-IP areas. Furthermore, the creation of new IP rights over TCE currently in the "public domain" raises complex questions. The over-protection of TCE in an IP sense could stifle creativity, foment rivalry and chill intercultural dialogue. The measured and targeted contribution of IP to the protection of TCE depends therefore on careful consideration of what one wishes to protect and why and how one does so.

2.3 The WIPO IGC – Key Issues

Although[30] existing conventional IP systems, especially copyright and related rights, do already provide some coverage for TCE, many call for a new legal instrument for the protection of TCE. However, what precisely is a "traditional" cultural expression? When is use of a TCE legitimate cross-cultural borrowing and when is it "misappropriation"? What are the appropriate role, contours and shape of the "public domain"? Who should benefit from the protection of TCE? As much creativity is derivative, are many TCE not the

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Distinction: Informational Capitalism and New Expectations for Intellectual Property" (2007) University of California Davis Law Review 40:3, pp. 891–918, at p. 892.

[30] An earlier version of this specific section appeared as Wend Wendland, "WIPO's Work on Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions – Taking Stock of Developments to Date and an Assessment of Options for Future Progress" in Indigenous Peoples' Centre for Documentation, Research and Information (doCip), Update 76, Geneva: doCip, 2007, pp. 14–18.

result of centuries-old cultural intermingling, rendering it difficult if not impossible to identify single community "owners"? For how long should any protection be granted? What public policy goals are sought to be achieved through granting IP-like protection to TCE?

These are some of the key questions currently exercising the mind of the WIPO IGC in relation to the *content* or *substance* of IP-like protection that could be afforded to TCE. This Committee is examining a draft *sui generis* system for the protection of TCE, which could perhaps provide a framework for new national and regional laws as well as a new international instrument. The draft provisions provide for both "positive" (the ability to prevent unauthorized use of and/or to commercialize a TCE) and "defensive" (the ability to prevent the obtaining of IP rights over a TCE or derivative there from) forms of protection for TCE.[31]

Another key question before the WIPO IGC is what *form* should any outcome of its work take. Many are calling for an "internationally binding legal instrument". Others are more cautious, preferring to leave a decision as to the form of an outcome until such time as its content is clearer.[32]

2.4 Current State of Play in the IGC

Most recently, at the Tenth Session of the WIPO IGC (December 2006), the IGC agreed upon a list of ten key policy and legal questions intended to frame and guide its future work. Two similar lists were prepared, one focused on TCE and the other on TK, and IGC participants were invited to comment on the lists.[33]

The Eleventh Session (July 2007) then began to examine the comments received. The comments, which included comments from a range of States, indigenous organizations and other civil society NGOs, are a fascinating insight into the views of the diverse participants in the IGC process. They

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[31] The draft provisions are enclosed at the end of this volume in Annex 1. They are contained unaltered in the Annex of documents WIPO/GRTKF/IC/8/4, 8 April 2005, WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, and WIPO/GRTKF/IC/12/4(c), 6 December 2007 considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources and Folklore at its Eighth, Ninth, Tenth, Eleventh and Twelfth Sessions. Committee members have expressed diverse views on the acceptability of this material as a basis for future work, in particular regarding certain passages of Part III: Substantive Principles.

[32] See also Martin A. Girsberger's contribution to this volume.

[33] The List of Issues regarding TCE is provided at the end of this volume in Annex 2. For the full Lists of Issues, and other decisions taken by the IGC's Tenth Session, see WIPO, Decisions of the Tenth Session of the Committee, 30 November–8 December 2006, Geneva, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_decisions.doc.

highlight areas of disagreement, but also issues on which there is common ground.[34] The Eleventh Session decided[35] that the WIPO Secretariat should prepare "factual extractions", with attribution, consolidating the viewpoints and questions of the IGC participants on the Lists of Issues, and make these available for review by the IGC participants and discussion at the Twelfth Session, which took place 25–29 February 2008.

The Agreement on the list of ten key questions at the Tenth Session followed a somewhat difficult period in the life of the IGC. While the main documents being discussed by the IGC at the Fifth (July 2003) and Sixth (March 2004) Sessions were analytical options papers,[36] the Seventh Session of the IGC (November 2004) saw, for the first time, the discussion of "draft policy objectives and core principles" for the protection of TK and TCE.[37] Drawing from extensive consultations, national and regional laws and the submissions of IGC participants, these set out elements for the *sui generis* ("special") protection of TK and TCE. The Seventh Session discussed the drafts and called for further comments on them, including specific suggestions for wording, and requested the WIPO Secretariat to produce, on the basis of inputs and comments received, further drafts of the objectives and principles. These further drafts[38] presented the revised objectives and principles in a distilled and focused format, which was welcomed at the Eighth Session (June 2005) by many delegations but severely criticized by others who argued that the new documents were in a prescriptive, treaty-like format, which prejudged the form of the outcome of the IGC's work. A stalemate ensued, in which no agreement could be reached on future steps in relation to these two documents. The IGC, nonetheless, reiterated its broad support for the work it was undertaking on TCE and TK.[39]

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[34] The comments on the TCE List of Issues are available in WIPO documents WIPO/GRTKF/IC/11/4(a), 30 April 2007, WIPO/GRTKF/IC/11/4(a) Add., 26 June 2007, and WIPO/GRTKF/IC/11/4(a) Add.2, 3 July 2007. The comments on the TK List of Issues are available in documents WIPO/GRTKF/IC/11/5(a), 19 May 2007, WIPO/GRTKF/IC/11/5(a) Add., 28 June 2007, and WIPO/GRTKF/IC/11/5(a) Add.2, 3 July 2007. The comments are also displayed electronically in tabular form at http://www.wipo.int/tk/en/igc/issues.html.

[35] The decisions of the IGC's Eleventh Session are available at http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=81852.

[36] Such as documents WIPO/GRTKF/IC/5/3, 2 May 2003, and WIPO/GRTKF/IC/6/3, 1 December 2003 (TCE), and WIPO/GRTKF/IC/6/4, 12 December 2003 (TK).

[37] Documents WIPO/GRTKF/IC/7/3, 20 August 2004 (TCE), and WIPO/GRTKF/IC/7/5, 20 August 2004 (TK).

[38] WIPO/GRTKF/IC/8/4, 8 April 2005 (TCE), and WIPO/GRTKF/IC/8/5, 8 April 2005 (TK).

[39] See decisions of the IGC's Eighth Session at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_8/wipo_grtkf_ic_8_decisions.doc.

The Ninth Session of the IGC (April 2006) saw the IGC discussing the same two documents again, unchanged from the Eighth Session (but simply renumbered in line with documents for the Ninth Session).[40] On this occasion, however, the IGC agreed to request IGC participants to submit written comments on the draft provisions and requested the WIPO Secretariat to circulate the comments before the Tenth Session.[41] At the Tenth Session (December 2006), views on the draft provisions remained divided. However, as already noted, the IGC then agreed upon the lists of key issues, which were intended to form the focus of the IGC's future deliberations and called for written comments on those issues.

For many, agreement to discuss lists of key issues was seen as an elegant device enabling discussion to recommence on the core substantive issues raised by the draft provisions, without necessarily requiring direct discussion of the two documents on which views were so divided. Some, however, pointed out that the IGC had already in its earlier sessions discussed similar policy issues and options, and were concerned that the key issues were simply a distraction from continued work on the draft provisions. In either event, from this point on, work on each of TCE and TK is being conducted on two related and parallel tracks, the draft provisions and the lists of key issues.

2.5 Participation of Indigenous and Local Communities

The direct and effective participation in WIPO's work on TCE and TK of indigenous representatives and civil society more broadly has been central to the credibility and substantive focus of WIPO's work in this area, beginning with the fact-finding missions conducted in 1998 and 1999.[42] The degree of accessibility of these groups to WIPO and their ability to participate directly in the IGC have been widely recognized.[43] At present, some 190 non-governmental organizations are specifically accredited to the IGC and a WIPO

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[40] WIPO/GRTKF/IC/9/4, 9 January 2006 (TCE) and WIPO/GRTKF/IC/9/5, 9 January 2006 (TK).

[41] Documents WIPO/GRTKF/IC/10 INF 2, 29 September 2006, WIPO/GRTKF/IC/10 INF 2 Add., 26 October 2006, WIPO/GRTKF/IC/10 INF 2 Add.2, 24 November 2006, and WIPO/GRTKF/IC/10 INF/3, 2 October 2006.

[42] WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva: WIPO, 2001.

[43] Duncan Matthews, *NGOs, Intellectual Property Rights and Multilateral Institutions*, London: Queen Mary Intellectual Property Research Institute, 2006, at pp. 29–30; South Centre and Centre for International Environmental Law (CIEL), "The Proposed WIPO Framework on Traditional Knowledge: Does It Meet Indigenous Peoples' Demands?" (2007) Intellectual Property Quarterly Update, pp. 1–20, at p. 2.

Voluntary Fund funds the participation of representatives of accredited indigenous and local communities.[44] Indigenous representatives at the IGC are among the most active, articulate and thoughtful participants.

2.6 The Mandate of the IGC

In the midst of wrangling over the form and contents of the main working documents, the mandate of the IGC came up for renewal in late 2003 and again in late 2005. On each occasion, the renewal of the mandate was not controversial as a matter of principle, underlining that, despite differences over specific technical proposals and the status and contents of the main working documents, there remains broad support for WIPO's work on these issues and the continuation of the IGC in particular.

In late 2003, the WIPO General Assembly decided that the IGC

> (i) […]will continue its work for the next budgetary biennium on questions included in its previous mandate; (ii) its new work will focus, in particular, on a consideration of the international dimension of those questions, without prejudice to the work pursued in other fora, and, (iii) no outcome of its work is excluded, including the possible development of an international instrument or instruments.[45]

The General Assembly urged the IGC to accelerate its work and requested the WIPO Secretariat to continue to assist the IGC by providing necessary expertise and documentation. This mandate was renewed in the same terms by the General Assembly in 2005 for a further two years.

The WIPO General Assembly of September 2007 was called upon to review the mandate of the IGC again. At its Eleventh Session (July 2007), the IGC agreed to recommend to the General Assembly that the current mandate be renewed on the same terms as in 2005. After much debate, the IGC added the following wording to its decision: "To work towards further convergence of views on the questions included in its previous mandates, in particular, within the areas of TCE and TK, on the Lists of Issues agreed at its Tenth Session, with a view to making appropriate recommendations to the General Assembly".[46] A difference in point of view existed as to whether or not this

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[44] For further information on the accreditation procedure, see http://www.wipo.int/tk/ en/igc/index.html#accreditation. Details of the Fund, its operation, and the application procedure, are fully set out at http://www.wipo.int/tk/en/ngoparticipation/ voluntary_fund/index.html.

[45] WIPO, Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, WO/GA/32/7, 20 July 2005, at p. 1.

[46] WIPO, Decisions of the Eleventh Session of the Committee, 3–13 July 2007,

additional wording formally became part of the renewed IGC's mandate or was merely a related agreed statement on the part of the IGC. The General Assembly endorsed the recommendation made to it by the IGC.[47] The IGC's mandate has, therefore, been renewed for the 2008–2009 biennium.

2.7 What Future for the IGC? Can It Meet Indigenous Peoples' Demands?

Many are impatient with the progress being made by the WIPO IGC. The issues at stake are complex, and views on a range of questions – from the suitability of WIPO taking on this issue to the content and legal nature of any legal instrument that may be developed by WIPO – are varied, as already alluded to. The debate does not always break down along classic North–South lines, as many States from all regions have not yet worked out their domestic, let alone regional and international, positions. While many States seem clear on what they do *not* want, few seem as clear on what they *do* want. A recent high-profile Asian-African Forum on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, held in Bandung, Indonesia to "achieve greater collaboration and coordination among [countries of Asia and Africa] towards formulating common approaches and positions [in the WIPO IGC]", managed only to issue a somewhat irresolute declaration, illustrating the bewildering complexity of the issues even for the countries who are the strongest *demandeurs* for rapid progress[48] (in fairness, it should be pointed out that the Bandung meeting took place under the auspices of a "New Asia–Africa Strategic Partnership" that includes countries such as Singapore, Japan and the Republic of Korea which are not necessarily *demandeurs*). Even among the indigenous participants there are diverse views.

Contributing perhaps to slower than anticipated progress – and the resulting impatience – is conceptual uncertainty in the minds of some as to the distinctions between the *preservation* (or, safeguarding) of living heritage, the *protection* of intellectual creativity against misappropriation and misuse (and for commercial exploitation, if so desired) and the *conservation* of biodiversity. The ambiguity inherent in the word "protection" has already been alluded

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Geneva, available at http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_www_81852.doc.

47 All the reports, documents and other publications referred to in the article are available from the WIPO Secretariat, and on the WIPO website at http://www.wipo.int/tk/en. All are available in English, French and Spanish, and some also in Arabic, Chinese and Russian.

48 Bandung Declaration, available as WIPO document WIPO/GRTKF/IC/11/12, 28 June 2007.

to earlier.[49] Many delegations' calls for the "protection" of TCE mask therefore diverse policy goals and IP-related objectives. For examples: delegations refer to protection of TCE for the economic benefit of the State and/or communities; the preservation of cultural traditions, including their protection against commercialization; the maintenance of intangible cultural heritage as the "common heritage of humanity"; and, the promotion, development and management of TCE towards stimulating local creativity and sustainable development.[50] It should be clear that IP principles and measures are only intended for achieving some of these objectives. In addition, for some, calls for the protection of TCE and TK are simply tactical and are intended to provide negotiating leverage on other issues and in other forums. This confusion has fed uncertainty as to which intergovernmental forum should be dealing with which issue, and a certain amount of playing one forum off against another ("forum shopping"). In reality, however, there should be no competition between different forums – each addresses a distinct facet of the overall preservation, protection and conservation of the natural and cultural heritage, and, working complementarily, can contribute towards an eventual comprehensive and coherent solution.[51] A further complication in the work of the IGC is its simultaneous treatment of three themes, which are related but which also raise their own distinct policy and legal questions, namely genetic resources, traditional knowledge and TCE. It would promote clarity and an understanding of the issues if the three themes could be further disentangled from each other only to facilitate management of the discussion. In view of the holism with which indigenous peoples view their natural and cultural heritage, this may be politically unavoidable, however. On a larger canvas, a healthily robust debate within WIPO and elsewhere on how best knowledge and creativity should be generated, made accessible, regulated and used, is marked by competing views amidst technological advances, social transformations and shifting political interests. This provides an interesting but unsettling backdrop on which the work on the protection of TCE and TK is projected. This point is touched upon again below when discussing the "public domain".

Yet, there has been valuable progress of a more low-key and technical nature, including draft recommendations of the recognition of TK within the patents system for "defensive" protection purposes;[52] the inclusion of TK-related

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49 See also Prott, *supra* note 10.

50 South Africa, Indigenous Knowledge Systems Policy, also published as WIPO/GRTKF/IC/9/11, 2 March 2006.

51 See Martin A. Girsberger's contribution to this volume.

52 See documents WIPO/GRTKF/IC/5/6, 14 May 2003, and WIPO/GRTKF/IC/11/7, 6 June 2007.

publications as "prior art";[53] options as to patent disclosure requirements that are relevant to genetic resources and TK that are used in patented inventions;[54] a draft toolkit for identifying the IP implications of documenting TK;[55] standards for the documentation of codified traditional medicinal knowledge;[56] resources related to managing IP options when documenting, recording and digitizing intangible cultural heritage;[57] and a database of IP-related provisions used in agreements related to access to and benefit-sharing in genetic resources.[58] IGC delegates have also highlighted that the IGC's work has led to several local, national and regional initiatives, with the IGC's working documents and draft instruments being considered useful resources as guidance for community, national and regional consultations and legislative and policy initiatives. The IGC also acts as an international forum where cases of alleged misappropriation can be brought to international attention.

Early parts of this article referred to concerns that the aspirations and perspectives of indigenous peoples would be dissipated if not absorbed within IP-focused discussions. In brief the concerns expressed by some indigenous and local communities are that measures which provide IP-like protection for TCE would undermine their customary and traditional systems. Any new instrument, they argue, should recognize the holistic nature of their knowledge systems, their right to control their natural resources, the right to self-determination and their customary laws. Certainly, the WIPO IGC is not able nor intended – structurally, politically or technically – to address all these concerns in a comprehensive, holistic and coherent way.[59]

However, the work of the WIPO IGC has launched an important and ongoing re-evaluation of core IP concepts such as "authorship", "originality", "fair use" and the "public domain" and prompted fresh contemplation of time-honoured principles relating to fixation, formalities and limitations and exceptions. While TK and TCE were not on WIPO's agenda a mere ten years ago, they are now at the epicentre of IP policy-making. The IGC's work has opened

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53 See the references at http://www.wipo.int/tk/en/tk.

54 Anil K. Gupta, *WIPO-UNEP Study on the Role of Intellectual Property Rights in the Sharing of Benefits Arising from the Use of Biological Resources and Associated Traditional Knowledge*, Geneva: WIPO and UNEP, 2004.

55 Document WIPO/GRTKF/IC/5/5, 1 April 2003.

56 Document WIPO/GRTKF/IC/4/14, 6 December 2002.

57 See WIPO's Creative Heritage Project at http://www.wipo.int/tk/en/folklore/culturalheritage/index.html. With regard to the use of new technologies by indigenous communities, which the Creative Heritage Project seeks to support through IP advice, see Mira Burri-Nenova's contribution to this volume.

58 See http://www.wipo.int/tk/en/databases/contracts.

59 South Centre and CIEL, *supra* note 43.

IP policy development to a wide range of new interest groups, including an emerging "indigenous public",[60] with the IGC becoming

> an important forum […] to recognize, protect, and promote the creativity and innovation of peoples who have traditionally been excluded from or otherwise failed to benefit from the conventional systems of IPRs. The lively participation of indigenous peoples and NGOs representing the interests of rural peoples, women, the disabled, traditional healers, farmers, consumers, and traditional artisans as well as food security, environmental and human rights interests have worked to bring a diverse set of new interests and agendas into international IPR negotiations.[61]

So, perhaps rather than IP overwhelming and muting the aspirations and perspectives of indigenous peoples, they are influencing and transforming IP policy development from within. This is, however, not to ignore disparities between the aspirations of many indigenous peoples and a formalized IP-centred process such as the IGC, nor the profound social, economic, cultural and political issues at stake for them. Only indigenous peoples themselves can decide whether to remain involved in such a process and whether or not, in addition to other approaches, to make use of IP-based approaches to meeting their needs.

3. KEY CONCEPTUAL, POLICY AND LEGAL QUESTIONS

The WIPO IGC has established a "List of Issues" related to TCE, which is intended to guide future discussions, as described earlier. The list, contained in Annex 2 to this volume, comprises most of the key issues any policy tool or legal instrument would need to address in relation to IP and the protection of TCE. This chapter will only discuss two of the issues briefly, these issues being interlinked and particularly pivotal.

The first issue relates to the definition of TCE that should receive protection. This points to a key conceptual uncertainty lying at the centre of the discussion, namely what exactly is a "traditional" cultural expression? The second issue is the scope of protection, in other words, which acts, if any, in respect of TCE should be regarded as illegal?

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[60] Jane Anderson, "Access and Control of Indigenous Knowledge in Libraries and Archives: Ownership and Future Use", Paper for *Correcting Course: Rebalancing Copyright for Libraries in the National and International Arena* American Library Association and the MacArthur Foundation, Columbia University, New York, 5–7 May 2005, at p. 19.

[61] Coombe, *supra* note 29, at pp. 812–813.

3.1 What Is a "Traditional" Cultural Expression?

As traditional cultures evolve and as communities and individuals continually express themselves in new and adapted ways, how and by whom are TCE developed? An answer to this question seems core to the resolution of other key issues, such as the beneficiaries of protection (including questions related to the role of individuals in the creation and custodianship of TCE), the nature of the protection to be afforded TCE (including whether follow-on creations and other derivative productions should be protected as TCE), and the precise interplay between any *sui generis* form of protection for TCE and copyright protection for "other" cultural expressions. These are complex questions and this article does not pretend to answer them.

"Traditional cultural expressions" may range from truly old and preexisting materials that were once developed communally or by "authors unknown", through to their most recent and contemporary expressions, with an infinite number of incremental and evolutionary adaptations, imitations, revitalizations, revivals and recreations in between, some of which may still identify a particular culture or community and carry religious or other meanings, while others may have no relevance to their maker other than their sale value. Are any or all of these "traditional cultural expressions"?

These questions go to the heart of theories and conceptions of origination and creativity, and in particular, the role of the individual and the meaning of "originality" in "traditional" creativity.[62] Do or can individuals create TCE? If so, are they to be regarded as "authors" in the copyright sense? May it be said then that all TCE had, at some point, an identifiable "author", and were subsequently adopted, maintained and recreated by a community? If so, are TCE not simply productions in respect of which the time period for protection has lapsed (tending towards a position that they should not be protected anew)? Or, are there characteristics of TCE that disqualified them from protection under current IP rules (tending towards an argument that their protection may be justifiable at least on grounds of equity)?

The nature of traditional cultures and how they evolve and develop is beyond the scope of this article,[63] but it seems that a deeper examination of

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[62] See Valdimar T. Hafstein, "The Politics of Origins: Collective Creation Revisited" (2004) Journal of American Folklore 117:465, pp. 300–315.

[63] See generally Michael Brown, *Who Owns Native Culture?,* Cambridge, MA: Harvard University Press, 2003; Hafstein, *supra* note 62*;* Scafidi, *supra* note 5; Farley, *supra* note 5; Peter Shand, "Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion" (2002) Cultural Analysis 3, pp. 47–88; Sherylle Mills, "Indigenous Music and the Law: An Analysis of National and International Legislation" (1996) Yearbook for Traditional Knowledge Music 28, pp. 57–86; Carl Lindahl, "Who Wrote 'O Death'", unpublished manuscript, on file with

these questions may help to identify more precisely the key characteristics of TCE, what exactly should be protected and why, and which legal remedies may be necessary.

3.2 Identifying Core Characteristics of TCE

In common with the subject matter of most forms of IP protection, and unlike unique cultural objects, TCE are reproducible and susceptible to copying, adaptation and commercial exploitation. Yet, unlike many forms of conventional IP, many TCE derive their significance and worth from community recognition and identification, and not an individual's mark of originality. In addition, although reproducible, unauthorized copies of TCE will often not be regarded as "authentic" from a community perspective, although outsiders may not know this.

"Traditional" creativity is often marked by fluid social and communal creative influences.[64] Many expressions of folklore are handed down from generation to generation, orally or by imitation. Lyrics, notes of songs, proverbs, designs, fables and the like often develop anonymously and circulate within the oral traditions of communities for many years (as motifs, "floating lyrics" or "formulas"[65]). While not attributable to any known individual and not yet taking on an identifiable and distinctive form, they are nonetheless marked culturally and have a communal character.

Expressions of traditional cultures reflect and identify a community's history, cultural and social identity, and its values. They often carry religious and spiritual meanings, and perform various spiritual, social and cultural functions (linked, for example, to initiation, hunting, marriage, birth and death rites and rituals), although they may also have decorative purposes.

What TCE *denote* by way of their external forms is reproducible and subject to exploitation. Yet the beliefs, values and meanings they *connote* are at least as important to the affected communities. As the American Folklore Society has noted, the commoditization and privatization of the values associated with TCE may run counter to the rights and desires of their holders.[66] A

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author; Burt Feintuch (ed.), *The Conservation of Culture: Folklorists and the Public Sector*, Lexington, KY: University Press of Kentucky, 1988; UNESCO and WIPO, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (Model Provisions) of 1982, Geneva: WIPO, 1985, *Travaux préparatoires*.

64 See Hafstein, *ibid*.

65 Lindahl, *supra* note 63. Also, personal communications with Michael Taft, Head of the Archive of Folk Culture, American Folklife Center.

66 Paper issued by AFS at Fourth Committee Session. See also Article 8 UNESCO Declaration on Cultural Diversity of November 2001.

challenge is how to balance IP protection of expressions of traditional cultures (including for commercial purposes, if so desired by communities), maintenance of respect for the cultural and spiritual values they connote and preservation of the social processes and cultural environments through and in which they are created.

While the cultural heritage of a community lies at the heart of its identity and links its past with its present and future, it is also "living" – it is constantly recreated as traditional artists and practitioners bring fresh perspectives and experiences to their work. Tradition can be an important source of creativity and innovation for indigenous, local and other cultural communities, as well as for local and foreign industry interests.

Over time, individual composers, singers and other creators and performers might, even subconsciously, call these motifs, "floating lyrics" and "formulas" to mind and reuse, rearrange and recontextualize them in a new way.[67] The resulting "expression" would often be a new "work" for copyright purposes. There is therefore a creative and dynamic interplay between collective and individual creativity, in which an infinite number of variations of traditional cultural expressions may be produced, both communally and individually.

In this dynamic and creative context, it is often difficult to know from an IP perspective what constitutes independent creation, since all artists in a community dip into the commonly held pool of lines, tunes and proverbs, and may also be influenced by each other's use of these. The question for IP is whether or not these commonly held "floating lyrics" should be the subject matter of protection.

It seems that even where an individual may be regarded by IP law as the author of a tradition-based creation, it could still be regarded from a community perspective as the product of social, communal and even spiritual creative processes. The essential characteristics of such "individual" yet traditional creations are that they still contain motifs, a style or other items that are characteristic of and identify a tradition and a community that bears it, and that they are created or performed by individuals recognized by the community as having the right, responsibility, or permission to do so. Thus, individually created but tradition-based "works" and performances are not "owned" by the individuals but "controlled" by the community, usually according to indigenous and customary legal systems and practices.[68]

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67 Lindahl, *supra* note 63.

68 Intervention of the Tulalip Tribes of Washington, Committee Fifth Session of the WIPO IGC (WIPO/GRTKF/IC/5/15, 4 August 2003, at para. 56); Mills, *supra* note 63; Karen M. Duffy, *Carry It on for Me – Tradition and Familial Bonds in the Art of Acoma Potter,* Thesis (PhD), Indiana University, 2002, at p. 211.

It would appear, therefore, that the essence of TCE is that, whether one is speaking of the oldest, preexisting and collective expressions of a traditional culture, or whether of the most recent adaptations, performances and variations thereof, they are regarded by a community as identifying and reflecting its traditions, values and beliefs, and thus as being "owned" by that community. Expressions of culture, whether "old" or "contemporary", are "traditional", therefore, when they still reflect and identify the traditions, values and beliefs of a community, and are created or performed by persons communally recognized as having the right, responsibility or permission to do so.

In summary, therefore, and drawing also from national and regional laws, it seems that generally speaking TCE may be said to be (i) handed down from one generation to another, either orally or by imitation, (ii) reflective of a community's cultural and social identity, (iii) consist of characteristic elements of a community's heritage, (iv) 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) often made primarily for religious and spiritual, not commercial, purposes, and (vi) constantly evolving, developing and being recreated within the community.

3.3 The Draft IGC Provisions

With this background, the key elements of the draft provision on this issue being discussed by the IGC read as follows (see draft Article 1, Annex 1 to this volume):

> "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested […] [and are]
> (aa) the products of creative intellectual activity, including individual and communal creativity;
> (bb) characteristic of a community's cultural and social identity and cultural heritage; and
> (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

These are the suggested criteria by which to determine whether a TCE ought to be protectable or not. These criteria emphasize that TCE, in order to be protected, should be intellectual creations and therefore "intellectual property", including both individual and communal creativity. Differing versions, variations or adaptations of the same expression could qualify as distinct TCE if they are sufficiently creative (much like different versions of a work can qualify as copyright works if they are each sufficiently original).

TCE should have a linkage with a community's cultural and social identity and cultural heritage. This linkage is embodied by the term "characteristic" which is used to denote that the expressions must be generally recognized as representing a communal identity and heritage. The term "characteristic" is intended to convey notions of "authenticity" or that the protected expressions are "genuine", "pertain to" or an "attribute of" a particular people or community. Both "community consensus" and "authenticity" are implicit in the requirement that the expressions, or elements of them, must be "characteristic": expressions, which become generally recognized as characteristic, are, as a rule, authentic expressions, recognized as such by the tacit consensus of the community concerned.[69] The word "authenticity" itself is not used, because it is a theoretically problematic concept.[70]

The notion "heritage" is used to denote materials, intangible or tangible, that have been passed down from generation to generation, capturing the intergenerational quality of TCE; an expression must be "characteristic" of such heritage to be protected. It is generally considered by experts that materials which have been maintained and passed between three, or perhaps two, generations form part of "heritage".[71] Expressions, which may characterize more recently established communities or identities, would not be covered.

The role of individuals in the creation of TCE is a source of much discussion in the IGC and in particular in national and local consultations. As discussed earlier, many TCE are handed down from generation to generation, orally or by imitation. Over time, individual composers, singers and other creators and performers might call these expressions to mind and reuse, rearrange and recontextualize them in a new way. There is, therefore, a dynamic interplay between collective and individual creativity, in which an infinite number of variations of TCE may be produced, both communally and individually.

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69 See Commentary to UNESCO and WIPO, *supra* note 63.

70 See generally the discussions at "Folklore, Aesthetic Ecologies and Public Domain", University of Pennsylvania, 2–3 April 2004 and the Eighth Congress of Société Internationale d'Ethnologie et de Folklore/Third Congress Association d'Anthropologie Mediterraneenne, Marseille, 28 April 2004; personal communications with, amongst others, Dorothy Noyes, Associate Professor of Folklore, Ohio State University and Valdimar Hafstein, Researcher, Reykjavik Academy, Iceland and Adjunct Lecturer in Ethnology and Folklore, University of Iceland.

71 For example, discussions with Professor Edi Sedyawati and others at National Consultation Forum on Intellectual Property and Traditional Knowledge and Cultural Expressions/Folklore, Indonesia, 30 November–1 December 2004 (notes on file with author) and UNESCO Expert Meeting on "Inventorying Cultural Heritage", Paris, 17–18 March 2005 (notes on file with author).

The individual plays a central role in the development and re-creation of traditional cultural expression. In recognition of this, the description of TCE in draft Article 1 includes expressions made by individuals. In order to determine what is or what is not a TCE, it is therefore not directly relevant whether the expression was made collectively or by an individual. The Inuit Circumpolar Conference (ICC) has argued in submissions to the IGC that even a contemporary creative expression made by an individual (such as, for example, a film or video or a contemporary interpretation of preexisting dances and other performances) can be protected as a TCE, provided it is characteristic of a community's cultural and social identity and heritage and was made by the individual having the right or responsibility to do so in accordance with the customary law and practices of that community. This is the approach followed in the current draft, based on such comments. However, many argue that contemporary TCE made by individuals are not TCE *stricto sensu*. As far as the *beneficiaries of protection* are concerned, however, the primary focus of the draft IGC provisions is on communal beneficiaries rather than on individuals (see draft Article 2 of the provisions). Thus, in sum, the draft provisions recognize that individuals may create TCE but would recognize only communities as rights holders and/or beneficiaries of protection, in line with the very nature of a TCE as opposed to a conventional creative work.

Several comments have been made by IGC participants on this draft Article. Cogent questions have been raised, including:

- Given the iterative, evolving and dynamic nature of TCE, what would the relationship be between the *sui generis* protection of TCE and the copyright and related rights protection of "non-traditional" cultural expressions? Why should "non-traditional" cultural expressions (such as the works of Shakespeare) fall into the public domain but not TCE?
- How should TCE that have become part of the national traditional culture of a country be treated?
- What meanings in practice should be given to key terms and phrases such as "tradition(al)", "communities", "heritage", "handed down from generation to generation" and "characteristic"?
- How best should the link or association between a TCE and a particular community be determined? In which circumstances would such a link be regarded as broken?
- What is meant in this context by the "public interest" and how would the "public interest" be best served?

4. WHAT SCOPE OF PROTECTION?

There is wide agreement within the IGC that TCE should be protected against "misappropriation". However, when is the use of a TCE "misappropriation"? As Canada pointed out at the most recent session of the IGC,

> […] communities and individuals around the world have historically drawn upon and co-mingled materials, ideas and other aspects of culture from one another. In some instances, these actions could be considered to be positive acts of 'appropriation' for which individuals and communities would not express concern. However, there could be other cases where individuals and communities could view such acts in relation to TCE as "misappropriation".[72]

The term "misappropriation" means different things to different people.

What forms, if any, of special protection to confer upon TCE turns also upon what objectives that are sought to be achieved. As alluded to earlier, the discussions in the IGC reveal that participants have a range of specific IP-related objectives in mind, which are not necessarily mutually exclusive:

- preventing access to and use of TCE;
- granting a positive right to exploit TCE;
- ensuring equitable benefit-sharing from the use of TCE;
- promoting creativity and innovation based on TCE;
- preventing the unauthorized obtaining of IP rights over TCE, and/or derivatives thereof ("defensive protection").

Two issues are especially relevant to a consideration of the scope of protection, namely the "public domain" question and the treatment of derivative works. These questions link in turn to the draft IGC provisions dealing with the rights to be granted in respect of TCE (Article 3), exceptions and limitations to those rights (Article 5), formalities (Article 7) and the term of protection (Article 6).

4.1 Cultural Expressions in the "Public Domain": Private and Public Knowledge

An integral part of developing an appropriate policy framework within which to view IP protection and TCE is a clearer understanding of the role, contours and boundaries of the so-called "public domain".[73] The key questions here are

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[72] Intervention of Canada at IGC, 11 July 2007, as reported in WIPO/GRTKF/IC/11/15 Prov., 15 October 2007, at para. 146.

[73] See WIPO/GRTKF/IC/5/3, 2 May 2003, at paras. 22–33.

perhaps: should enforceable IP rights be established over TCE that are currently deemed to be in the "public domain"? Does the protection already afforded by IP to contemporary interpretations of traditional cultures adequately strike the right balances and meet the needs of traditional communities and the general public? Which approach offers the greatest opportunities for creativity and economic development, best serves cultural diversity and cultural preservation, promotes a robust and rich public domain and addresses the concerns of the custodians of traditional cultures?

The term "public domain" is used here in the sense in which the term is used in copyright to refer 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, subject to respect for moral rights.[74] This conventional notion of the public domain contains:

(i) IP for which the term of protection has run out;
(ii) IP that has been forfeited or unclaimed; and
(iii) those intangible goods that fall outside the scope of protection of IP laws.[75]

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. Even public domain works remain protected by moral rights – the rights to integrity and to be acknowledged as the author, which can be particularly important to indigenous peoples.

How does this conception of the "public domain" align itself with TCE? One can draw a distinction between (i) preexisting, 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 preexisting traditional culture or folklore. The former is generally trans-generational, old and collectively "owned" by one or more groups or communities. It is likely to be of anonymous origin. Expressions of this "pre-existing traditional culture" are generally not protected by current copyright laws and are treated, from the

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[74] See Jessica Litman, "The Public Domain" (1990) Emory Law Journal 39:4, pp. 965–1024. See also Rosemary Coombe, "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2003) DePaul Law Review 52:4, pp. 1171–1192; and Raquel de Roman Perez, "Comparison between the Public Domain System and the Model of the WIPO Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore" (2007) Revue Internationale du Droit d'Auteur 212, pp. 67–103.

[75] See William van Caenegem, "The Public Domain: Scientia Nullius" (2002) European Intellectual Property Review 24:6, pp. 324–330.

perspective of the IP system, as part of the "public domain". Many national IP laws follow this approach.[76]

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 in respect of which there is generally a living and identifiable creator (or creators). Such a contemporary production may include a new interpretation, arrangement, adaptation or collection of public domain preexisting cultural heritage and expressions, or even their "repackaging" in the form of digital enhancement, restoration, colorization and the like. Contemporary, tradition-based expressions and representations of traditional cultures are generally protected by existing copyright, as they are sufficiently "original". 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 who is not a member of the relevant cultural community in which the tradition originated. Once the protection afforded to these "new" TCE expires, they fall into the "public domain".

While this distinction may be artificial because of the "living" and cumulative nature of cultural heritage, it is useful within an IP analysis (much like the otherwise artificial distinction between TCE and "traditional knowledge").

But this "public domain" is characterized by indigenous representatives and those speaking for local communities as an artificial construct of the IP system, which does not take into account private domains or shared intellectual commons established by customary and indigenous laws. According to this view, the public domain is not a concept recognized by indigenous peoples. As TCE had never been protected under IP they could not be said to have entered any "public domain". The position of the Tulalip Tribes of Washington State, USA has been particularly lucid on this point: "… open sharing does not automatically confer a right to use the knowledge [of indigenous peoples]. […] TCE are not in the 'public domain' because indigenous peoples had failed to take the steps necessary to protect the knowledge in the Western IP system, but from a failure of governments and citizens to recognize and respect the customary laws regulating their use".[77] Furthermore, they question whether the "public domain" status of cultural heritage offers the greatest opportunities for creation and development. Should all historic materials be denied protection simply because they are not recent enough? Merely providing IP protection for contemporary, tradition-based cultural expressions

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[76] For instance, Australia, Belgium, Canada, Colombia, Czech Republic, Italy, Netherlands, Honduras, Japan, Kyrgyzstan, Republic of Korea, the Russian Federation and Vietnam.

[77] Tulalip Tribes' position reproduced in WIPO/GRTKF/IC/5/15, 4 August 2003, at pp. 27–28.

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 whose creativity resides in their traditions. The "public domain" construct can be used to justify disentitling indigenous and traditional communities' rights to their creations and innovations.

On the other hand, it is argued with equal conviction that a cultural "commons" (a form of public domain) serves important legal and cultural objectives. It is through sharing and contemporary adaptation and arrangement that cultural heritage is kept alive and transmitted to future generations.[78] As several States such as Canada, the States of the European Union and Japan have suggested in the IGC, the public domain character of folklore does not hamper its development – to the contrary, in line with the "forward-looking" character of IP protection, it allows for new creations to be derived from or inspired by it at the hands of contemporary artists; and 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.[79] According to this view, neither members of the relevant cultural communities nor the cultural industries would be able to create and innovate based on cultural heritage if private property rights were to be established over it. By overprotecting cultural expressions, the public domain diminishes, leaving fewer works to build on. Therefore, indigenous artists wishing to develop their artistic traditions by reinterpreting traditional motifs in non-traditional ways, and wanting to compete in the creative arts 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. Once again, this is a complex debate, which this article does not seek to resolve.

Indigenous peoples' claims that there is "no public domain in traditional knowledge"[80] superficially lie at right angles to calls for increased access to knowledge ("a2k") and calls for a richer, more accessible and robust public

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

79 For example, comments of European Community and its Member States and Canada on WIPO document WIPO/GRTKF/IC/4/3, 20 October 2002.

80 Tulalip Tribes, Statement to the Fifth Session of the WIPO IGC, July 2003, available at http://www.wipo.int/tk/en/igc/ngo/tulaliptribes.pdf.

domain.[81] At the initiative of many developing countries in particular, WIPO has recently adopted a "Development Agenda" which promotes work to *inter alia* "consider the preservation of the public domain […] and deepen analysis of the implications and benefits of a rich and accessible public domain". The a2k movement believes, broadly, that knowledge is essential for many human activities and values, including freedom of expression and information, the exercise of political power and economic, social and personal development.[82] For example, the importance of access to information about biodiversity is widely recognized and several international instruments such as the Convention on Biological Diversity, 1992, promote and facilitate the collection and dissemination of such information. In a similar vein, UNESCO's 2003 Convention for the Safeguarding of Intangible Cultural Heritage obliges States Parties to prepare inventories and lists of intangible cultural heritage in their territories. Many online databases now provide easy access to biodiversity-related and cultural information. But most seem to have been set up with little understanding of issues of access to, control over and ownership of the information they hold, and the concerns of indigenous peoples seem to have been overlooked. Calls for greater access to knowledge seem at times to regard all information and knowledge as inherently "homeless". Jane Anderson and Kathy Bowrey point out that "despite pretensions as a social movement, the global humanitarianism of furthering access to knowledge has progressed with no Indigenous involvement, consent or inclusion".[83]

The two positions are not necessarily irreconcilable, and "IP protected" and "public domain" are not necessarily mutually exclusive binary options. Both indigenous peoples and the a2k movement start from the premise that the conventional IP system is inappropriate and dysfunctional and each seeks alternative models for how access to and use of knowledge and creativity are regulated. However, indigenous peoples argue for a restoration and recognition of lost rights based on their customary laws, while those calling for a more robust public domain would probably resist new rights over what is currently "public domain" TCE and TK. However, the "knowledge-sharing spaces" indigenous peoples call for and the "commons" the a2k movement seeks are perhaps not that distinct. The knowledge-sharing spaces of indigenous peoples

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[81] See e.g. Adelphi Charter at http://www.adelphicharter.org.

[82] Tony Vetter and Eddan Katz, "Access to Knowledge in the Information Society", Draft for Discussion, International Institute for Sustainable Development, September 2007, at p. 4.

[83] Jane Anderson and Kathy Bowrey, "The Imaginary Politics of Access to Knowledge: Whose Cultural Agendas are Being Advanced?" draft, on file with author, at p. 11; published in a revised version in (2006) Australasian Intellectual Property Law Resources 13.

allow information to be freely shared subject to compliance with specific cultural norms and practices. [84] Information shared freely within a knowledge-sharing space does not imply that it becomes part of the "public domain".[85] Similarly, "open access" models encourage the sharing of information and knowledge, subject to respect for an author's control over the integrity of the work and the right to be acknowledged and cited.[86] Synergies and distinctions between these approaches could be explored further to avoid a fragmentation of IP policy development on these issues. Further conceptual cross-pollination and bridge building along these lines might be useful.

4.2 Derivative Works

Some of the legal and cultural policy issues relevant to IP and TCE pivot on whether or not to grant a right of adaptation in respect of TCE, and on appropriate exceptions and limitations to rights in TCE.

In copyright, an author, or subsequent rights holder, normally has the exclusive right to control the making of adaptations of the work, being works based upon the preexisting work and including any form in which a work may be recast, transformed or adapted. Examples would be translations, revisions or adaptations. These are sometimes together referred to as "derivative works". Although a third party needs the consent of the author to make a derivative work based upon the author's work, derivative works may themselves qualify for copyright protection if sufficiently original.

Even works derived from materials in the public domain can be copyright protected, because a new interpretation, arrangement, adaptation or collection of public domain materials, or even their "repackaging" in the form of digital enhancement, colorization and the like, can result in a new distinct expression, which is sufficiently "original". This clarifies why a contemporary literary and artistic production derived from or inspired by traditional culture that incorporates new elements or expression can be considered a distinct, original work and is thus protected.

However, the protection afforded to such derivative works vests only in the new material or aspects of the derivative work. This is referred to as "thin copyright," referring to the thin layer of protectable elements in an otherwise unprotectable work, where the remaining elements are dictated by functionality, belong to another author or are in the public domain. The underlying idea

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[84] Margaret Raven, "Rethinking the Public Domain: A Challenge for Knowledge-Sharing Societies in the Information Age" (2005) Work in Progress 17:2, pp. 22–23, at p. 23.

[85] Tulalip Tribes, *supra* note 80.

[86] Vetter and Katz, *supra* note 82, at p. 11.

is that although an adaptation may be copyrightable, it cannot serve to either take something out of the public domain that was already in the public domain, or diminish an earlier author's rights.[87] Thus, aside from new material that belongs to the author, a derivative work may also comprise material that already belongs to another rights holder or material in the public domain. The copyright or public domain status, as the case may be, of this material is unaffected.

While a copyright holder's exclusive rights normally include a right to authorize or prevent the adaptation of the protected work, this does generally not prevent other creators from being inspired by other works or from borrowing from them. Copyright supports the idea that new artists build upon the works of others and it rewards improvization. The challenge is, however, to distinguish unlawful copying and adaptation from legitimate inspiration. In the area of TCE, many of which are the product of cultural exchange and influence, and where protection is often sought for the "style" of a TCE, this challenge is especially acute.

4.3 The Draft IGC Provisions

Taking these factors into account and from within the broader and more complex policy context as described briefly above, Article 3 of the draft IGC provisions is a first attempt to strike some sort of a balance. The Article is a draft and has received numerous comments since it was first published in this form for the eighth session of the IGC in June 2005, many of which are critical but many of which are also supportive.

Annex 1 to this volume contains the whole Article 3, so here it is simply summarized. TCE would be protected at three optional levels:

- TCE "of particular cultural or spiritual value or significance", if registered or notified, would be protected against a wide range of forms of reproduction and dissemination in the absence of the free, prior and informed consent (FPIC) of the community concerned. In respect of TCE that are literary and artistic productions, the scope of protection is based on copyright and related rights principles. In the case of TCE that are signs, symbols and other marks, the scope of protection is based on the kind of protection generally afforded to marks.
- Other TCE (which are not registered or notified) would be protected only through regulation of how they may be used by third parties. Use by third parties would not require FPIC. Such uses should, however, be

[87] Farley, *supra* note 5, at footnote 85.

made in such a way that ensures the relevant community is identified, prevents distortion, mutilation or other modification of, or other derogatory action, as well as false, confusing or misleading linkages with the concerned community, and makes provision for equitable remuneration or benefit-sharing when the use or exploitation is for gainful intent.
- Secret TCE would be protected against unauthorized disclosure, subsequent use, and the acquisition and exercise of IP rights by third parties.

By not, as a general rule, granting a right of prior authorization (referred to in the draft as a right of FPIC) in respect of TCE, the draft article seeks to recognize that cultural vitality, creativity and diversity stem in large measure from the freedom of authors and performers, including those from within indigenous and local communities, to draw from and be inspired by the cultural expressions of others. No formalities for this level of protection are required. TCE should not be used unfairly or in derogatory or misleading ways, however, drawing from moral rights and unfair competition principles, and, should there be gains made from their use, a reasonable amount should be shared with the relevant community, a kind of compulsory licensing scheme as found in copyright.

However, some TCE should not be used at all, such as sacred symbols, rituals, anthems or designs. These can receive protection based on the prior and informed consent principle – the right to say "no". However, in the interests of transparency and certainty, such TCE should be registered or notified so that the general public is aware of which TCE are subject to prior and informed consent and so that other communities claiming similar rights have the opportunity to object and for the question to be resolved in a transparent manner. This level of protection draws, therefore, upon the registration mechanisms as found in patent and trademark laws. Such registration is optional and would secure a higher level of protection. Non-registered TCE remain protected but at a less high level. The office receiving applications for registration should seek to resolve disputes as to which communities are entitled to register which TCE (see draft Article 7).

As mentioned, many useful comments on this article have been made, and it remains to be seen whether it eventually forms part of any new law in this area. Based on the comments received, a number of improvements to the article could be made, but it has not been possible to make any changes to the Article since it was first published because of disagreements among IGC participants as to the desirability of the draft provisions on TCE as a basis for the work of the IGC, as referred to above.

5. CONCLUSIONS

Claims for the protection of TCE are sometimes based upon social, cultural and economic values that differ from those on which the current IP system is founded. Yet, to the extent that TCE embody creativity and indigenous peoples' wish to be able to prevent their misappropriation, the judicious use of IP principles within broader development strategies can be useful.

However, the protection of TCE by IP-like measure raises a number of profound cultural, political, trade-related, legal and social questions. The issues before the WIPO IGC are politically sensitive and often bewildering in their complexity. The IGC has, however, made significant progress in clarifying the IP dimension of the "protection" of TCE, stimulating national and regional initiatives, drawing a new range of stakeholders into IP policy-making and overseeing the development of a range of practical tools. Whether it will also succeed in developing new international law remains to be seen.

Concerns as to the effects of vesting new wide-ranging collective property rights in expressions of traditional cultures on creativity and cultural vitality give cause for reflection. In the end, perhaps one or two focused norms addressing the most acute IP-related problems, such as the unauthorized use of sacred TCE (TCE of "particular cultural or spiritual value or significance"), the use of TCE without proper acknowledgement of source and the derogatory and distorting use of TCE, might fill the normative gap. Norms such as these, which are deeply rooted in IP values and principles, could but need not necessarily be implemented in IP law. Working in tandem with laws and programs for the preservation of intangible cultural heritage and building on from the protection for contemporary adaptations, recordings, performances and compilations of TCE already provided by existing IP systems, these few targeted norms might just complete the picture.

"It's a Small World" is the legendary boat ride at Disney theme parks, which takes one on a musical tour of nations, in which hundreds of international dolls all dance to and sing the famous "It's a Small World (After All)".[88] Inuits, Africans, Cossacks, Native Americans and Tahitians smile and hail you as you glide past. The first verse goes as follows:

> It's a world of laughter
> A world of tears
> It's a world of hopes
> And a world of fears
> There's so much that we share
> That it's time we're aware
> It's a small world after all

[88] Written in 1964 by Robert and Richard Sherman.

Accompanying my daughter there some years ago, I could not but think of some of the issues related to the protection of TCE. How would new IP-like property rights over TCE affect creativity in a derivative culture? When does legitimate cultural borrowing become "misappropriation"? Which approach would work best to foster cultural diversity in this culturally pluralistic and socially, technologically and commercially interconnected world? Should indigenous peoples not receive special protection for their intangible cultural properties? Which approach best preserves the old while fostering the new? In a lighter vein, will "It's a Small World (After All)" one day be a TCE for which perpetual protection will be sought? I did not emerge from the ride any wiser.

8. The lay of the land: the geography of traditional cultural expression

Johanna Gibson

> Through the use of ancestrally inherited designs, artists assert their identity, and their rights and responsibilities. They also define the relationships between individuals and groups, and affirm their connections to the land and the Dreaming.[1]

> You see, the land is not only to cultivate. The land is also for you to be cultivated in as a person. This is why, when the land is in the hands of others, you are only a tool.[2]

1. INTRODUCTION

The relationship between copyright and traditional cultural expressions (TCE) is an uneasy and problematic schema, one which not only locates the interests within the proprietary and objective character of copyright, but also one which shares much with the imperial narration of knowledge that accompanies histories of colonisation and global cartography. Intellectual property laws chart the modern trade routes built upon international knowledge economies. Knowledge is thus inextricably geographically-bound not only for traditional communities but also for the momentum of globalisation.

> The main battle in imperialism is over land, of course; but when it came to who owned the land, who had the right to settle and work on it, who kept it going, who won it back, and who now plans its future – these issues were reflected, contested, and even for a time decided in narrative.[3]

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[1] Wally Caruana, *Aboriginal Art*, London: Thames and Hudson, 1993, at p. 15, as quoted in Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, Geneva: WIPO, 2003, at p. 75.

[2] T. Marcelino, a Guarani farmer from Bolivia, as quoted in UNICEF, "Ensuring the Rights of Indigenous Children", Innocenti Digest 11, October 2003, at p. 2.

[3] Edward W. Said, *Culture and Imperialism*, London: Vintage, 1994, at p. xiii.

The narration of traditional cultural expression within the western social model for recognising and rewarding conventional forms of creativity – copyright – risks a similar colonising effect upon contemporary indigenous and traditional cultural expression. That is, copyright models of dealing with traditional cultural expression potentially jeopardise the full repertoire of expression and language in the broader sense. Traditional cultural expression, in so far as it is inextricably linked to the land and to the language and coherence of a traditional group, emerges as the modern territorial dispute. Language and land are mutually and fundamentally constitutive:

> My rights to use this image arise by virtue of my membership of the land owning group. The right to use the image is one of the incidents arising out of land ownership. […] Aboriginal art allows our relationship with the land to be encoded.[4]

Intellectual property may be of parallel interest, but arguably, it will never be the overriding and defining interest for traditional-knowledge holders. When copyright is useful for traditional cultural expression it is because there is an issue of copyright at stake, but there is no protection of traditional cultural expression as such. The protection is of intellectual property, not traditional knowledge.

The entry-point for this discussion must therefore include a consideration of the relationship between expression and the land, and the relationship between land and the constitution of community subjectivity. Given that this collection is addressing the issues arising with the access to and use of traditional knowledge and TCE in a digital environment, in an almost paradoxical way, that obvious entry-point is land.

2. THE KNOWLEDGE LANDSCAPE

It is critical, in considering the circulation and apportionment of TCE in a digital setting, to recognise that the crucial mechanism of transmission for indigenous and traditional groups is that of tradition. In other words, tradition is not the subject matter of protection, reservation or rationing when examining the negotiation of traditional knowledge; rather, it is the mechanism by which information is transmitted and exchanged. Therefore, tradition is not the object or end in itself, it is a tool for transmitting knowledge in abstract ways similar to the functioning of intellectual property laws and indeed copyright. Copyright is the dominant mechanism by which to access the right to benefit

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[4] Marika Banduk, an indigenous Australian artist speaking about the painting "Djanda and the Sacred Water Hole", as quoted in Janke, *supra* note 1, at p. 11.

from one's creative output.[5] The question is not that of whether tradition as such may be the subject matter of a human right, but whether indigenous and traditional groups will be able to realise the right to benefit in a culturally relevant and appropriate way if that mechanism of tradition is not sustained. Indeed, it is necessary to examine whether copyright and other areas of intellectual property law may at certain points interfere with that right for indigenous and traditional groups.

Crucially, then, the fundamental concern when examining the relationship between TCE and copyright is the conflict between what are arguably two incompatible mechanisms for the transmission and exchange of information and knowledge – that of copyright and that of traditional systems of dissemination and exchange. In dealing with the protection of traditional cultural expression, it is thus necessary to examine the conflicts between two differing and at times opposing systems and the inescapable consequences for cultural diversity and cultural self-determination.

It is in this acknowledgement of tradition as a mechanism rather than an object of protection, that the relevance of land becomes much clearer. Just as copyright, as a mechanism, necessarily must rely upon the characterisation of an object (an expression), similarly traditional knowledge is articulated upon the tangibility of tradition, the recording process of tradition. Those recording processes, however disparate, generally converge upon the tangibility of the land. In this way, the land records the traditional process in belief systems and other aspects of traditional cultural expression otherwise seemingly "uncertain" for the purposes of copyright. In that traditional relationships to knowledge and cultural expression, generally speaking, are articulated upon a relationship to the land, land ownership or guardianship is thus instrumental in recognising interests and achieving relevant and effective protection of traditional cultural expression, that is, stewardship of the land gives rise to the right to knowledge. The use and dissemination of knowledge is characterised upon this relationship to the land.

> The image is associated with a place on Rirratjingu land called Yalangbara (which is at Port Bradshaw south of Yirrkala) and represents the events associated with the Djangkawu that took place there. My rights to use this image arise by virtue of my membership of the land owning group. The right to use the image is one of the incidents arising out of land ownership. […] Aboriginal art allows our relationship with the land to be encoded, and whether the production of artworks is for sale or ceremony, it is an assertion of the rights that are held in the land. The place, Yalangbara, and the particular story of the Djangkawu associated with it do not exist in isola-

[5] Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (CESCR, 993 U.N.T.S. 3, concluded 16 December 1966, entered into force 3 January 1976).

> tion. They are part of a complex or 'dreaming track' stretching from the sea off the east coast of Arnhem Land through Yalangbara, across the land to the west of Ramingining and Milingimbi.[6]

It is land, or territory, that is the anchor or absent in all of these concerns – intellectual property, traditional knowledge and cultural expression, and the digital environment. In other words, the anxiety or trouble for the digital environment, for intellectual property and for traditional knowledge is land or indeed territory. The trouble is perhaps introduced by the very distinct differences in those conceptualisations of territory.

First, as will be explained in this chapter, intellectual property models are circumscribed by the legal, economic and philosophical western traditions of land and land ownership. In particular, with the current momentum towards international harmonisation of the standards and indeed the administration and enforcement of intellectual property laws, local and "seigneurial" knowledge and property is overcome in favour of a globalised cartography articulated upon the territorial loci of nation-states. The internationalisation of intellectual property reemphasises national borders and discredits the seating of knowledge within community. The "feudal" community is overcome by the territorial authorities that drive the operation of globalisation. Global systems, paradoxically, rely upon the very sovereignty of the nation-state:

> [T]he current phase of globalization consists at least partly of global systems evolving out of the capabilities that constituted territorial sovereign states and the interstate system. In other words, the territorial sovereign state, which its territorial fixity and exclusivity, represents a set of capabilities that eventually enable the formal or evolution of particular global systems.[7]

This is relevant not only in considering current intergovernmental discussions of traditional knowledge and cultural expression at the level of the World Intellectual Property Organization (WIPO) and the application of intellectual property law, but also in other areas of international law relevant to the articulation of indigenous interests, which rely similarly upon national capacities to globalise obligations. One of the most significant examples in this regard is the Convention on Biological Diversity (CBD). The CBD is based on national sovereignty over natural resources and aims to provide for the equitable sharing of the benefits derived, thereby in turn reinvigorating national sovereignties with respect to biological and intellectual resources. At the same time, the text recognises the traditional knowledge of indige-

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6 Marika Banduk, as quoted in Janke, *supra* note 1, at p. 11.

7 Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages*, Princeton: Princeton University Press, 2006, at p. 21.

nous and local communities.[8] Despite this recognition of community, which is sustained throughout the document, the CBD nevertheless emphasises the sovereignty of states with respect to the preservation of biological resources, noting that such protection is ultimately the responsibility of states.[9]

Secondly, the translation of traditional knowledge systems within intellectual property models imposes similarly competitive, rivalrous and crowdable notions upon the subject matter itself (not merely the system of protection). The very territorial nature of intellectual property rights maps clearly onto notions of national capacity and resources. Capacity and authority through knowledge is territorially tied to the sovereignty of the nation-state. Intellectual property becomes indexical of a contemporary territorial kingship[10] in the nationalism of the knowledge economy.[11] This continues

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[8] Preamble to the Convention on Biological Diversity (CBD, adopted 5 June 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro, entered into force 29 December 1993) and Article 8(j) CBD.

[9] Preamble to the CBD.

[10] The relationship of modern nationalism to divine authority is useful to respond to in this context. Saskia Sassen explains it drawing upon the historical developments of the French monarchy and the paradoxical invocation of popular sovereignty and nationalism. Sassen (*supra* note 7, at p. 19) writes: "A variety of conditions and decisions established France early as a distinct entity and stimulated a specifically French identity, which included loyalty and patriotism. These developments allowed the formation of an abstract notion of sovereignty, which eventually becomes popular sovereignty, even though divine kingship was precisely the specific capability the French Revolution aimed at destroying. The divinity of the French kings can be interpreted as feeding the mythical character of the nation in the later secular period. Nationalism and patriotism can then be seen as capabilities developed through territorial kingship and its claim to divine origins".

[11] The term "knowledge economy" refers to the phenomenon where knowledge and knowledge-intensive activities are recognised as a significant input/output for societies and their economies. In other words, knowledge is itself an important resource and commodity of a society – an economic asset. This is understood in terms of the lessening significance of trade in basic tangible goods and the increased importance of knowledge and knowledge products as economic commodities in trade (see the Agreement on Trade-Related Aspects of Intellectual Property Rights [TRIPS], consolidated in the Agreement Establishing the World Trade Organization with Understanding on the Rules and Procedures Governing the Settlement of Disputes and Trade Policy Review Mechanism, Marrakesh, 15 April 1994, TS 57 (1996) Cm 3277; (1994) 33 ILM 15, entered into force 1 January 1995). The term can be traced to economic commentaries of the 1960s with the increased economic significance of services over that of traditional industries (like manufacturing). See Peter F. Drucker, *The Age of Discontinuity: Guidelines to Our Changing Society*, New York: Harper and Row, 1969.

despite the semantic shift to the idea of the dynamic creative economy[12] (as distinct from the artefacts of the knowledge economy) and the business models that have developed upon advancing technological processes of exchange and dissemination – the digital environment.

Thirdly, in mapping traditional knowledge through intellectual property, traditional relationships to land (through the rendering of the knowledge embedded in that land) are similarly translated into competitive western systems. Importantly, this is significant not only from the perspective upon creativity and the creative process that is motivated by intellectual property frameworks, but also in terms of the repositioning of the governance structures upon traditional knowledge away from community models to national sovereignties and global interstate trade cartographies.

Fourthly, traditional and indigenous communities have been subjected to the same rationalisation, whereby authenticity is realised and demonstrated through attachment to the land in a literal and possessory westernised sense, rather than in what is arguably a more relevant and meaningful sense. That is, that rationalisation is from the externalised perspective rather than from within the community itself, in that it is concerned with the "nostalgic" construction of indigenous and traditional interests. This construction is vested in the continuity of connection to place and geographic community which ultimately betrays a self-conscious western construction of cultural resources and knowledge. That is, such knowledge and the relationship to that knowledge is understood only within the context of the institution of western legal paradigms and the legitimated justice of individual property interests. The requirement for connection to place is at once already circumscribed within a discourse that "traditionalises" the Indigene and is a requirement itself defeated by the process of modernity (that is, how does one fulfil the requirement of place in an urbanised group?). Furthermore, within the economics of this attachment to place, the tradition of those not identifying with place is discredited.

Finally, when it comes to the digital environment, we see industries based upon intellectual property struggling to chart and define those territories by transforming knowledge into "land" as it were. The very title of this collection, the digital "environment", demonstrates the importance of territory in giving effect to the issues at stake.

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[12] Largely derived from the idea of the "creative industries", the term "creative economy" has gathered momentum in recent years, particularly at the level of government policy-makers, in its resonances with ongoing creativity and dynamic use. See Peter Coy, "The Creative Economy", *BusinessWeek Online*, 28 August 2000. See also the Creative Economy Programme, launched in late 2005 by the UK Government Department for Culture, Media and Sport (DCMS) and built upon policies of international competitiveness for the UK as a creative hub in an international knowledge or creative economy (http://www.cep.culture.gov.uk/).

3. INTELLECTUAL PROPERTY AND LAND'S END

Much has been said about the relationship between intellectual property and personal property – an idea is not a book, but some argue that the business models built upon copyright and other areas of intellectual property law render an idea, a "book", as such. That is, the attachment of intellectual to property presupposes an externalisation of the idea as object, as unit. But what is particularly interesting is the way in which an idea is indeed similar to a "book" or in fact a "library". In other words, the way in which an idea is reterritorialised by intellectual property models is remarkable for rendering land ownership (at least in a conceptual sense, the "place" of the book) intriguingly relevant. This is especially significant in the context of traditional cultural expression.

Indeed, land itself has acquired a proprietary meaning in and of itself, having developed as a synonym for ownership and possession. The implicit trace of the relationship between individuals and land, between individuals and things, appears to dominate the background of all basic conceptualisations of proprietary relationships. Therefore, while ideas and intellectual property in the context of personal property have been considered at length throughout the literature, it becomes pertinent to investigate this important relationship to land. In this present discussion, this is particularly relevant in the context of the importance of land to the resilience and significance of traditional cultural expression and the dissemination of that expression within traditional communities.

What indeed may this landing of ideas, as it were, indicate for the economic geography created through knowledge and the accompanying property frameworks? And what might it say about the possessory cultural relations to knowledge – territory which today is much more regularly the subject matter of demarcation through legal disputes in the courts than is land. And yet the basis of understanding of proprietary models in the western world, and indeed the basis of western/European society and class systems, remains that of land ownership. In the modern knowledge economy, is this emphasis a distraction from the territories at stake?

Therefore, rather than looking at the expression of ideas as chattels (the usual way in which the proprietary nature of intellectual property is described and challenged), I would like to look at the way in which ideas and information relate to territories. How does information transform a site? For instance, information in an archaeological site, or the transformation of a site by the existence and recognition of architectural works, will have tangible economic and legal effects upon a site. In the former, arguably the value at stake is that established in antiquity and archaeotourism, where guidebooks, oral discussions and performances, and even

the structure of tours[13] may transform the site through some form of intellectual property protection. Importantly, each change is protected, transforming the land in multiple and overlapping ways. The information transforms the site; the value of the land inheres in the idea.

Similarly, traditional knowledge and cultural expression embedded in the land logically transforms a site. But how might that be realised beyond the mere architecture of copyright? What does intellectual property have to do with that information? The digital landscape provokes similar questions and conceptual concerns. How does knowledge realise an economic and social geography in the context of the Internet?

In this sense, of particular interest is the relationship between intellectual property frameworks and not goods (as personal property) but land (as real property). That is, as distinct from a relationship between people and things, a perspective instead upon the connections between knowledge and land indicates more clearly the relationships between people. And in this sense, the historical developments in the use of land and feudal societies are explicitly relevant and instructive. While today, the distinction between real property and personal property is critical to the common law of property, this distinction is clarified by the history of land use and contract (as somewhat distinct from the accumulation of chattels) as the basis for Anglo-Saxon society. Not only was land the economic basis of feudal society, but also land use explains a significant turning point in the conferral of status and as the source from which such chattels and resources (eventually as items of personal property) could be derived. Indeed, in Scottish law, statutory copyright was heritable property rather than movable until the 1840s,[14] thereby sustaining until relatively recently this relationship between people as distinct from the attachment to things.

Nevertheless, the ownership of land is not a natural right in the sense that it is a comparatively recent development in relationships to the land. In feudal societies, ownership was not necessarily a relevant nor was it a reasonable explanation of the relations at stake. Where the term does emerge in the late fifteenth century, it is to denote not legal title but rather the relationship to the land as beneficiary that is established through dynamic, living use.[15] This critical nature

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[13] In some jurisdictions (such as France), the structure of the tour may be subject to protection through the recognition of format rights.

[14] George J. Bell, *Principles of Mercantile Jurisprudence*, 4th edn, Edinburgh: Edinburgh University Press, 1821, at p. 68. Copyright was deemed personal property by the Copyright Act 1842, Section 25.

[15] John H. Baker suggests that one of the earliest examples of the use of "ownership" as a legal relationship is in B & M 103 (*c.* 1490). But in fact, there, "*le owner*" was used to denote a person without legal title. In other words, and what is most impor-

of "use" is fundamentally instructive to present discussions of copyright and intellectual property laws, and the nature of the "value" to be found in knowledge. Indeed, it is not as object of access (the unit) but as use. Similarly, this historical development of the term supports arguments for use as a crucial value in the maintenance of intellectual property. At this juncture, the location of value shares much with the mechanism of tradition recorded in the land. Use is not wastage of cultural artefact but indeed a question of the right to benefit in relevant ways from that cultural output.

In feudal systems, while the king owned the land, neither the lord nor the vassal tenant owned land absolutely. Rather, the land was held by the tenant on behalf of the lord. This dynamic "use" relationship was inevitably ossified as the law of tenures in the fifteenth century. Nevertheless, it is significant that the relationship to land in English legal history was born of a social fact rather than an immutable legal concept. In other words, land value originates in the relations between people and the land's use, as distinct from control and exclusive ownership of the land. An understanding and appreciation of this relationship to use is relevant to the issues raised by contemporary legal interpretations of, and indeed public objections to, native title and land rights as turning on rights to exclude as distinct from parallel and cooperative use. The theory of rent is "a payment made to landlords for the right to use land and its appurtenances (the resources embedded within it, the buildings placed upon it and so on)".[16] In other words, the property model, as it were, takes account of the way in which the resources, and indeed the information, embedded within the land transform the value of the land, and in fact the site itself. What Harvey identifies in this relationship is that land "evidently has both use value and exchange value".[17]

Rather intriguingly, however, within an intellectual property model of knowledge, what is the "use" of that knowledge? In that intellectual property laws have charted the terrain of the industrial revolution and the emergence in the nineteenth century of trade in invention and other intellectual goods (as exemplified at the Great Exhibition and other international events of the period),[18] developments in intellectual property laws have also charted the

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tant for the present discussion, *le owner* was a beneficiary through use. See John H. Baker, *An Introduction to English Legal History*, 4th edn, London: Butterworths, 2002, at p. 223.

16 David Harvey, *Limits to Capital*, new edn, London: Verso, 2006, at p. 330.

17 *Ibid.*

18 Attention to intellectual property as export and its vulnerability in international demonstrations, such as the international trade fairs of the period, were directly motivating factors behind the establishment of the Paris Convention for the Protection of Industrial Property of 20 March 1883, and the Berne Convention for the Protection of Literary and Artistic Works of 9 September 1886.

transformation of the key social and economic relations from those between people to those between individuals and things. Thus, the change is that from dynamic means (use value) to the objects as ends (exchange value). The "use value" is not only deferred by the exchange value of knowledge (in a model of trade in intellectual property) but also made increasingly difficult to realise, if we accept the positions of many civil society and consumer organisations which argue that intellectual property protection and laws operate as a genuine obstacle to access and thus to the achievement of use.[19] And indeed, this is relevant when examining dealings with knowledge as cultural relations, in that there is arguably a loss or diminishing of the cultural and social dimension within a strictly economic model of the creative economy.

4. KNOWLEDGE, NO USE FOR A PERSON

> Knowledge is and will be produced in order to be sold, it is and will be consumed in order to be valorized in a new production: in both cases, the goal is exchange. Knowledge ceases to be an end in itself, it loses its "use-value".[20]

Jean-François Lyotard speaks of the "mercantilization of knowledge",[21] whereby the economic exchange of information commodities becomes the governing organising principle of society and the governance that might be achieved with respect to any entity, whether it be the nation-state or the traditional community, is compromised and rendered secondary to the governance of the market. Lyotard asks, when it comes to information, "will the State

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[19] The international "Access to Knowledge" movement is a cooperation between a number of civil society organisations towards the conclusion of an international treaty on access to knowledge to be presented to the WIPO General Assembly. The movement gained its momentum at an international meeting of civil society organisations, academics and governments in Geneva in September 2004, "The Future of WIPO". At this meeting Argentina and Brazil tabled a document calling for WIPO to fulfil its mandate with respect to developing countries (the "Development Agenda") and meeting participants drafted the Geneva Declaration on the Future of the World Intellectual Property Organization (2004), calling for a Treaty on Access to Knowledge and Technology. The full text of the Declaration, together with signatures, is available at http://www.cptech.org/ip/wipo/genevadeclaration.html. The proposal by Argentina and Brazil, for the establishment of a development agenda for WIPO, was tabled at the 31st (15th Extraordinary) Session of the General Assembly of WIPO, 27 September–5 October 2004 (WO/GA/31/11; WO/GA/31/12; WO/GA/31/13).

[20] Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge*, Minneapolis: University of Minnesota Press, 1984, at pp. 4–5.

[21] *Ibid.* at p. 5.

simply be one user among others?"[22] One may also ask, when it comes to traditional knowledge, does the assimilation of customary management of that knowledge within intellectual property render the community a mere user of its own knowledge?

For this question, it is prudent to consider the relationship between intellectual property protection of TCE and the access of traditional communities. That is, how might the commoditisation of TCE through copyright protection interfere with the genuine access of communities to their own knowledge? This question must be considered not only in terms of the creation of possible restrictions on use in an intellectual property sense, but also through the destruction of value and the creation of offence in the use of the expression in question. In other words, access may be compromised such that in a real and relevant way the value of that knowledge to the indigenous and traditional community is no longer available.

It is arguable that the "branding" of value through the intellectual property system indeed necessarily transforms a community's role and responsibility with respect to its knowledge in this way. In rendering "value" through this kind of model, the "loss" of knowledge suddenly has a commercial and tangible effect. And the "blame" for that loss of knowledge, now re-made as personal property, is constructed as resting with the "identity" of the Indigenous and traditional group, the "personality" as it were:[23] "the failures of public sympathy, state institutions, and lawful forms of property become the failures of local people to maintain their 'culture'".[24]

We see these emphases on preservation in disputes regarding the repatriation to traditional communities of human remains held in museums. Recently in the United Kingdom, the Natural History Museum settled a claim brought by the Tasmanian Aboriginal Centre through the Australian High Commission. The claim challenged the museum's use of the remains for anthropological research and tests, demanding return of the remains for customary burial; however, the museum countered that the specimens would be returned following completion of the testing, arguing in favour of the significance for international anthropological and scientific research and the potential loss to the

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[22] *Ibid.* at p. 6. This becomes relevant again in Chapter 5 where the discussion of freedom suggests the covert regulation of that freedom not only through expanded intellectual property rights but also through the market (as in media monopolies and so forth).

[23] See the discussion of identity and ownership in Johanna Gibson, *Community Resources: Intellectual Property, International Trade and Protection of Traditional Knowledge*, Aldershot: Ashgate, 2005, at Chapter 1.

[24] Elizabeth A. Povinelli, *The Cunning of Recognition: Indigenous Alterities and the Making of Australian Multiculturalism*, Durham: Duke University Press, 2002, at p. 189.

research community if such experimentation were to be stopped. The claim was finally settled in May 2007 after three days of mediation.

Similarly, the uniqueness of traditional cultural expression is at times deployed as the basis for preservation *ex situ* through museums and anthropological archives. According to the narratives within which it is authenticated, if traditional knowledge (particularly ancient knowledge) is used by community it is almost a waste.[25] In other words, traditional "use" is compromising the "value" that is otherwise consolidated by reading that knowledge and consumption through intellectual property frameworks. According to this modelling, traditional knowledge has no "use-value" other than that precipitated by these laws and usually only as ancient heritage or "history". The value of that knowledge, within western legal and cultural frameworks, is ascertained through constructions of its authenticity, its collectability, its objectification and commodification; and this construction arguably is effected by intellectual property perspectives.

5. THE CULTURE PLOT

Traditional use in such cases is presented therefore as "waste". In contrast, preservation is presented by proponents of the institutional model as a priority that is achievable only in this way, which arguably depends very much upon the commodification of knowledge as a fixed and legitimate object of "culture". Thus, this commodified and ossified state of knowledge is favoured over a performative and generative value with particular cultural effects for communities: "'culture' appears to denote a form of property".[26]

However, if we return to the opening example, it is clear that not only in the intrinsic link between the traditional cultural expression and the land, but also in the performance of that traditional cultural expression and the relationship to the land, an important distinction in the "proprietary" relationship emerges. That is, traditional custodianship models can perhaps be understood as operating upon the interaction between members of the community themselves, rather than between individuals and things, as in conventional proprietary relationships.

Territory emerges, therefore, in these cultural interactions and the exchanges of knowledge, as it were. Land is therefore a resource of the

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[25] See Moira G. Simpson, *Making Representations: Museums in the Post-Colonial Era*, London: Routledge, 2001, at pp. 198–199. Simpson discusses the way in which repatriation is almost presented as a threat to preservation of that knowledge.

[26] Miguel Tamen, *Friends of Interpretable Objects*, Cambridge, MA: Harvard University Press, 2001, at p. 73.

community that is recognised through the tradition and cultural knowledge inhering in the land, rather than competitive relationships to land: "it is land involved in a particular relationship which is perceived as a resource, and thus the land itself *refers to* the site of real valuation – generative or productive relations between persons".[27] The site of contestation, of territory, is that of culture and community. "Land" is always already marked by community, the marking and making of territory, but physical land in and of itself is indexical of the depth of community integrity indicated by that land.

Therefore, while communities may be dispersed and alienated from their physical land (place), the assertion is communities cannot be defeated by this displacement, because of this disembodied memory of the community subjectivity (space).[28] This relationship anatomises territory. In other words, territory cannot be realised and accessed without the facilitation of community management and governance and that is necessarily through the recognition of customary law.

It is in this sense that the marking and recognition of territory, of "land", therefore, occurs not through imperial models of "title", but through community: "All the inhabitants have to do is *recognize* themselves in it when the occasion arises".[29] Thus, territory is not delimited by western conceptions of physical space, of utility, and of resources. Deleuze and Guattari have suggested that "[w]hat defines the territory is the emergence of matters of expression (qualities)".[30] So, what defines the territory is "community": "The territory is not primary in relation to the qualitative mark; it is the mark that makes the territory".[31]

Thus, the relationship of community to territory and resources is realised not through the linkage of territory as object with an individual legal subject,

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[27] James Leach, "Land, Trees and History: Disputes Involving Boundaries and Identities in the Context of Development" in Lawrence Kalinoe and James Leach (eds), *Rationales of Ownership: Transactions and Claims to Ownership in Contemporary Papua New Guinea*, Wantage: Sean Kingston Publishing, 2004, pp. 42–56, at p. 42.

[28] Félix Guattari refers to the impossibility of being wiped out in the process of "historical discursivity", such as the discursive translation of traditional knowledge through intellectual property law and through its misappropriation into non-traditional copyright, inventions, and so on, because of the persistence of the irreversible refrain of "the incorporeal memory of collective subjectivity". See Félix Guattari, *Chaosmosis: An Ethico-Aesthetic Paradigm*, Sydney: Power Publications, 1995, at p. 27.

[29] Marc Augé, *Non-Places: Introduction to an Anthropology of Supermodernity*, London: Verso, 1995, at p. 44.

[30] Gilles Deleuze and Félix Guattari, *A Thousand Plateaus: Capitalism and Schizophrenia*, Minneapolis: University of Minnesota Press, 1987, at p. 315.

[31] *Ibid.*

but in its sense-making through customary law, which will differentiate territory (understood not just as land, but as knowledge, culture, and so on) according to subjects who are recognised by the community and perform within the community. In other words, rights will be conferred upon subjects because of their status within the community, and not despite it. Those individuals will not be "subjects", as such, unless recognised by the community. The agency of community does not constitute the individual subject, but the territory (knowledge, culture, land).

6. INTELLECTUAL PROPERTY, CULTURAL CARTOGRAPHY

The assimilation of traditional knowledge within intellectual property models suggests, therefore, a threat to this connection between people through the land by the very nature of its attention to the relations between individuals and things. This transformation from the efficacy of traditional affinities to that of intimacy between people and things is at once a transformation in the mechanism of tradition in the transmission and exchange of knowledge, compromising traditional mechanisms of preservation and management on a cohesive local basis. However, the dominant language by which the international trading community captures value in culture and in the creative, intellectual property is also the international forum in which this discussion is set to be resolved.

These questions are formally under the administration of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)[32] of the World Intellectual Property Organization's (WIPO).[33] The IGC is specifically assigned the task of examining and resolving applications of intellectual property to questions of access to and protection of traditional knowledge and traditional cultural

[32] The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) was established in the 26th (12th Extraordinary) Session of the WIPO General Assembly, held in Geneva 25 September–3 October 2000 to consider and advise on appropriate actions concerning the economic and cultural significance of tradition-based creations, and the issues of conservation, management, sustainable use, and sharing of the benefits from the use of genetic resources and traditional knowledge, as well as the enforcement of rights to traditional knowledge and folklore. See WIPO, Matters Concerning Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, WO/GA/26/6, 25 August 2000. See also Wend B. Wendland's contribution to this volume.

[33] WIPO was established in 1967 with the task of the administration of intellectual property treaties and conventions signed by member nations.

expression. This discussion takes place in the context of international instruments, national laws of member states, and current debate over balancing interests between commercialising traditional knowledge, on the one hand, and protecting it against commercialisation, on the other. Looking at the work of WIPO and the guidelines and principles produced by the IGC there is indeed, at the intergovernmental level, an important relocation of the use value of traditional knowledge within communities in the acknowledgement of the importance of customary law not only for relevant management, but also for effective management in a commercial sense. As set out in the WIPO Revised Provisions,[34] customary practices are a central articulation for the relevant development of protection mechanisms:

> *Objectives*
> *Support customary practices and community cooperation*
> (vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities;

Further, as the general guiding principles make clear, relevant protection should not make it at the same time impossible for communities to continue traditional and customary forms of developing and disseminating knowledge:

> *General Guiding Principles*
> *(h) Principle of respect for customary use and transmission of TCEs/EoF*
> The commentary to this principle states that 'protection should not hamper the use, development, exchange, transmission and dissemination of TCEs/EoF by the communities concerned in accordance with their customary laws and practices. No contemporary use of a TCE/EoF within the community which has developed and maintained it should be regarded as distorting if the community identifies itself with that use of the expression and any modification entailed by that use. Customary use, practices and norms should guide the legal protection of TCEs/EoF as far as possible'.

For the customary law of communities, the value of resources and their necessary protection is derived from systemic community practices and the preservation of connections not simply with place but with habit and the past (the space[35] of community). The essential problem for the organised protec-

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[34] These draft provisions have been annexed to documents WIPO/GRTKF/IC/8/4, 8 April 2005, WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, and WIPO/GRTKF/IC/12/4(c), 6 December 2007, considered by the WIPO IGC at its Eighth, Ninth, Tenth, Eleventh and Twelfth Sessions. They are reproduced in their entirety at the end of the volume in Annex 1.

[35] A more detailed consideration of the relationship between place and space, introduced here, is given in Gibson, *supra* note 23, at Chapter 7. See also Michel de Certeau, *The Practice of Everyday Life*, Berkeley: University of California Press, 1988.

tion of traditional cultural expression in the context of community use, and the maintenance of the use-value for those communities, is to reconcile these principles with the risk and individualisation attached to modern notions of property, development and trade efficiency.[36]

The progress of society, and ultimately the observations of "development" levelled at traditional communities are subject to the self-conscious and reflexive nature of modernisation and development and thus, the relationship between the process of modernisation and the institutions of that development, particularly that of the legal institution.[37] As discussed earlier, the rendering of indignity through the attachment to land creates a proprietary or possessory notion of authenticity, of community and of personhood through that attachment to place. This attachment to place must be problematised as a strategy of categorisation which continues to archive and historicise the traditional and indigenous community, without accounting for its capacity for evolution in a contemporary context:

> Our increasing interconnectedness – and our growing awareness of it – have not, then, made us into denizens of a single village. Our most basic social identities – the identities that are called "tribal" in Africa, for example, or the ethnic groups of the Balkans or the modern multicultural city – are no longer village identities. Everyone knows you cannot have face-to-face relations with six billion people. But you cannot have face-to-face relations with a hundred thousand or a million or ten million (with your fellow Serbs or Swahilis or Swedes) either; and we humans have had practice in identifying, in twos, cities, and nations, with groups on this grander scale.[38]

Departing from models fixing community to place, community resists determination and placement, but rather experiences "locality" through the practice and interaction of culture. Arguably the same "demonstration" and experience of locality could be recognised in the digital environment, where the interactions between participants describe the geography of the Internet (through hubs and nodes, and the increasing relevance of networks as a model for understanding the way in which information is used and indeed an economic geography is maintained).

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[36] See Jean-François Lyotard's discussion of the concept of development in Jean-François Lyotard, *The Inhuman*, Stanford: Stanford University Press, 1991, in particular at pp. 2–7.

[37] Ulrich Beck, Anthony Giddens and Scott Lash, *Reflexive Modernisation: Politics, Tradition and Aesthetics in the Modern Social Order*, Cambridge: Polity Press, 1994.

[38] K. Anthony Appiah, "Citizens of the World" in Matthew J. Gibney (ed.), *Globalizing Rights*, Oxford: Oxford University Press, 2003, pp. 189–232, at pp. 195–196.

This locality is indeed realised in the documents emerging from the WIPO IGC in that this connection between land and knowledge is available in the acknowledgement of customary laws. As distinct from place, the space (or site of contestation) of traditional resources, is that of culture – knowledge is land. A reduction to place alone, leads to a misappropriation and objectification of traditional knowledge that is inevitably disenfranchising and displacing to indigenous and traditional groups.[39] Access to self-governance of traditional knowledge according to customary law, therefore, is necessary for cultural autonomy and thus gives place to the disenfranchised (by the law) and displaced (from culture):

> Culture is the battlefield of a new colonialism; it is the colonized of the twentieth century. Contemporary technocracies install whole empires on it, in the same way that European nations occupied disarmed continents in the nineteenth century. Corporate trusts rationalize and turn the manufacture of signifiers into a profitable enterprise. They fill the immense, disarmed, and almost somnolent space of culture with their commodities […]. This economic system […] [replaces] the act of democratic representation with the reception of standardized signifiers that destine workers to become consumers, and that turn people into a public mass […]. [C]ulture appears as the field of a multiform battle between the forces of the soft and the hard. It is the outrageous, cancerous symptom of a society divided between the technocratization of economic progress and the folklorization of civic expression.[40]

If traditional knowledge is translated into information commodities for consumption, then all cultural obligations become assimilated within a relationship of consumption, with all communities transformed into consumers.

Arguably, the translation of these concerns within intellectual property frameworks decimates the relationship between community and resources that is necessarily indicative of "cultural knowledge", as distinct from commercial information to be traded by virtue of intellectual property "physicalisation" of that information. Indeed, resistance to the recognition of customary law and to *sui generis* protection for traditional knowledge relies upon an artificial polarisation of information/knowledge, high culture/tradition, art/folklore, invention/imitation, legal certainty/custom, and so on. This is continued not only in the rendition of traditional knowledge as open, shared, and for the benefit of all, but also in the charges of hypocrisy laid against indigenous and traditional groups wishing to commercialise or to license their traditional knowledge

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[39] It is important to assert that this is not to deny the importance of physical land, but to reject the simplification of indigenous cultural origins to western conceptions of real property and competition for resources. Thus, it opens up the space of community, rather than confines it to place.

[40] Michel de Certeau, *Culture in the Plural*, Minneapolis: University of Minnesota Press, 1994, at p. 134.

where appropriate.[41] However, importantly the WIPO Revised Provisions[42] acknowledge this by emphasising the continuation of traditional mechanisms for dissemination, transmission and exchange – that is, tradition as the necessary mechanism or circumstances for traditional knowledge and cultural expression. This is apparent not only in the objectives (particularly paragraph (vi)) and in the general guiding principles (paragraph (h)) but also in the substantive provisions. Article 5 provides:

> (a) Measures for the protection of TCEs/EoF should:
> (i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices.

The recognition of customary law will, therefore, actualise the necessary process of belonging that may be fractured through ongoing colonisation by western legal models and "impersonation" through the appropriation and representation of traditional knowledge and traditional cultural expression.

Thus, the practice of culture "creates" locality or space, as it were, in a kind of countering of the effects of globalisation.[43] The homogenisation of culture through colonising effects, to an extent, is countered by the participation of community in the political, economic, social, and cultural public sphere. Misappropriation of traditional knowledge and expressions of culture is in itself a threat to that participation in that it is an effective loss of voice, a loss of the capacity "to express their world conception through systems of values and ethical standards".[44] Misuse of those systems compromises their meaning, exhausts their value, and transforms them into meaningless commodities. Thus, misappropriation is a literal appropriation of voice in that it is a transformation and obstruction of the means of expression. In offensive misappropriation of traditional cultural expression, there is a severance of the mechanism of

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[41] On knowledge development, see the discussion in Pat Howard, "The Confrontation of Modern and Traditional Knowledge Systems in Development" (1994) Canadian Journal of Communication 19:2.

[42] WIPO, The Protection of Traditional Cultural Expressions/ Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/4, 8 April 2005.

[43] Indeed, this is the kind of environment that arguably is sought to be promoted by the United Nations Educational Scientific and Cultural Organization (UNESCO) Convention on the Protection and Promotion of the Diversity of Cultural Expression (adopted 20 October 2005, entered into force 18 March 2007) – that is, the capacity to practise culture.

[44] Para. 2 of the Istanbul Declaration on Intangible Cultural Heritage (adopted at the 3rd Round Table of Ministers of Culture "Intangible Cultural Heritage, Mirror of Cultural Diversity" in Istanbul, 16–17 September 2002).

connection between people, thereby potentially denying access to the political sphere, and ultimately denying the freedom of expression of indigenous and traditional groups. Communities must be enabled to continue self-governance of resources according to customary law in order to participate in an international environment, without being assimilated or simplified as "individual", uniform legal subjects within existing systems.[45]

In the context of the ongoing WIPO discussions,[46] it seems critical to maintain emphasis on the mechanism of tradition, and to reassess the historical and jurisprudential basis for personal property and the departure from real property in this context. Indeed, the historical development of proprietary relationships to land provides insight not only into the limitations and assumptions of intellectual property, but also into the justifications for the protection of traditional cultural expression. Such justifications are based upon the very heart of the matter, as it were, the land.

7. CONCLUSION

So at this final point what is very significant in the work coming out of WIPO in particular is the way in which traditional knowledge is being mainstreamed, not as a form assimilated within intellectual property laws, but rather transforming intellectual property laws. Part of this is arguably a transformation in the relationship to knowledge not only for the purposes of the protection of traditional cultural expression but also in debates surrounding the value chains in intellectual property law, and the increasing attention to use and to the user in the creation, transmission and capture of value. In a digital environment and a creative economy increasingly confronted by user-generated content and viral markets, knowledge kinships are suddenly relevant. Capturing this attention, that communication of networks between people for which objects comprising intellectual property are merely indexical, is the real challenge for

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[45] The notion of "belonging" and its attachment to place, through the translation of community and information in intellectual property law, together with the importance of "territory" in biodiversity, land rights, and human rights frameworks re-inscribe the central quality of the land in traditional cultural expression. In doing so, the concept of "territory" is significant in the realisation of the interpersonal and intra-communal relationship, and its situation within culture rather than geo-physical place. For further discussion, see Gibson, *supra* note 23.

[46] The mandate of the IGC was considered at the recent 43rd Assembly of the Member States of WIPO, 24 September–3 October 2007 and the renewal of its mandate approved by the 34th WIPO General Assembly (Report of the 34th WIPO General Assembly, WO/GA/34/16, para. 293). For a detailed discussion, see Wend B. Wendland's contribution to this volume.

contemporary business models. Paradoxically, in a virtual environment, territory as the means of recording connections between people has become far more significant in a business context for which units are without currency. As Rosemary Coombe said to me once, "[i]ndigenous people have brought a great deal of creativity into intellectual property law". In the translation of tradition as a social fact into a legal concept, it is hoped that creativity will drive an effective international response.

PART FOUR

New technologies and development

9. The long tail of the rainbow serpent: new technologies and the protection and promotion of traditional cultural expressions

Mira Burri-Nenova*

Technologies have often been seen as a peril for traditional cultural expressions (TCE) and as an inhibitor of their protection. The first reason for this angst, whose legitimacy will be one of the issues discussed in this paper, is that new technologies are viewed as the very epitome of globalisation forces – both as driving and deepening the process of globalisation itself and as a means of spreading its effects. Frequently made statements in this regard (and widely supported ones too) are that, "[t]he 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".[1] "Increasingly, traditional knowledge, folklore, genetic material and native medical knowledge flow out of their countries unprotected by intellectual property, while works from developed countries flow in, well protected by international intellectual property agreements, backed by the threat of trade sanctions".[2]

* The author thanks Christoph Beat Graber for inspiring the title of this contribution. The rainbow serpent is a major mythological being for Aboriginal people across Australia, although the creation stories associated with it are best known from northern Australia. The rainbow serpent is seen as the inhabitant of permanent waterholes and is in control of life's most precious resource, water. It is known both as a benevolent protector of its people and as a malevolent punisher of law-breakers (excerpts taken from Wikipedia at http://en.wikipedia.org/wiki/Rainbow_Serpent).

1 WIPO, Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/3, 2 May 2003, Annex, at para. 4. For examples of appropriation and misappropriation of TCE, see *ibid*. Annex, at para. 94. See also Terri Janke, *Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions*, Geneva: WIPO, 2003.

2 Bellagio Declaration, formulated at the Rockefeller Conference: Cultural Agency/Cultural Authority: Politics and Poetics of Intellectual Property in the Post-

A second reason for the perceived negative effects of new technologies lies in their very nature, since they allow, among other things, instantaneous access to information, reproduction of the original without loss of quality and data transport at the speed of light at an ever decreasing price.[3] A clear recognition of this is paragraph 31 of General Comment No. 17 of the Committee on Economic, Social and Cultural Rights,[4] which explicitly adds to the obligation to protect author's rights[5] the prevention of "unauthorized use of scientific, literary and artistic productions that are *easily accessible or reproducible through modern communication and reproduction technologies*".[6]

It is the purpose of this work to put these "modern technologies" into a new perspective by undertaking firstly, a more refined enquiry into their characteristics and effects, and secondly, by broadening the "picture" within which the relationship "new technologies – TCE" is so easily (and somewhat hurriedly) fitted. Profiting from the other contributions to this volume,[7] we do not need to depict all the underlying TCE issues and/or the legal tools at the local, national, regional and international levels, attempting to address them. We thus focus our analysis on the first part of the equation "new technologies – TCE" and seek to pinpoint the impact of selected new technologies upon TCE, and above all, upon the *environment*, where TCE are to be protected and promoted.

Colonial Era, 11 March 1993, Bellagio, Italy (reproduced in James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society*, Cambridge, MA: Harvard University Press, 1996, at pp. 196–200). See also Mihály Ficsor, *The Law of Copyright and the Internet*, Oxford: Oxford University Press, 2002, at paras 10.67 *et seq.*

3 See further *infra* Section 2.

4 Committee on Economic, Social and Cultural Rights, General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from Any Scientific, Literary or Artistic Production of Which He Is the Author (Article 15(1)(c)), UN Doc. E/C.12/2005, 21 November 2005 (hereinafter *General Comment No. 17*). On General Comment No. 17, see Laurence R. Helfer, "Towards a Human Rights Framework for Intellectual Property" (2007) UC Davis Law Review 40, pp. 971–1020; Peter K. Yu, "Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) UC Davis Law Review 40, pp. 1039–1149; Hans Morten Haugen, "General Comment No 17 on 'Authors' Rights'" (2007) The Journal of World Intellectual Property 10:1, pp. 53–69.

5 Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966), 993 UNTS 3, 16 December 1966, entered into force 3 January 1976.

6 Emphases added.

7 See in particular the contributions of Christoph Beat Graber, Martin A. Girsberger and Wend B. Wendland. For a brief overview of the issues pertinent to TCE, see Michael Blakeney, "Hans Christian Andersen and the Protection of Traditional Cultural Expressions" in Helle Porsdam (ed.), *Copyright and Other Fairy Tales: Hans Christian and the Commodification of Creativity*, Cheltenham, UK: Edward Elgar, 2006, pp. 108–128.

The analysis is structured in three sections. Section One briefly outlines our starting premises in the context of TCE. The second section concentrates on new technologies: first, by addressing the question, which begs a clarification from the outset, namely precisely which "new technologies" we are considering; second, by analysing their impact on markets, consumer and business behaviour patterns; and third and most important, by examining the repercussions of these for the processes of formation, production and expression of culture. Section Three suggests an adjusted basic conceptual framework for the relationship "new technologies – TCE" and some possible solutions to the implications outlined in Section Two. A brief conclusion follows.

1. STARTING PREMISES

1.1 On Complexity

Before we begin with the substantive analysis of new technologies and in order to clarify the methodology applied herein, we would like to stress one particular characteristic of any discussion on any TCE-related issue, namely its *complexity*.

TCE is indeed a terminological shortcut for grouping together a wide variety of expressions, both tangible and intangible, which are staggeringly diverse in their nature, meaning and form.[8] It depicts an extremely complex

[8] WIPO suggests a comprehensive definition of TCE, to which we subscribe in this paper: "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are: (aa) the products of creative intellectual activity, including individual and communal creativity; (bb) characteristic of a community's cultural and social identity and cultural heritage; and (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community. See WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles,

reality whose limits are indefinable and whose building elements may often be in themselves complex notions, such as the concept of "dreaming" (or "dreamtime") of Australia's indigenous peoples.[9] TCE are also not a static but a highly dynamic, living system, which is constantly in the process of renegotiation, innovation and creation.[10] Furthermore, it should be acknowledged that, "[i]ndigenous peoples regard all products of the human mind and heart as interrelated, and as flowing from the same source: the relationships between the people and their land, their kinship with the other living creatures that share the land, and with the spirit world".[11] Thus, the needs and expectations of the TCE custodians in terms of the protection demanded are correspondingly diverse. These demands range from intellectual property (IP) protection to support economic development and prevent unwanted use by others[12] to land and self-determination claims.[13]

WIPO/GRTKF/IC/8/4, 8 April 2005, Annex, at Article 1 (Subject Matter of Protection) (unaltered in WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, and WIPO/GRTKF/IC/12/4(c), 6 December 2007; the draft provisions are reproduced in the Annex of this volume). For a detailed explanation of the notion of TCE, see WIPO, *supra* note 1, Annex, at paras. 48–67.

[9] See Howard Morphy, *Aboriginal Art*, London: Phaidon, 1998, at pp. 67–100.

[10] Michael F. Brown, "Can Culture Be Copyrighted?" (1998) Current Anthropology 39:2, pp. 193–206, at p. 196. See also WIPO, *supra* note 1, at para. 9.

[11] Erica-Irene Daes, Discrimination against Indigenous Peoples: Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, E/CN.4/Sub.2/1993/28, New York: United Nations Economic and Social Council, Commission on Human Rights, 1993, at para. 21.

[12] WIPO, *supra* note 1, Annex, at para. 34. See also *ibid*. paras. 42–43. On the major concerns of indigenous communities, see Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, prepared for the Australian Institute of Aboriginal and Torres Strait Islander Studies and the Aboriginal and Torres Strait Islander Commission, Sydney: Michael Frankel and Company, 1998, at pp. 19–42.

[13] See Rosemary J. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Bruce Ziff and Pratima V. Rai (eds), *Borrowed Power: Essays on Cultural Appropriation*, New Brunswick: Rutgers University Press, 1997, pp. 74–96. In addressing these diverse needs, WIPO has formulated a broad set of objectives that the TCE protection should aim at. They encompass: (i) recognition of value; (ii) promotion of respect; (iii) meeting the actual needs of the communities; (iv) prevention of the misappropriation of TCE; (v) empowerment of communities; (vi) support of customary practices and community cooperation; (vii) contribution to safeguarding traditional cultures; (viii) encouraging community innovation and creativity; (ix) promotion of intellectual and artistic freedom, research and cultural exchange on equitable terms; (x) contribution to cultural diversity; (xi) promotion of community development and legitimate trading activities; (xii) preclusion of unauthorised IP rights; and (xiii) enhancement of certainty, transparency and mutual confidence. See WIPO, *supra* note 8, Annex, at p. 3.

Complexity is also a salient feature of the fields of law most relevant to TCE – the intellectual property rights (IPR) and the human rights frameworks.[14] These legal domains are no simple hierarchical structures but are defined and shaped by tangled relationships, trade-offs, balances, internal inefficiencies and conflicts.

The IPR model,[15] for instance, was put in place "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".[16] Over time, modern legal systems have developed a broad palette of sophisticated[17] and flexible IP tools that serve "to protect both traditional and new forms of symbolic value produced in particular places as they circulate in global commodity markets".[18] Still, the IPR system is not perfect and shows substantial deficiencies with specific regard to TCE. The limitations are inherent in the nature and in the mechanisms of IP protection and relate to the centrality of authorship, originality and mercantilism to the "Western" IP model. Numerous non-Western, collaborative or folkloric modes of production are consequently left outside the scope of IP protection.[19] In addition, there is often a dissonance (i) between certain IP and traditional concepts, such as "ownership" or "author" and their non-existence under the customary laws of indigenous communities; (ii) between the fixation requirement in copyright and the intangible and oral character of some traditional expres-

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14 On the history of IP and TCE protection, see WIPO, *supra* note 1, Annex, at paras 68–90. See also WIPO, Comparative Summary of *Sui Generis* Laws for the Protection of Traditional Cultural Expressions, WIPO/GRTKF/IC/5/INF/3, 28 April 2003.

15 Under IPR as a general category, one understands the rights granted to creators and inventors to control the use made of their productions. They are traditionally divided into two main branches: (i) "copyright and related (or neighbouring) rights" for literary and artistic works and (ii) "industrial property", which encompasses trademarks, patents, industrial designs, geographical indications and the layout designs of integrated circuits.

16 US Constitution, at Article I, Section 8, para. 8.

17 See e.g. Laurence R. Helfer, "Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking" (2004) The Yale Journal of International Law 29:1, pp. 1–83.

18 Rosemary J. Coombe, Steven Schnoor and Mohsen Ahmed, "Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property" (2007) UC Davis Law Review 40, pp. 891–917, at p. 916, referring to Wend B. Wendland, "Intellectual Property and the Protection of Cultural Expressions: The World of the World Intellectual Property Organization" in F. Willem Grosheide and Jan J. Brinkof (eds), *Intellectual Property Law 2002*, Antwerp: Intersentia, 2003, at pp. 101, 103.

19 Bellagio Declaration, *supra* note 2, at Discussion (footnotes omitted).

sions; (iii) between the novelty requirement and the limited term of IP protection and the perpetual nature of TCE.[20]

Beyond the specific characteristics of TCE, there are furthermore complex relationships between the private and the public, and between creativity, innovation and the IP incentives given to promote them. There is a constant need to strike a balance between the private interests of authors and the public interest in enjoying broad access to their productions[21] – a balance that is in itself a complex high-wire act and that may be vital, as we discuss below, for the sustainability of culture, including a traditional one, and for the sustainability of creativity.

As for the latter, the content industries are constantly asserting that IPR are the guarantee of innovation and creativity and thereby, the single most important prerequisite for a vibrant culture. While IP protection certainly fulfils essential economic functions in cultural production and distribution,[22] evidence of a direct causality between IPR (or stronger IPR) and creativity is equivocal, and IP protection may even trigger systemic harm.[23] The US Supreme Court did recognise this in part, noting in *Grokster* that, "[t]he more artistic protection is favored, the more technological innovation may be discouraged".[24] Beyond this, some copyright scholars observing the process

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[20] WIPO, *supra* note 1, at paras. 102–144. See also Christoph Beat Graber, "Can Modern Law Safeguard Archaic Cultural Expressions? Observations from a Legal Sociology Perspective" in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, The Hague: Kluwer Law International, 2008.

[21] See e.g. General Comment No. 17, at para. 35. For an interpretation, see Helfer, *supra* note 4, at pp. 997–1000.

[22] See e.g. Wendy J. Gordon, "Intellectual Property" in Peter Can and Mark Tushnet (eds), *Oxford Handbook of Legal Studies*, Oxford: Oxford University Press, 2003, Chapter 28, pp. 617–646; William M. Landes and Richard A. Posner, *The Economic Structure of Intellectual Property Law*, Cambridge, MA: Belknap Press of Harvard University, 2003, at pp. 11–123; Wendy J. Gordon and Robert G. Bone, "Copyright" in Boudewijn Bouckaert and Gerrit De Geest (eds), *Encyclopaedia of Law and Economics*, Cheltenham, UK: Edward Elgar, 2000, pp. 189–215.

[23] Julie E. Cohen, "Creativity and Culture in Copyright Theory" (2007) UC Davis Law Review 40, pp. 1151–1205, at pp. 1193–1194. See also Bellagio Declaration, *supra* note 2, at Discussion.

[24] US Supreme Court, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005), referring to *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), at 442. For a case note, see Urs Gasser and John G. Palfrey, Jr., "Catch-As-Catch-Can: A Case Note on Grokster" (2006) Swiss Review of Business and Financial Market Law 78:2, pp. 119–126 and Tim Wu, "The Copyright Paradox – Understanding Grokster" (2006), Supreme Court Review, 2006. See also Jane C. Ginsburg, "Copyright and Control over New Technologies of Dissemination" (2001) Columbia Law Review 101:7, pp. 1613 *et seq.*; Douglas Lichtman and William M.

of creativity more closely, argue that it is the *creative play* that is of primary importance for the artistic and intellectual innovation[25] – a play that may very well be obstructed by contemporary (and ever strengthening[26]) IP regimes.

The second essential legal framework on TCE – the human rights one – is also extraordinarily complex, as has been lucidly shown by Christoph Beat Graber's contribution to the present volume[27] with particular regard to the author's right to benefit, enshrined in Article 15(1)(c) of the International Covenant on Economic, Social and Cultural Rights (CESCR).[28] Furthermore, one also needs to acknowledge that the legal frameworks evolve over time and tend to "conquer" new regulatory fields. Despite the distinct theoretical and philosophical roots of human rights and IP regimes,[29] "the recent expansion of the two fields has blurred these distinctions in new and unexamined ways […] expand[ing] their scope over time, creating dense 'policy spaces' in which formerly unrelated sets of principles, norms, and rules increasingly overlap in incoherent and inconsistent ways".[30]

Landes, "Indirect Liability for Copyright Infringement: An Economic Perspective" (2003) Harvard Journal of Law and Technology 16:1, pp. 395–410.

25 See recently Cohen, *supra* note 23. See also Eben Moglen, "Anarchism Triumphant: Free Software and the Death of Copyright" in Niva Elkin-Koren and Neil Weinstock Netanel (eds), *The Commodification of Information*, The Hague: Kluwer Law International, pp. 107–132; David Lange, "Reimagining the Public Domain" (2003) Law and Contemporary Problems 66, pp. 463–483.

26 Vaidhyanathan notes in this regard: "Copyright in recent years has certainly become too strong for its own good. It protects more content and outlaws more acts than ever before. It stifles creativity and hampers the discovery and sharing of culture and knowledge". See Siva Vaidhyanathan, "The Googlization of Everything and the Future of Copyright" (2007) UC Davis Law Review 40, pp. 1207–1231, at p. 1210. Sharing this position, see also David Bollier, *Silent Theft: The Private Plunder of Our Common Wealth*, London: Routledge, 2003; Lawrence Lessig, *Code and Other Laws of Cyberspace*, New York: Basic Books, 1999; Lawrence Lessig, *Free Culture: How Big Media Uses Technology and the Law to Lock Down Culture and Control Creativity*, London: Penguin, 2004; Siva Vaidhyanathan, *Copyrights and Copywrongs: The Rise of Intellectual Property and How It Threatens Creativity*, New York: New York University Press, 2003.

27 See also Christoph Beat Graber, "Traditional Cultural Expressions in a Matrix of Copyright, Cultural Diversity and Human Rights" in Fiona Macmillan (ed.), *New Directions in Copyright Law: Vol. 5*, Cheltenham, UK: Edward Elgar, 2007, pp. 45–71.

28 *Supra* note 5.

29 "In contrast to human rights, intellectual property rights are generally of a temporary nature, and can be revoked, licensed or assigned to someone else. While under most intellectual property systems, intellectual property rights, often with the exception of moral rights, may be allocated, limited in time and scope, traded, amended and even forfeited, human rights are timeless expressions of fundamental entitlements of the human person". See General Comment No. 17, at para. 2.

30 Helfer, *supra* note 4, at p. 980, referring to Robert O. Keohane and Joseph S.

The lack of coherence is not only evident from collisions between the IP and the human rights domains. Even the recent efforts of the international community, whose drafters were fully aware of the existing fragmentation, have not succeeded in generating coherence due both to the limitations of the political and diplomatic processes and the limitations of the legal instruments themselves. A much celebrated legal effort that exemplifies this with particular regard to the protection and promotion of TCE is the Convention on the Protection and Promotion of the Diversity of Cultural Expressions,[31] adopted at the 33rd Session of the General Conference of UNESCO in 2005. Despite the admirable goals[32] the UNESCO act set itself, it subscribes to an overbroad definition of cultural diversity,[33] while being ethnocentric in the formulation of the rights of the State parties.[34] It barely refers to intellectual property rights[35] and provides no meaningful mechanism for resolving conflict of law situations with other international obligations of the States (most notably,

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Nye, Jr., "The Club Model of Multilateral Cooperation and Problems of Democratic Legitimacy" in Roger B. Porter *et al.* (eds), *Efficiency, Equity, and Legitimacy: The Multilateral Trading System at the Millennium*, pp. 264 *et seq*., at p. 266.

[31] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005, entered into force 18 March 2007 (hereinafter *UNESCO Convention on Cultural Diversity*). On the negotiating history, see Ivan Bernier, "A UNESCO International Convention on Cultural Diversity" in Christoph Beat Graber, Michael Girsberger and Mira Nenova (eds), *Free Trade versus Cultural Diversity: WTO Negotiations in the Field of Audiovisual Services*, Zurich: Schulthess, pp. 65–76.

[32] Among others, "to protect and promote cultural diversity", "to create the conditions for cultures to flourish and to freely interact in a mutually beneficial manner" and "to give recognition to the distinctive nature of cultural activities, goods and services as vehicles of identity, values and meaning". See UNESCO Convention on Cultural Diversity, at Article 1, points (a), (b) and (g), respectively.

[33] "Cultural diversity" refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is made manifest not only through the varied ways in which the cultural heritage of humanity is expressed, augmented and transmitted through the variety of cultural expressions, but also through diverse modes of artistic creation, production dissemination, distribution and enjoyment, whatever the means and technologies used. UNESCO Convention on Cultural Diversity, at Article 4(1).

[34] Article 6(1) defines the core right of each of the State parties to "adopt measures aimed at protecting and promoting the diversity of cultural expressions *within its territory*". TCE are mentioned only in a cursory manner in the Convention in para. 13. Para. 15, Article 2 and Article 7(1)(a) refer further to indigenous peoples. See also Nicole Aylwin and Rosemary J. Coombe, "Cultural Pluralism Protects Traditional Knowledge", 2006, available at http://www.wacc.org.uk/wacc/publications/media_development/2006_3/cultural_pluralism_protects_traditional_knowledge.

[35] IPRs are mentioned only in the preamble of the Convention.

those existing under the World Trade Organization agreements).[36] Since the Convention on Cultural Diversity contains neither specific obligations for the State parties,[37] nor guidelines on what legitimate measures aimed at protecting and promoting cultural diversity are, it remains a mere political effort to protect the national content industries that bears a suspicious resemblance to protectionism, and *intensifies* the existing discrepancies in the TCE protection domain.

The above sketch reveals only a fraction of the complexity of TCE protection and promotion debates from a legal perspective. It captures neither the confounding complexity of implementation and enforcement, nor the influence of the manifold different national, international and civil society organisations and agencies active in the field.[38] It is nonetheless sufficiently clear that any effort to deal with TCE protection will be confronted with the complex relationships and interdependencies existing in the above system and its effect will need to be tested against the whole and in the knowledge of the likelihood of having multiple, diverse and unexpected repercussions in various directions.

1.2 On Methodology

Instead of attempting to reduce the above complexity, we introduce and reveal the complexity of a new variable, namely *technology*. We deem that this variable is particularly important in the environment of TCE because, as we show below, it strongly influences the processes of cultural formation, production,

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[36] Article 20(1) states that, "[p]arties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention". Article 20(2) adds on the other hand that, "[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties". See Christoph Beat Graber, "The New UNESCO Convention on Cultural Diversity: A Counterbalance to the WTO" (2006) Journal of International Economic Law 9:3, pp. 553–574.

[37] See Articles 5–10 of the UNESCO Convention on Cultural Diversity. For a critique of the lack of binding obligations, see Keith Acheson and Christopher Maule, "Convention on Cultural Diversity" (2004) Journal of Cultural Economics 28, pp. 243–256; Rachael Craufurd Smith, "The UNESCO Convention on the Protection and Promotion of Cultural Expressions: Building a New World Information and Communication Order?" (2007) International Journal of Communication 1, pp. 24–55.

[38] See in particular the contribution of Martin A. Girsberger to this volume.

expression, distribution and consumption, and has not been sufficiently taken into account until now. In the following analysis, we situate the discussion of the relationship "new technologies – TCE" within the broad context of *complex adaptive systems.*[39] Such systems are complex in that they are diverse and made up of multiple interconnected elements (such as the ones sketched above) and adaptive in that they have the capacity to change and learn from experience. This approach allows us to take into consideration all the elements and the multiplicity of forces at play, and avoids the dangers that some positive, though narrowly defined objectives or actions, conflict and/or are influenced by policies formulated elsewhere in society.[40]

2. NEW TECHNOLOGIES

2.1 Which New Technologies?

The concept of "new technologies" is infinitely general and may often be a misnomer. It may in fact be observed that many of the documents tackling TCE protection, lump new technologies together and do not define their parameters and/or effects. While the precise limits of the cluster of technologies discussed herein may indeed be hard to define, the roots of all phenomena undoubtedly lie in the process of *digitisation*.

Digitisation allows for the expression of each and every type of content (be it audio, video or text) in a line of zeroes and ones and thereby creates a universal code for all information. As a consequence, it is irrelevant to the network whether the data being transferred is the video of the Apache sunrise ceremony, a picture of a sacred Aboriginal totem or the latest hip-hop hit – they will all be rendered in zeroes and ones.

The ability of digital systems to handle an ever greater amount of multimedia content at lower and lower cost is a product of the exponential growth in the processing power and memory of microchips.[41] As a third element of

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[39] Generally, on complex adaptive systems, see e.g. Paul Cilliers, *Complexity and Postmodernism: Understanding Complex Systems*, London: Routledge, 1998; Yaneer Bar-Yam, *Dynamics of Complex Systems*, Boulder, CO: Westview, 2003. On networks, see Mark Newman, Albert-László Barabási and Duncan J. Watts (eds), *The Structure and Dynamics of Networks*, Princeton, NJ: Princeton University Press, 2006.

[40] See in this sense Michael F. Brown, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property" (2005) International Journal of Cultural Property 12, pp. 40–61, at pp. 41–42.

[41] Milton L. Mueller, "Digital Convergence and its Consequences: A Report on the Digital Convergence and Market Structures", 1999, available at http://dcc.syr.edu/miscarticles/rp1.pdf. Gordon Moore of Intel postulated in 1965 that the transistor

this technological matrix comes the perfection of optical fibres,[42] which have substantially enhanced the breadth and capacity of networks[43] and made possible the conveyance of digitised information at high speed.

This three-pronged technological matrix allowed and spurred on the development of the Internet[44] as a global, publicly accessible network of interconnected computer networks, which transmit data by packet switching using a standard Internet Protocol. This "network of networks" consists of millions of smaller government, academic, business and domestic networks, which carry information and various services (such as electronic mail) and most notably, the *world wide web*. The latter builds the logical layer of the Internet as a system of interlinked, hypertext documents, which allows us to find web pages, various contents on them and to navigate between them, i.e. to reach out to the application and content layers.[45]

In the following sections, we focus our attention on the Internet, taken collectively as network, logical, application and content layers and interchangeably referred to as "digital environment",[46] and look into the impact of this single most powerful global communication and information platform.[47]

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density on a single integrated circuit microchip would double approximately every 18 months. This rule showing the incredible pace of technological advance became known as Moore's Law and (unlikely as it may seem) is still valid. On Moore's Law, see e.g. Rob Frieden, *Managing the Internet-Driven Change in International Telecommunications*, Boston/London: Artech House, 2001, at pp. 17 *et seq*.

[42] The concept was originally developed at Standard Telephones and Cable Ltd., England. For more on the development of optical fibre technology, see David Gillies and Roger Marshall, *Telecommunications Law*, Vol. 1, 2nd edn, London: Butterworths LexisNexis, 2003, at p. 19.

[43] Metcalfe's Law holds that the potential value of network increases by the square of the number of nodes, while the Fibre Law holds that capacity doubles every nine months. See e.g. Chris Marsden, Jonathan Cave, Edward Nason, Andrew Parkinson, Colin Blackman and Jason Rutter, "Assessing Indirect Impacts of the EC Proposals for Video Regulation", RAND Europe, 2006, at pp. 72 *et seq*. Currently, almost all networks (in developed and even in developing countries) have become IP-based. See OECD, Information Technology Outlook 2006, Paris: OECD, 2007.

[44] For a brief history of the Internet, see the Internet Society's account, available at http://www.isoc.org/ internet/history/brief.shtml.

[45] For a precise explanation of how the world wide web functions, see Tim Berners-Lee *et al*., *Architecture of the World Wide Web*, Vol. 1, W3C Recommendation, 15 December 2004, available at http://www.w3.org/TR/webarch/. For an overview of developments of the world wide web, see Jeremy G. Butler, "The Internet and the World Wide Web" in Dan Harries (ed.), *The New Media Book*, London: British Film Institute Publishing, pp. 40–51.

[46] Technological developments stemming from the Internet technology like IPTV (Internet Protocol television) or video-on-demand will also be taken into consideration.

[47] Since technologies are in a constant state of flux, as a rule-of-thumb, any

We do so however not in the sense of building some grand theory of the new Network/Information Society[48] but examine narrowly and specifically the effects of digital technologies on the markets for content and the content production modes, because of their as yet unexplored relevance for TCE.

2.2 The Impact of New Technologies on Markets for Cultural Content

2.2.1 New mechanisms / new diversity

In the not-so-distant past, the markets for cultural content were dominated by analogue media. People had access to a limited number of outlets, such as television or cinema, and to a limited variety of content. Technical advances and the liberalisation and deregulation of media markets increased the number of outlets (e.g. while in 1989, 90 TV channels were available in the EU15,[49] at the beginning of 2004, over 860 channels with potential national coverage were broadcast[50]). Paradoxically, the impact of multiple channels has not been positive for diversity. Rather, the variety of content has shrunk even more: in the European television market, for instance, the quantity of imported programmes and their costs have continuously soared,[51] while the quality and the range of programmes have been radically reduced.[52] The pursuit of a maximisation of profits and a minimisation of financial risks has resulted in "imitation, blandness and the recycling of those genres, themes and approaches regarded as profitable".[53] The formats and contents of TV

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technological advance that has a bearing upon the means and conditions of communication and information distribution across the different layers (network/logic/applications/ content), will be relevant to the present discussion of TCE and new technologies.

48 See Manuel Castells, *The Information Age: Economy, Society and Culture*, Vol. 1: *The Rise of the Network Society*, 2nd edn., Oxford: Blackwell, 2000. For an overview of the theories, see Frank Webster, *Theories of Information Society*, London: Routledge, 1995; Frank Webster (ed.), *The Information Society Reader*, London: Routledge, 2004.

49 Stylianos Papathanassopoulos, *European Television in the Digital Age*, Cambridge: Polity, 2002, at p. 14.

50 European Commission, Fifth Report on the Application of Directive 89/552/EEC "Television without Frontiers", COM(2006) 49 final, 10 February 2006, referring to the European Audiovisual Observatory, 2004 Yearbook.

51 Papathanassopoulos, *supra* note 49, at pp. 17–18.

52 Papathanassopoulos, *ibid*. at pp. 18–19, referring to Jay G. Blumler, "Vulnerable Values at Stake" in Jay G. Blumler (ed.), *Television and the Public Interest*, London: Sage, 1992, pp. 22–24; Yves Achile and Bernard Miège, "The Limits of Adaptation Strategies of European Public Service Television" (1994) Media, Culture and Society 16, pp. 31–46.

53 Papathanassopoulos, *supra* note 49, at p. 19, referring to Denis McQuail, "Commercialisation and Beyond" in Denis McQuail and Karen Siune (eds), *Media Policy: Convergence, Concentration and Commerce*, London: Sage, 1998,

programmes, films and shows have become increasingly homogeneous.[54] TCE in this context have been either repackaged and commodified, or qualified as "not selling" and marginalised. The emergence of global media giants going beyond national and sectoral boundaries, placing the same content in all available distribution channels and formats, has only aggravated the situation.

The reasons for this rather bleak picture, which exacerbates the indigenous communities' fears of appropriation and misappropriation, lies not (or at least not only) in the uniform tastes of the public or the lack of cultural creativity. Simply put, it has to do with the economics of scarcity in media and the nature of distribution of cultural content in a "push", point-to-multipoint mode. To convey this figuratively: where storage and distribution costs are high, the "shelf-space" is limited and it makes sense (especially to the large profit-maximising media conglomerates) to put up only those products that sell best – the hits, i.e. uniform content that, subject to the lowest common denominator, appeals at a certain moment to the largest possible audience.[55]

As a result of this scarcity intrinsic to analogue media markets, sales and correspondingly consumption are concentrated in a miniscule part of all the available content. Put bluntly, 20 per cent of the content produced and sold (be it a book, film or song) generates 80 per cent of all the sales in that market (with a few blockbusters making up a substantial chunk of it). The remaining 80 per cent of existing content never actually make it on to TV and cinema screens or the shelves of the CD and DVD shops, or find only marginal audience in unpopular outlets, such as "world music" shops.

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pp. 107–127, at pp. 119–120 and Laurie Ouilette and Justin Lewis, "Moving Beyond the 'Vast Wasteland': Cultural Policy and Television in the United States" (2000) Television and New Media 1:1, pp. 95–115, at p. 96. On the "multi-channel paradox", whereby despite the diversity of channels, there is no actual diversity of content, see Mónica Ariño, "Competition Law and Pluralism in European Digital Broadcasting: Addressing the Gaps" (2004) Communications and Strategies 54, pp. 97–128, at pp. 98 *et seq*.

[54] For a critique of the cultural industries and on the homogeneity of content, see Christoph Beat Graber, *Handel und Kultur im Audiovisionsrecht der WTO. Völkerrechtliche, ökonomische und kulturpolitische Grundlagen einer globalen Medienordnung*, Berne: Staempfli, 2003, at pp. 18 *et seq*. For counter-arguments, see Gaetano Romano, "Technologische, wirtschaftliche und kulturelle Entwicklungen der audiovisuellen Medienmärkte in den letzten Jahren" in Graber *et al*., *supra* note 31, pp. 1–13, at pp. 4 *et seq*.

[55] "For too long we've been suffering the tyranny of lowest-common-denominator fare, subjected to brain-dead summer blockbusters and manufactured pop. Why? Economics. Many of our assumptions about popular taste are actually artifacts of poor supply-and-demand matching – a market response to inefficient distribution." Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More*, New York: Hyperion, 2006, at p. 16.

One may argue that this is nothing unusual. After all, the 80/20 rule, which was first used to describe the allocation of wealth among individuals, whereby 20 per cent of the population owns 80 per cent of the wealth, was formulated by the Italian economist Vilfredo Pareto in 1896. Furthermore, these so-called *power laws* have been noted in many areas, such as physics, biology, geography, economics and linguistics, and depict a frequent situation of extreme distribution, whereby a relatively small proportion of elements generates a large proportion in distribution.[56]

Yet, we show in the following paragraphs that the digital environment has given new dimensions to this underlying rule and, most importantly in our context, has modified the rules of supply and demand for content, making a great deal more of it available and accessible. This paradigm change has become known as "The Long Tail" theory and was coined by the editor of the *Wired* magazine, Chris Anderson, in 2004,[57] although it builds upon substantiated prior and parallel research.[58]

In its briefest form, the long tail theory holds that in digital markets:

(i) supply and demand are not concentrated only on a small definite number of products (as in the offline world) and the tail of available variety is far longer than we realise;
(ii) the entire tail is now within reach economically; and
(iii) all those niches, when aggregated, make up a significant market.[59]

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[56] See generally Carl Shapiro and Hal R. Varian, *Information Rules*, Cambridge, MA: Harvard Business School Press, 1999. See with regard to the world wide web, F. Faloutsos, P. Faloutsos and C. Faloutsos, "On Power-Law Relationships of the Internet Topology" in Mark Newman, Albert-László Barabási and Duncan J. Watts (eds), *The Structure and Dynamics of Networks*, Princeton, NJ: Princeton University Press, 2006, pp. 195–206.

[57] Chris Anderson, "The Long Tail", *Wired* 12.10, October 2004. Later, in 2006, it became a more comprehensive book (*supra* note 55).

[58] See in particular Clay Shirkey, "Power Laws, Weblogs, and Inequality" in Jon Lebkowsky and Mitch Ratcliffe, *Extreme Democracy*, 2003, available at http://www.extremedemocracy.com/, pp. 46–52; Erik Brynjolfsson, Yu Hu and Michael D. Smith, "Consumer Surplus in the Digital Economy: Estimating the Value of Increased Product Variety at Online Booksellers" (2003) MIT Sloan Working Paper No. 4305–03; Erik Brynjolfsson, Yu Hu and Michael D. Smith, "From Niches to Riches: The Anatomy of the Long Tail" (2006) Sloan Management Review 47:4, pp. 67–71; Erik Brynjolfsson, Yu Hu and Duncan Simester, "Goodbye Pareto Principle, Hello Long Tail: the Effect of Search Costs on the Concentration of Product Sales", February 2007, available at SSRN: http://ssrn.com/abstract=953587.

[59] Chris Anderson, *The Long Tail*, Manifesto 10:1, 14 December 2004, available at http://www.changethis.com/ 10.LongTail.

The interesting question then is what has made the long tail *real* in the digital environment?

On the supply side, the key factor determining whether a long tail will form or not is the cost of inventory storage and distribution. Where the latter is insignificant, it becomes economically viable to sell relatively unpopular products. As already mentioned, this is in contrast to the substantial storage and distribution costs of the offline world (or what Brynjolffson *et al.* call "brick-and-mortar" world[60]), where the shelf-space (be it TV prime time or a Christmas weekend at the cinema) is limited and so is the choice.

A large conventional film rental outlet, for instance, holds about 1000 to 3000 titles, while an online DVD rental firm, like the US market leader Netflix, operating from centralised warehouses, has about 80 000. Where the products are *only* digitally available, the difference is even more striking: a large CD shop may hold about 30 000 titles, while an online music store will have about twenty times more (and constantly growing) number of titles. A TV station can broadcast only one particular film in the 20:00 slot, while its catalogue of digitally stored and distributed films may amount to more than five hundred titles.[61] One should also note here that these are contradistinctions relating only to one particular distribution channel, while in the reality of the digital environment, channels are multiple and simultaneously accessible.

On the demand side, the costs of searching and finding are crucial for the materialisation of the long tail (especially as variety becomes greater). On the one hand, this means the time invested in searching; on the other hand, the efficiency of the search. The Internet is a vast complex nonlinear network that may however be searched through a single point of entry. Search engines help us locate content within the huge volume of dynamic information on the net, thus turning into linchpins of the Internet.[62] The increasing availability of new

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[60] Brynjolfsson *et al*., "From Niches to Riches", *supra* note 58.

[61] Bluewin TV, for instance, which is a service of Swiss telecommunications operator Swisscom AG, currently offers its subscribers more than 500 video-on-demand films and over 100 TV channels and 70 radio stations, together with additional gadgets such as an electronic programme guide, a live pause function and remote recording *via* mobile phone or the Internet. See *Neue Zürcher Zeitung*, "Bluewin-TV von Swisscom geht auf Sendung", 31 October 2006..

[62] James Grimmelmann, "The Structure of Search Engine Law", New York Law School Research Paper Series 06/07, No. 23. at p. 2, referring to John Battelle, *The Search: How Google and Its Rivals Rewrote the Rules of Business and Transformed Our Culture*, New York: Portfolio, 2005; David Vise and Mark Malseed, *The Google Story: Inside the Hottest Business, Media, and Technology Success of Our Time*, New York: Delta, 2006. A survey shows that only the act of sending or reading email outranks search engine queries as an online activity (PEW Internet and American Life Project, Search Engines, 2002, available at http://www.pewinternet.org/).

tools, such as samples, feedback and recommendations, enable users to find the desired products and even new products.[63] Further advanced search tools, such as *Amazon* user reviews or *Yahoo! Music* ratings, have emerged as new orientation institutions. They are manifestations of a novel type of collective intelligence (the so-called, wisdom of crowds[64]), which creates effective filters of information that are essential in an ocean of data. The search and linkage facilitators of the Web 2.0, such as notably "tagging",[65] contribute further to sharing of experiences and intensify the information flow.

One should also acknowledge here that both the supply and demand side factors, as sketched above, are essentially dynamic. First, because with the rapid advances in digital technology, the storage and distribution costs of products, and even the expenses incurred in the production of physical goods (e.g. by printing on demand), are constantly falling; and second, because of the learning experience[66] and the expansion of the network[67] on the demand side.

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63 Brynjolfsson *et al.* analysed consumer purchase data collected from a retail company that has both an Internet channel and a catalogue channel. The company sells exactly the same product selection through both channels with the same pricing and shipping policies. However, because of the search, browsing, and recommendation tools that are unique to the Internet channel, product sales are significantly more evenly distributed on the Internet than through the catalogue channel where sales are more concentrated on best-selling products. For the catalogue channel, the top 20 per cent of products generate just over 80 per cent of this company's sales, mirroring the 80/20 rule. However, through the company's Internet channel, the same top 20 per cent products generate barely 70 per cent of sales. Since this retailer offers the same products through both channels, this shows that the demand-side drivers of the long tail phenomenon can operate independently of the supply-side drivers, such as virtual shelf-space. See Brynjolfsson *et al*., "From Niches to Riches", *supra* note 58. Experience with P2P networks shows equally that the initial experience of users focusing on hits is supplanted rapidly by more varied choice of content, and by adaptation and "mashing" of content into new forms. See Marsden *et al*., *supra* note 43, at p. 23.

64 James Surowiecki, *The Wisdom of Crowds: Why the Many Are Smarter Than the Few and How Collective Wisdom Shapes Business, Economies, and Nations*, New York: Doubleday, 2003.

65 Tagging, which is basically a process of creating labels for online content by attaching a keyword to a piece of information (e.g. a picture, article or video) is "a kind of next-stage search phenomenon", whereby online searching is advanced and personalised and digital material is organised in a tailored manner on top of existing formally defined classification schemes. See PEW Internet and American Life Project, Tagging, January 2007, available at http://www.pewinternet.org/ and David Weinberger, *Everything Is Miscellaneous: The Power of the New Digital Disorder*, New York: Doubleday, 2007.

66 See e.g. PEW Internet and American Life Project, The Broadband Difference: How Online Americans' Behaviour Changes with High-Speed Internet Communications at Home, 2002, available at http://www.pewinternet.org/.

67 On positive network effects, see e.g. Shapiro and Varian, *supra* note 56, at pp. 173–225.

This simple set of economic and technological drivers may have far-reaching implications for businesses, consumers and the economy as a whole.[68] As Anderson rather prophetically puts it:

> [w]hen you can dramatically lower the costs of connecting supply and demand, it changes not just the numbers, but the entire nature of the market. This is not just a quantitative change, but a qualitative one, too. Bringing niches within reach reveals latent demand for non-commercial content. Then, as demand shifts toward the niches, the economics of providing them improve further, and so on, creating a positive feedback loop that will transform entire industries – and the culture – for decades to come.[69]

In our particular context, this means above all that a great variety of creative content is made available and accessible – the 80 per cent creative content become equally as reachable as the 20 per cent commercial hits, endorsing in parallel the economic reason for businesses to broaden the range of their offerings and making overall the long tail "thicker" and "longer".[70] Another interesting implication regarding content diversity may stem from the possibility that in the digital environment content becomes accessible and usable long after its traditional viewing at cinemas, on TV, or through DVD rental or sale.[71] The latter "one-off" purpose corresponds to the model of "pushing" content at a mass market of users. The digital environment however allows for individually "pulling" content and may thus change the value attached to cultural content. Put romantically, the value of the content transcends its mere "one-off" use and offers incentives for creating "good" content, be it original, avant-garde or traditional.

2.2.2 New types of content production

With the sophistication of networks and growing adoption of the Internet (especially broadband), the content layer has become particularly "dense" and miscellaneous.[72] Essentially, everything is online and some things are *only*

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68 Brynjolfsson *et al*., "From Niches to Riches", *supra* note 58, at p. 1.

69 Anderson, *supra* note 55, at p. 26. See also Brynjolfsson *et al*., *ibid.* at pp. 6–8.

70 Brynjolfsson *et al.*, "From Niches to Riches", *supra* note 58.

71 Marsden *et al*., *supra* note 43, at pp. 22–23.

72 For excellent examples, see OECD, Digital Broadband Content: Mobile Content. New Content for New Platforms, DST/ICCP/IE(2004)14/Final, 3 May 2005; OECD, Digital Broadband Content: The Online Computer and Video Game Industry, DST/ICCP/IE(2004)13/Final, 12 May 2005; OECD, Digital Broadband Content: Scientific Publishing, DST/ICCP/IE(2004)11/Final, 2 September 2005; OECD, Digital Broadband Content: Music, DST/ICCP/IE(2004)12/Final, 13 December 2005. See also Weinberger, *supra* note 65.

online. Different media, such as video gaming, music, radio and newspapers, are widely accepted as substitutes for traditional analogue media.[73] Moreover, the spread of the network and its increasing density both in the sense of numbers of people online and billions of applications and contents, have led to the emergence of a new type of communication amongst users as well as new types of creativity and content production.

Due to the decreased costs of identifying like-minded groups of individuals and of communicating and acting together,[74] multiple virtual communities and social networks have arisen.[75] In conjunction with these new forms of social interaction and much more critically for our present context, people online, enabled by the Web 2.0 tools,[76] also create new content turning the web into a participative web. Besides the intensified individual creation of content in the digital environment,[77] a commons-based production of information, knowledge and entertainment emerges,[78] where "… individuals band together,

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[73] Edwin Horlings, Chris Marsden, Constantijn van Oranje and Maarten Botterman, Contribution to Impact Assessment of the Revision of the Television without Frontiers Directive, RAND Europe, TR-334-EC DG, 1 November 2005, at p. 6. See also e.g. PEW Internet and American Life Project, More Online, Doing More, February 2001 and Internet Penetration and Impact, April 2006; both available at http://www.pewinternet.org/.

[74] Urs Gasser, "Social Structures in Cyberspace: The Design and Function of Digital Institutions", Discussion Paper presented at the 9th Annual Conference of the International Society for New Institutional Economics: The Institutions of Market Exchange", 22–24 September 2005, Barcelona, at para. 1. See also Marshall Van Alstyne and Erik Brynjolfsson, "Global Village or Cyber-Balkans? Modeling and Measuring the Integration of Electronic Communities" (2005) Management Science 51:6, pp. 851–868.

[75] See most prominently http://www.myspace.com/ or http://www.facebook.com/. To reveal the sheer dynamism of these networks, O'Reilly Radar shows that during the first quarter of 2006, 280 000 new users signed up each day to MySpace and it had the second-largest amount of Internet traffic. See John Musser with Tim O'Reilly, *Web 2.0: Principles and Best Practices,* O'Reilly Radar, November 2006, at p. 4.

[76] Web 2.0 is a phrase coined by O'Reilly Media (http://www.oreilly.com/) in 2004. Proponents of the Web 2.0 concept say that it differs from early Web development (labelled Web 1.0) in that it moves away from static websites, the use of search engines and surfing from one website to the next, towards a more dynamic and interactive world wide web. See Tim O'Reilly, "What Is Web 2.0?: Design Patterns and Business Models for the Next Generation Software", 30 September 2005, available at http://www.oreillynet.com/pub/a/oreilly/tim/news/2005/09/30/what-is-web-20.html. See also OECD, Participative Web: User-Created Content, DSTI/ICCP/IE(2006)7/FINAL, 12 April 2007.

[77] See e.g. Tom O'Regan and Ben Goldsmith, "Emerging Global Ecologies of Production" in Harries, *supra* note 45, pp. 92–105.

[78] The content covers a wide range of types. OECD identifies eight categories: (i) text, novel and poetry; (ii) photo and images; (iii) music and audio; (iv) video and

contributing small or large increments of their time and effort to produce things they care about".[79] This has given previously unavailable opportunities for amateur and professional creators to express their visions and thoughts, and to interact. Consumers have turned into creators, who actively participate, using, reusing, mixing and sharing content, and constantly reshape the environment.

Data on content creation, when available, is quite impressive.[80] The mere fact that by the second quarter of 2006, 50 million blogs were created, new ones being added at a rate of 2 per second,[81] exemplifies the dynamism of the processes. Wikipedia, the multilingual, web-based, free content encyclopaedia,[82] is perhaps the best known (and much disputed[83]) instance of commons-based creation but there are hundreds of other, smaller-scale content creation projects that contribute to the miscellaneous information environment.[84]

Only lately have the further-reaching economic and social virtues of common ownership and production begun to be explored.[85] A recent report of

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film; (v) citizen journalism; (vi) educational content; (vii) mobile content; and (viii) virtual content. See OECD, Participative Web, *supra* note 76, at p. 15. For examples, see at pp. 16–18.

[79] Yochai Benkler, "Freedom in the Commons: Towards a Political Economy of Information" (2003) Duke Law Review 52, pp. 1245–1276, at p. 1261.

[80] In countries, such as Finland, Norway, Iceland, Portugal, Luxembourg, Hungary and Poland, an average of one third of all Internet users aged 16–74 years were engaged in content generation in 2005. Younger age groups (16–24) were even more active Internet content creators and show a participation of 60–70 per cent. The data from Asia and the US confirm this trend of ever increasing content contribution, especially where broadband is available and amongst the young. See OECD, Participative Web, *supra* note 76, at pp. 9–12. See also PEW Internet and American Life Project, Content Creation Online, 29 February 2004, available at http://www.pewinternet.org/.

[81] See Musser and O'Reilly, *supra* note 75.

[82] Presently, Wikipedia has approximately 7.4 million articles in 253 languages (1.8 million in the English edition) and ranks among the top ten most-visited websites worldwide. See http://en.wikipedia.org/wiki/Wikipedia#_note-0.

[83] See Don Tapscott and Anthony D. Williams, *Wikinomics: How Mass Collaboration Changes Everything*, New York: Portfolio, 2006; George Bragues, "Wiki-Philosophizing in a Marketplace of Ideas: Evaluating Wikipedia's Entries on Seven Great Minds", April 2007, available at http://ssrn.com/abstract=978177; Andrew Keen, *The Cult of the Amateur: How Today's Internet Is Killing Our Culture*, New York: Currency, 2007.

[84] See Weinberger, *supra* note 65.

[85] See e.g. Yochai Benkler, "Coase's Penguin, or Linux and the Nature of the Firm" (2002) Yale Law Journal 112, pp. 369–446; Carol M. Rose, "The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems" (1998) Minnesota Law Review 83, pp. 129–182; Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom*, New Haven: Yale University Press, 2006.

the OECD did however acknowledge the enormous potential that user created content has and states that:

> [t]he Internet as a new creative outlet has altered the economics of information production and led to the democratisation of media production and changes in the nature of communication and social relationships […]. Changes in the way users produce, distribute, access and re-use information, knowledge and entertainment potentially gives rise to increased user autonomy, increased participation and increased diversity. These may result in lower entry barriers, distribution costs and user costs and greater diversity of works as digital shelf space is almost limitless.[86]

Amongst the various implications of these developments, and a key one in our context, is the increased economic importance of information, which has correspondingly magnified the value of copyright law[87] and expanded its reach.[88] At the same time, the existing copyright models have been put under pressure. Since the latter are often too rigid to allow full realisation of the possibilities of the digital mode of content production and distribution (or indeed render them illegal), some new hybrid models of authors' rights protection have emerged.[89] One prominent model is the Creative Commons (cc) licence,[90] which allows managing and spreading content under a "some rights

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[86] OECD, Participative Web, *supra* note 76, at p. 5. The OECD Report elaborates further that, "[t]hese changes imply a shift away from simple passive consumption of broadcasting and other mass distribution models ('couch potatoes') to more active choosing, interacting and actually creating of content and a shift to a participatory 'culture'. Technological change empowers individuals to 'tell their stories', to produce cultural goods such as music and to transform the information and media content environment surrounding them. Users may derive a higher value from this content consumption as the content may be more personalised as users have a greater control over this on-demand content". See *ibid*. at p. 35, referring to Lessig, *supra* note 26; William W. Fisher III, *Promises to Keep: Technology, Law, and the Future of Entertainment*, Stanford: Stanford University Press, 2004; William W. Fisher III, speech at the OECD Italian government Conference on The Future Digital Economy Digital Content – Creation, Distribution and Access, 30–31 January 2006, Rome, available at www.oecd.org/dataoecd/16/44/36138608.pdf; OECD, The Future Digital Economy: Digital Content Creation, Distribution and Access, 30–31 January 2006, Rome; and Benkler, *supra* note 85.

[87] Brown, "Heritage Trouble", *supra* note 40, at p. 44. See also Julie E. Cohen, "Pervasively Distributed Copyright Enforcement" (2006) Georgetown Law Journal 95, pp. 1–48.

[88] Lawrence Lessig, "(Re)creativity: How Creativity Lives" in Porsdam, *supra* note 7, pp. 15–22, at p. 19.

[89] On copyright and user-created content, see OECD, Participative Web, *supra* note 76, at pp. 44–52. See also Urs Gasser and Silke Ernst, "From Shakespeare to DJ Danger Mouse: A Quick Look at Copyright and User Creativity in the Digital Age", Berkman Center for Internet and Society Research Publication No. 2006–05, June 2006.

[90] See http://creativecommons.org/. There are also some other types of licences

reserved" mode. Under a cc-licence, the Creator/Licensor may shape her or his package of rights applying different conditions to the licensed work (attribution; non-commercial; no derivatives; or share alike[91]). People may thus use or distribute their work under the specified conditions, while the copyright of the creator remains intact. The availability of such legal constructs feeds back positively into the development of user-created content and by giving more possibilities to the user-creator, enhances the diversity of content.[92]

3. REPERCUSSIONS FOR THE PROTECTION AND PROMOTION OF TCE

It has not been the purpose of the preceding sections to convey the idea that markets (even new and emerging ones) will readily provide answers to all TCE-related questions, or that, traditional "culture is an underleveraged resource, and that we need to learn the sophisticated techniques for squeezing more money out of it".[93] We hold rather that a consideration of the above-described technologies and market mechanisms is vital when discussing TCE. This consideration of the effects of the digital environment upon TCE must occur firstly, on a general conceptual level, and secondly, on a more concrete, policy options level.

3.1 On a Conceptual Level

On the conceptual level, it is essential to realise that these "new" technologies profoundly change the environment, where TCE are to be protected and promoted. As we saw above, digital technologies create new markets, while also modifying the ways in which markets function. Beyond market mechanisms, the digital environment has an impact on how artists and culture-makers express themselves, how they communicate with one another and with the public, how cultural content is presented and made accessible and how it is consumed. In short, it "affects the entire spectrum of culture production,

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designed by the Creative Commons, such as public domain, developing nations, sampling, founder's copyright, GNU, Wiki and music sharing. The "developing nations" licence, for instance, allows a wide range of royalty-free uses of a work in developing nations, while retaining full copyright in the developed world.

91 See http://creativecommons.org/about/licenses/meet-the-licenses.

92 See OECD, Participative Web, *supra* note 76, at p. 14.

93 David Bollier, "Globalization and Diversity, UNESCO and Cultural Policymaking: Imperatives for US Arts and Culture Practitioners and Organizations", speech at the Smithsonian Institution, Washington, DC, 11 January 2005.

distribution and presentation […] [and] brings with it the promise of cultural renewal".[94]

The discussions on TCE cannot be somehow placed in a parallel world totally unlinked to the modern digital networked environment, whose reach will only become greater over time, and to its underlying issues, to its strivings for innovation, access and cultural diversity. Taking this much broader view of the relationship "new technologies – TCE", the question is not so much whether indigenous communities use the Internet – a question that would normally lead to a discussion of TCE in a development context and seek an instrumentalisation of ICT (information and communication technologies).[95] The question is above all how the changed (and changing[96]) digital environment influences all the complex institutions and processes that we outlined at the beginning of this chapter and whether (and how) one could coherently and efficiently provide for the protection and promotion of TCE in this environment.

We hold that the new dynamism, diversity of content and empowerment of the users/communities may allow for the design of a flexible and multifaceted toolbox, as we show below. At the same time, these processes exacerbate the interrelatedness of effects within the complex system, making regulatory decisions more precarious. In this sense, for instance, the granting of additional IP protection to forms of TCE should not be assessed as beneficial, because it will have harmful repercussions within the larger complex system, among other things, reducing creativity and obstructing production of new cultural content.[97] The WIPO itself has admitted in this regard that certain amendments to the existing IPR regimes and a search for new forms are needed, notably because of the necessity for: (i) the preservation and safeguarding of intangible cultural heritage; (ii) the promotion of

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[94] Netherlands Council for Culture, From ICT to E-Culture: Advisory Report on the Digitalisation of Culture and the Implications for Cultural Policy, submitted to the State Secretary for Education, Culture and Science, June 2003 (English edition, August 2004), at p. 8. See also PEW Internet and American Life Project, Artists, Musicians and the Internet, December 2004, available at http://www.pewinternet.org/.

[95] Even fora with broader agenda, such as the World Summit on the Information Society (WSIS), engage above all in this instrumentalisation aspect. See WSIS, Declaration of Principles, WSIS-03/Geneva/Doc/4-E, 12 December 2003; WSIS, Plan of Action, WSIS-03/Geneva/Doc/5-E, 12 December 2003; WSIS, Tunis Commitment, WSIS-05/Tunis/Doc/7-E, 18 November 2005; WSIS, Tunis Agenda for the Information Society, WSIS-05/Tunis/Doc,6(Rev.1)-E, 18 November 2005.

[96] Forecasts show, for instance, that by 2020 a global, low-cost network will be available to most people worldwide. See PEW Internet and American Life Project, The Future of the Internet II, 24 September 2006.

[97] See e.g. Gasser and Ernst, *supra* note 89.

cultural diversity; and (iii) the promotion of creativity and innovation, including a tradition-based one.[98]

However, the need for balance in the complex system of TCE protection and promotion goes beyond a balance within the IP regime.

> 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.[99]

The goal of TCE protection and promotion in the digital environment may thus need to be framed within the more overarching objective of ensuring sustainable access to cultural goods and sustainable production of culturally diverse content,[100] which does not simply mean that everything is accessible in the romantic sense of the public domain[101] but involves a complex equilibrium between openness and discretion.[102]

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98 WIPO, *supra* note 1, at para. 8. See also the Declaration on the Future of the WIPO (12 October 2004, at http://www.futureofwipo.org); Helfer, *supra* note 4, at pp. 1010–1012 and James Boyle, "A Manifesto on WIPO and the Future of Intellectual Property" (2004) Duke Law and Technology Review 9.

99 WIPO, *supra* note 1, Annex, at para. 4.

100 Rosemary J. Coombe, "Protecting Cultural Industries to Promote Cultural Diversity: Dilemma for International Policy-Making Posed by the Recognition of Traditional Knowledge" in Keith E. Maskus and Jerome H. Reichman (eds), *International Public Goods and Transfer of Technology under a Globalized Property Regime*, Cambridge: Cambridge University Press, 2005, pp. 559–614, at p. 613.

101 For a critique, see Anupam Chander and Madhavi Sunder, "The Romance of the Public Domain" (2004) California Law Review 92, pp. 1331–1373. For a comprehensive analysis, see Charlotte Waelde and Hector MacQueen (eds), *Intellectual Property: The Many Faces of the Public Domain*, Cheltenham, UK: Edward Elgar, 2007.

102 Brown, "Heritage Trouble", *supra* note 40, at p. 51. Without such a balance, what emerges may be what Tyler Cowen calls the "paradox of diversity": "The world as a whole may be more diverse if some societies refuse to accept diversity as a value. Those cultures will continue to generate highly unique creations, given their status as cultural outliers'. Conversely, generalized diversity may produce greater uniformity because of the cultural blending it inevitably produces". Cowen clarified however that the paradox of diversity may not hold true for all social changes and that some manifestations of wealth and technology increase diversity across the board. See Tyler Cowen, *Creative Destruction: How Globalization Is Changing the World's Cultures*, Princeton: Princeton University Press, 2002, at p. 146. See also Rosemary J. Coombe, "Fear, Hope, and Longing for the Future of Authorship and a Revitalized Public Domain in Global Regimes of Intellectual Property" (2003) DePaul Law Review 52, pp. 1171–1191, at p. 1185.

Further, we argue that the sustainability of the digital environment will also become vital. In this context, developments, which one might characterise as purely technical and/or "foreign" to the system may seriously influence the TCE ecology as well. At the micro-level, digital sustainability, for instance, in the sense of ensuring that digitised formats, especially in the field of cultural heritage are interoperable, of high quality and future-proof, will certainly be important.[103] In a broader context, the organisation of information by search engines, their precision, positioning and ultimately control, may be critical.[104] We also consider as particularly important all decisions and/or developments that influence the interoperability of networks, software and content and the control of the network,[105] as well as the question of net neutrality.[106]

As a final remark on the conceptual level, we deem it essential that all stakeholders involved in the TCE discussions, including the States, the civil society, the international community, and the indigenous peoples themselves, cultivate alertness and sensitivity to the developments of the digital environment in order to be able to react appropriately making full use of the opportunities and diminishing the harmful effects.

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103 See Netherlands Council for Culture, *supra* note 94.

104 Vaidhyanathan, for example, questions the role of Google as ubiquitous search engine and asks whether public libraries may be more appropriate to administer knowledge. He notes: "It is important to remember that Google serves its own masters: its stockholders and its partners. It does not serve the people of the State of Michigan or the students and faculty of Harvard University. The real risk of privatization is simple: companies fail. Libraries and universities last. Companies wither and crash. Should we entrust our heritage and collective knowledge to a company that has been around for less than a decade?". See Vaidhyanathan, "The Googlization of Everything and the Future of Copyright", *supra* note 26, at p. 1220. For a more optimistic vision of Google's role, see Leslie A. Kurtz, "Copyright and the Human Condition" (2007) UC Davis Law Review 40, pp. 1233–1252, at pp. 1250–1251.

105 John G. Palfrey, Jr. and Robert Rogoyski, "The Move to the Middle: The Enduring Threat of 'Harmful' Speech to the End-to-End Principle" (2006) Washington University Journal of Law and Policy 21, pp. 31–65.

106 The principle of net(work) neutrality or in its broader sense, the end-to-end principle, essentially holds that the network should be neutral to the content being passed and that intermediaries should pass all packets, while the intelligence is located at the edges of the network where necessary. For an excellent account of the "net neutrality" discussions, see Susan P. Crawford, "Network Rules" (2006) Benjamin N. Cardozo School of Law Working Paper No. 159; Tim Wu, "Network Neutrality, Broadband Discrimination" (2003) Journal on Telecommunications and High Technology Law 2, pp. 141–175. See also the contributions to the special issue on net neutrality of the (2007) International Journal of Communication 1, available at http://ijoc.org/.

3.2 On a Concrete Policy Measures Level

While "the relationship between tradition, modernity and the market-place is not always perceived to be a happy one"[107] (and often isn't[108]), "[i]t 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".[109] Furthermore, although we do not underestimate the fact that many indigenous communities tend to be materially poor[110] and that the digital divide is a reality, anecdotal and empirical evidence shows that indigenous peoples have been active users of the Internet for quite some time now (albeit certain communities reject it). They have been "using it to communicate amongst themselves and to others, to gain access to resources, to publish and access databases, and to provide alternative perspectives on issues that are not covered in mainstream media".[111] It is even argued that many indigenous communities may overcome isolation through the Internet because it provides "an ideal medium for aboriginal communications"[112] and that it may further prevent the erosion of aboriginal languages, whose maintenance feeds positively into reaffirmation of cultural traditions and a renewal of traditional relationships with the environment.[113] Indeed, some argue that, "[t]he Internet is an ideal match for Aboriginal tribes, providing the necessary

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107 WIPO, *supra* note 1, Annex, at para. 13.

108 Tyler Cowen in his book *Creative Destruction* is one of the very few, who insists that global monopolies and imported technologies have also led to promoting local creativity by generating new markets for innovative, high-quality artistic productions. See Cowen, *supra* note 102 and Tyler Cowen, *In Praise of Commercial Culture*, Cambridge, MA: Harvard University Press, 1998, in particular at pp. 15–43.

109 WIPO, *supra* note 1, Annex, at para. 14. See also the contribution to this volume by Miriam Sahlfeld.

110 See Graham Dutfield, "Promoting Local Innovation as a Development Strategy" (2006) Innovations: Technology, Governance, Globalization 1:3, pp. 67–77, at pp. 72–73, referring to the work of Anil K. Gupta, "From Sink to Source: The Honey Bee Network Documents Indigenous Knowledge and Innovations in India" (2006) Innovations: Technology, Governance, Globalization 1:3, pp. 49–66.

111 Rosemary J. Coombe, "Preserving Cultural Diversity through the Preservation of Biological Diversity: Indigenous Peoples, Local Communities, and the Role of Digital Technologies" in Fiona Miller *et al.* (eds.), *The Gender of Genetic Futures*, NNEWH Working Paper Series, September 2000, pp. 132–160, at p. 147.

112 Coombe, *ibid*. at p. 148.

113 Coombe, *ibid*. at pp. 147–148, referring to L. Maffi and T. Skutnabb-Kangas, "Linguistic Diversity and the 'Curse of Babel'", United Nations Environment Programme, Cultural and Spiritual Values of Biodiversity, London: Intermediate Technology Publications, 2000. See also recently Ethan Zuckerman, "The Survival of Languages in a Digital Age", 16 May 2007, available at http://www.ethanzuckerman.com/blog/?p=1426.

economy of scale to support electronic publishing for such small constituencies […] because the Internet can support an admixture of audio, video, and text, transcending the print medium, it is ideally suited to the oral story-telling traditions of the Aboriginal Community".[114]

Bearing this in mind and taking into account the new mechanisms of the digital environment, as elaborated above, on the concrete policy measures level, one can envisage a number of tools that can be mobilised for the effective and efficient protection and promotion of TCE. We briefly look into the protection and the promotion tools as separate categories, although their effects will overlap in practice.

3.2.1 Tools to protect

In terms of protecting TCE from misappropriation and making sure that the economic benefits are reaped by the communities themselves, it is first necessary to make proper use of the available IP modes. Although we revealed the limitations of the IPR system at the beginning of this contribution, an apt use within these limitations can nonetheless be advantageous, provided that the indigenous communities have the necessary information on what they want to achieve and how they could achieve it by means of IP.[115]

In the digital environment, where information is organised, searched and accessed in a new way, some software tools, including digital rights management (DRM), may enable authorised members of communities to better "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".[116]

In addition, as we argued above, the emergence of softer forms of IP protection, less rigid than the proprietary ones, such as the Creative Commons

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[114] Barry Zellen, "Surf's Up!: NWT's Indigenous Communities Await a Tidal Wave of Electronic Information" (1998) Cultural Survival Quarterly 21:4, as referred to by Coombe, *ibid*. at p. 148. See also Marcia Nickerson and Jay Kaufman, "Aboriginal Culture in the Digital Age" (2005) Policy, Politics and Governance 10, pp. 1–7.

[115] See Miriam Sahlfeld's contribution to this volume. See also Coombe *et al*., *supra* note 18. Some governments have taken steps towards informing and educating the indigenous and local communities within their State territories. See e.g. New Zealand Ministry of Economic Development, Te Mana Taumara Mātauranga: Intellectual Property Guide for Māori Organizations and Communities, Wellington, 2007.

[116] WIPO, *supra* note 1, Annex, at para. 245, referring *inter alia* to Jane Hunter, Bevan Koopman and Jane Sledge, *Software Tools for Indigenous Knowledge Management*, September 2002, available at http://www.archimuse.com/mw2003/papers/hunter/hunter.html.

licence, may prove particularly useful, allowing the custodians of TCE to shape their presentation reserving some rights of importance to the community,[117] while releasing others to be shared, remixed and reused.[118] The pursuit of adequate protection tools should not however remain limited to the cc-licence, which cannot reflect all the specificities of traditional knowledge,[119] and attempts should be made to develop new non-standard licences that fit better the complex indigenous world of sacred, private, secret and shared.[120] Such tailored models may also correspond better to some indigenous forms of creation, where the author as a solitary figure is not central to the creative process. They may also contribute to overcoming the binary code in the TCE discussions of either IP *or* public domain[121] and allow "in-between" hybrid solutions.

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[117] Kansa *et al.* find the creative commons licence useful for TK/TCE protection and suggest ways in which it could be better moulded to correspond to the needs of indigenous communities. See Eric C. Kansa, Jason Schultz and Ahrash N. Bissell, "Protecting Traditional Knowledge and Expanding Access to Scientific Data: Juxtaposing Intellectual Property Agendas via a 'Some Rights Reserved' Model" (2005) International Journal of Cultural Property 12, pp. 285–314.

[118] Lawrence Lessig offers some examples of CC spread. The first example comes from Brazil, at the site Overmundo (http://www.overmundo.com.br). This is a collaborative website designed to spread Brazilian culture. Its distinctive feature is that both its content and design are generated by users and everything made available on the site under a CC license. The Overmundo tools give users the capacity to rate the quality of contributed content. The community has built a "cultural database" with thousands of people sharing and making content widely available. In less than seven months, there have been more than 7000 contributors from all over Brazil. A second example comes from South Africa: ccMixter South Africa (http://www.ccmixter.co.za) is leading a unique cultural remixing competition, drawing upon the work of creators from both Brazil and South Africa. The competition is part of the "culturelivre" project, which is a joint effort of Creative Commons in Brazil and South Africa. To find samples for the competition, ccSA invited some of the most important custodians of musical heritage in South Africa – including the International Library of African Music (ILAM) – to produce short riffs using traditional African instruments. Among these instruments are the Mutumba drums, which are generally inaccessible on the Internet today. These drums were originally from Zimbabwe and used to accompany spiritual ceremonies that include dancing, singing, clapping and playing the mbira thumb piano. Young musicians entering the competition can remix these traditional sounds, and in the process, develop an understanding of the roots of music in both cultures. See Lawrence Lessig, cc letter, 16 November 2006, available at http://creativecommons.org/weblog/entry/6155.

[119] Kansa *et al.*, *ibid.*

[120] Eric Kansa, "Finding Common Ground in the Digital Commons", 14 August 2007, available at http://icommons.org/articles/finding-common-ground-in-the-digital-commons.

[121] Kansa *et al.*, *supra* note 117.

The flexibility of the digital mode and the possibilities for "tagging" information, i.e. creating information about information is another useful attribute.[122] This so-called *metadata* may allow for the restriction of certain types of information, which is, for instance, considered sacred, secret or of other specific value to the indigenous community.[123] This may contribute substantially to overcoming the fears of indigenous peoples of maltreatment of sacred values and symbols, which are core to their identity. It may also facilitate the process of registering and compiling data on TCE that is subsequently easily findable, searchable and manageable, for purely anthropological purposes and/or more importantly, for IP protection.[124]

Needless to say, most of these windows of opportunity have not been fully explored or tested in practice. To reach a higher level of conceptualisation/implementation, the regulatory endeavours at national, regional and international level should take them into account and not be over-aggressive in their approach to (re)regulating.[125] The dangers of regulators with "tunnel vision",[126] who decide upon mere bits of the complex adaptive system that is TCE protection and promotion, are real and present. Procedural legal frameworks, as suggested for instance by Christoph Beat Graber in this volume, may be more advantageous, since they allow for constant readjustment and evolving law-making.

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122 See Weinberger, *supra* note 65.

123 Kansa *et al.* refer to the Indigenous Collections Management Project, which created data-security software and metadata standards for the dissemination of culturally sensitive materials. Kansa *et al.*, *supra* note 117, at p. 11. See also Hunter *et al.*, *supra* note 116.

124 While of course fully acknowledging the static of such databases: see Brown, "Heritage Trouble", *supra* note 40, and Michael F. Brown, *Who Owns Native Culture?*, Cambridge, MA: Harvard University Press, 2003, at pp. 206 *et seq*.

125 There are some new initiatives, such as the projected Treaty on Access to Knowledge (A2K Treaty, draft 9 May 2005, available at http://www.cptech.org/a2k/), which envisage certain restrictions to regulation. The A2K Treaty, for example, suggests some general limitations and exceptions to copyright (such as for educational or library institutions); special provisions regarding Internet Service Providers, DRM and the extension of the term of protection, as well as positive measures for the expansion and enhancement of the knowledge commons and the promotion of open standards, endorsing in effect maximum standards of IP protection. See Helfer, *supra* note 4, at p. 1014. See also Brian Fitzgerald, Anne Fitzgerald, Mark Perry, Scott Kiel-Chisholm, Erin Driscoll, Dilan Thampappilai and Jessica Coates, *Creating a Legal Framework for Copyright Management of Open Access within the Australian Research Sector*, OAK Law Project Report No 1, August 2006, Queensland, at pp. 99–102.

126 See Gunther Teubner and Andreas Fischer-Lescano's contribution to this volume, at p. 19.

3.2.2 Tools to promote

We do not deny that the processes of appropriation and misappropriation of TCE are facilitated in the digital environment. If we admit, however that, "[c]ulture is organic in nature and in order for it to survive, growth and development are necessary",[127] the perspective changes. Creativity and the dynamic aspect of TCE[128] come to the fore. This viewpoint transcends the preservation possibilities that digital technologies have allowed and means above all, protection and promotion of the indigenous communities. For, as Michael F. Brown notes, "if global cultural diversity is preserved on digital recording devices while the people who gave rise to this artistry and knowledge have disappeared, then efforts to preserve intangible property will be judged a failure".[129]

In view of the salient features of the digital environment revealed in this essay, we can envisage a few scenarios contributing to the promotion of TCE, and of the indigenous and local communities behind them.

First, the minimal storage and distribution costs of digital media are also applicable to TCE. More importantly, in a digitised form, these TCE become "present" in the online world. The capacity of the latter to continuously generate markets for niche products, as depicted in Section 2.2.1, also offers possibilities for the creation of markets for TCE, both in the form of physical objects and as fixed digitised performances, stories and songs. The new demand for TCE could have (at least) a twofold effect. It would mean, on the one hand, new (or multiplied) economic opportunities for the indigenous communities to market their creations globally and to become actively engaged in global trade. The financial inflow could substantially effect the strengthening of the identity of the peoples and their welfare.[130] This empowerment will also feed positively and foster "creativity, connectivity, and innovation [which] are probably far more effective at preserving and enhancing the dynamism and vitality of traditional knowledge"[131] than protectionism.

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127 WIPO, *supra* note 1, at para. 8.

128 Elizabeth Burns Coleman argues in this volume that TCE may indeed be perceived as more dynamic than modern cultural production.

129 Brown, "Heritage Trouble", *supra* note 40, at p. 54. See also Graham Dutfield, "Protecting and Revitalising Traditional Ecological Knowledge: Intellectual Property Rights and Community Knowledge Databases in India" in Michael Blakeney (ed.), *Intellectual Property Aspects of Ethnobiology, Perspectives on Intellectual Property*, Vol. 6, London: Sweet and Maxwell, 1999, pp. 103–122, at p. 109.

130 An excellent example in this regard is the story of the Seminole tribe, who is commercially very active and is now the owner of a number of casinos and the Hard Rock Café chain. See Rudolf Stumberger, "Der späte Sieg der Seminolen", *Neue Zürcher Zeitung*, 20 August 2007.

131 Kansa, *supra* note 120.

Certainly, these prospects of a global market for TCE need to be balanced against the associated risks of commodification and/or increased misappropriation due to the rising economic interest. They must be properly combined with protection tools, as suggested above, so that harm can be substantially reduced and/or prevented. On the other hand, the active participation of indigenous peoples as creators and traders would have a positive impact on their identity as a community. This revitalisation may indeed be crucial for the survival of the TCE and the communities creating them and through bottom-up, flexible and individually tailored approaches allow the position of the indigenous groups to be strengthened. The role of the State as facilitator and as provider of infrastructure and disseminator of education would however remain vital.

A further path for revitalisation and renegotiation in the broader sense of cultural diversity may be made available through the Web 2.0 and the emerging phenomenon of the participative web. Where the fair use of copyright allows, or through application of non-proprietary modes of protection (such as the Creative Commons licence), indigenous artists may reshape and recreate TCE (if customary laws so permit). These TCE would then enter the contemporary space of cultural content creation and allow also for other artists to add new layers of creative substance. This would enrich both the archaic and the contemporary without necessarily putting them in a conflict situation.

All these possibilities for TCE protection and promotion offered by the digital environment (admittedly outlined here in an optimistic manner) may advance in dynamic, rather than static, mode the realisation of one of the dicta of the discussions on indigenous cultural property, as formulated by Erica-Irene Daes, that, "each indigenous community must retain permanent control over all elements of its own heritage. It may share the right to enjoy and use certain elements of its heritage, under its own laws and procedures, but always reserves a perpetual right to determine how shared knowledge is used".[132] Indeed, what the digital environment may enable is "de-fragmenting" the TCE bulk and uniquely approaching each element of the complex TCE system.

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[132] Daes, *supra* note 11, at para. 30. Heritage is defined as follows: "'Heritage' is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks" (at para. 24). For a critique, see Brown, "Can Culture Be Copyrighted?", *supra* note 10, at p. 197 (and the further references noted), as well as Brown, "Heritage as Property", *supra* note 136, at pp. 58–59.

4. CONCLUSION

It has long been acknowledged[133] that, "[t]he emergence of a global network of interconnected computers able to access, store, process, and transmit vast amounts of information in digital form has already altered our cultural landscape and, in the decades to come, […] [will] transform many of our assumptions about communication, knowledge, invention, information, sovereignty, identity, and community".[134] Through some examples, we have revealed that such changes are already discernible and that their implications, while not yet fully explored, are perceptible. It is thus essential that the impact of the digital environment is seriously taken into consideration when discussing TCE protection and promotion, because it is an inseparable part of this complex adaptive system and strongly influences its other elements, and may very well change both the objectives of TCE protection and the instruments for its achievement.

Until now, digital technologies have largely been perceived only in the rather narrow context of having implications for copyright, mostly with a negative connotation, or as instruments promoting development. This has been a hindrance to formulating a comprehensive positive approach for TCE protection in the digital networked environment. Such an approach, able to grapple with all the complex issues pertinent to TCE protection and promotion, will necessitate a large, multi-level and multi-faceted toolbox. It could be shaped along the lines of the WIPO model, which uses a combination of IP and *sui generis* options.[135] However, it will need to be supplemented by civil society

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133 See Webster, *Theories of Information Society*, *supra* note 48.

134 Patricia L. Bellia, Paul Schiff Berman and David G. Post, *Cyberlaw: Problems of Policy and Jurisprudence in the Information Age*, Eagan, MN: West Group, 2006, at p. 1. See also Castells, *supra* note 48. Castells noted that, "[t]he potential integration of text, images, and sounds in the same system, interacting from multiple points, in chosen time (real and delayed) along a global network, in conditions of open and affordable access, does fundamentally change the character of communication. And communication decisively shapes culture" (*ibid*. at p. 356).

135 The WIPO model of protection follows a number of principles. Key among them are: the principle of responsiveness to aspirations and expectations of relevant communities, which recognises indigenous and customary laws and protocols and promotes complementary use of positive and defensive protection measures; the principle of flexibility and comprehensiveness, which recognises that effective and appropriate protection may be achieved by a wide variety of legal mechanisms, and that too narrow or rigid an approach at the level of principle may constrain effective protection. Protection may accordingly draw on a comprehensive range of options, combining proprietary, non-proprietary and non-IP measures, and using existing IP rights, *sui generis* extensions or adaptations of IP rights, and specially-created *sui generis* IP measures and systems, including both defensive and positive measures; the principle of

efforts,[136] education, capacity-building[137] and involvement of grassroots organisations[138] at the national, regional and global levels that raise the awareness of both TCE and the digital environment effects and opportunities and most likely, an adjustment of some IP rules. Such a model will admittedly be a little "messy"[139] (comprising bottom-up and top-down approaches) but "compromise solutions are rarely elegant, yet they may be the best outcome when irreconcilable values collide".[140]

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recognition of the specific nature and characteristics of cultural expression ensures that protection responds to the traditional character of TCE, namely their collective, communal and intergenerational character; their relationship to a community's cultural and social identity and integrity, beliefs, spirituality and values; their often being vehicles for religious and cultural expression; and their constantly evolving character within a community. See WIPO, *supra* note 8, Annex, at pp. 7–9.

136 Michael F. Brown, "Heritage as Property" in Katherine Verdery and Caroline Humphrey (eds), *Property in Question: Value Transformation in the Global Economy*, Oxford/New York: Berg, 2004, pp. 49–68, at p. 60.

137 eIFL-IP "Advocacy for Access to Knowledge: Copyright and Libraries" is, for instance, a programme to raise awareness in copyright issues for libraries in 50 developing and transition countries. The goal is to build capacity and expertise amongst the eIFL.net library community and to represent the interests of members in key international policy fora, such as WIPO, UNESCO and the WTO. It seeks to clarify the role of digital technologies in transforming the way libraries work and fully considering the role of libraries in collecting, organising, preserving and making available the world's cultural and scientific heritage for current and future generations (in particular publicly funded libraries operating for the public benefit, which support access to knowledge, as well as education and training, critical to developing nations whose human resources are central to their advancement. See http://www.eifl.net/.

138 See Dutfield, *supra* note 110, at p. 75.

139 "Once we admit that there is room for newness – that there are vastly more conceivable possibilities that realized outcomes – we must confront the fact that there is no special logic behind the world we inhabit, no particular justification for why things are the way they are. Any number of arbitrarily small perturbations along the way could have made the world as we know it turn out very differently". See Paul Romer, "New Goods, Old Theory and the Welfare Costs of Trade Restrictions" (1994) Journal of Development Economics 43, pp. 5–38, at p. 9.

140 Brown, *supra* note 136, at p. 62.

10. New information and communication technologies, traditional cultural expressions and intellectual property lawmaking – a polemic comment

Herbert Burkert

1. INTRODUCTION: ABOUT CONCEPTS

This comment is about *concepts*: How does law perceive the challenges of information and communication technologies, how does this relate to the way in which traditional cultural expressions (TCE) are perceived and the way in which information and communication technologies are seen to be useful for these expressions? The characteristics of information and communication technologies as such and their role in the (present and future) protection and promotion of TCE are exhaustively covered in the contribution by Mira Burri-Nenova to this volume.[1] This justifies a concentration on such conceptual issues.

It will be argued that there is a predominant pattern in law's responses to information and communication technology which, in the case of lawmaking for TCE in an information and communication technologies environment, meets with what will be called "International Bad Conscience Lawmaking", leading to a series of misled approaches, such as an obsessive repetitive disorder in lawmaking (to be exemplified by recent efforts of the World Intellectual Property Organization, WIPO) and – in an attempt to deny such a bad conscience – to a display of narcissistic behavior (exemplified by the recent Convention on the Protection and Promotion of the Diversity of Cultural Expressions[2] of the United Nations Educational, Social and Cultural

[1] In the mentioned contribution, the technologies dwelt upon are referred to as "digital technologies" and associated above all with digitisation and the advent of the Internet. In the present text, the broader concept of "information and communication technologies" is used, which includes in it the specific category of digital technologies.

[2] UNESCO, Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO, 20 October 2005, entered into force 18 March 2007 (hereinafter *the UNESCO Convention*).

Organization, UNESCO). The comment will then show similar conceptual deficiencies in the way the role of information and communication technologies for TCE are perceived due to a perspective narrowed by obsessive repetition and narcissistic behavior to – what is called here – the "Zoological Garden" view.

As it should be obvious by now, this comment takes a sceptical view on current approaches and for, of course, purely heuristic reasons – assumes a polemic tone.

Such an approach is seen as justified because of the contradictions hidden in the history of international intellectual property (IP) politics for TCE. International lawmaking had become interested in TCE only at a time when international IP lawmaking had seemed to be in full possession of its exploits from domesticating information and communication technologies, and when more success seemed certain.[3] TCE provided multiple new challenges. There was the conceptual challenge: TCE of indigenous people showed some resistance to be easily captured by the TCE of the IP rights community. But the effort seemed worth the try: TCE were deemed to have a high – at least potential – value in the globalization of knowledge economies.[4] There was the technological challenge: it was foreseeable that information and communication technologies would be able to capture, store and distribute TCE enhancing their cultural accessibility and furthering their economic value. And finally, there was even a moral benefit: property issues could be linked to a human rights debate, which – with post-colonialist enthusiasm and after a long series of admittedly terrible incidents – had somewhat belatedly discovered indigenous communities. Property could now show its caring face. This display of interest in indigenous communities – not without a bad conscience about the previous neglect – also came in handy as a strategy to preempt unwanted alliances at a time when the first signs of a backlash against past victories started to appear: International IP law was now increasingly accused of stifling scientific and artistic progress and innovation and exploiting less developed countries. Governments which had been promoting such policies now saw themselves accused of policy laundering having introduced IP law through the

[3] WIPO started its fact-finding initiatives on TCE at the end of the 1990s. International IP law had its great moments in the mid-1990s with the conclusion of the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) as part of a World Trade Organization (WTO) establishment package in 1994, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty, both of 1996.

[4] With regard to this motivation, see e.g. Olufunmilayo B. Arewa, "TRIPS and Traditional Knowledge: Local Communities, Local Knowledge, and Global Intellectual Property Frameworks" (2006) Marquette Intellectual Property Law Review 10:2, pp. 155–180, at pp. 155–177.

backdoor of international obligations because in the national debates they had failed to address resistance adequately.

2. MISCONCEPTIONS IN INTERNATIONAL LAWMAKING FOR TCE

2.1 Domestication – the Predominant Pattern of Law Reacting to Technological Change

IP lawmaking is reactive lawmaking, mainly reacting to old and new information and communication technologies of reproduction and transmission.[5] But there is also more general evidence available to allow for an exercise of pattern recognition.[6] Looking back at the reactions of law to technologies ranging from main frame computing to technological phenomena around the concept of the Internet, four patterns in dealing with the "new" in technology become visible:

(a) Law may declare the "new" as being in fact not so new. This is a standard response of law, and it is one of its key performances: to be able to apply rules, which are older than the phenomena to which they are applied, solving problems with the resources available to the contract and court system without demanding new rules from the political system. This approach can be called the assimilation approach, the *assimilation of the new through interpretation*.[7]

(b) Assimilation by court interpretation or by contracting parties may not always be sufficient. Courts may not be fast enough to develop a stable precedent, doubt may linger on among contracting parties. The legislature may feel a need to display political prowess. Intervention is called for. But intervention has to be careful. Existing law is almost always also the expression of political compromise. Balances might be upset. Pandora's box might flip open. In this situation it is safe to follow the way courts are moving anyway. Courts can provide added legitimacy. Their process of consensus building only needs to

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[5] For a vivid account of the history of these reactions against technological innovation, see Edward Samuels, *The Illustrated History of Copyright*, New York: Thomas Dunne Books and St. Martin's Press, 2000.

[6] For more details, see Herbert Burkert, "Internetrecht – Informationsrecht. Vom zwar Nützlichen aber eher Zufälligen zurück zum möglicherweise Wesentlichen?" in Rainer J. Schweizer, Herbert Burkert and Urs Gasser (eds), *Festschrift für Jean Nicolas Druey*, Zurich: Schulthess, 2002, pp. 693–714.

[7] There are, of course, limits to this approach in criminal law. Although interpretation is not excluded, the principle of "no punishment without a law" requires clearly defined norms beforehand.

be accelerated by *declaring law what is developing as a court precedent* anyway, only not fast enough. In most European countries for example, the courts were agreeing that computer programs were – at least in principle – copyrightable under existing copyright law. Making such an interpretation law was only speeding up a process that was already fully developing in court precedents.[8]

(c) Technologies are also projections of desire. Desire can be politically destabilizing. Utopian and impractical propositions will start floating around. Technological change may be used as an argument to reopen closed political debates. In short: the "new" in new technologies is not only invigorating, challenging, uplifting; it also creates uncertainty and fear of how – with these new technologies – the redistribution processes of power and influence may end. New interest groups may appear asking to get involved and to be considered. New allegiances may be forged upsetting traditional coalitions. In order to reduce uncertainty in the outcome of such conflicts the traditional stakeholders urge protection and the requirement *to domesticate the radical elements* in the new technology.[9] The history of IP law provides classical examples with the earliest copying technologies.[10] Producers of such technologies again and again had to be brought into line not to upset the distribution patterns between content producers, multipliers and distributors. At the campfires of IP lawyers they are still exchanging anecdotes of how the producers of reproduction technologies like the mechanical pianola, the phonograph, the radio set, the tape recorder, the photocopier, the computer and finally internet providers had been chased, and ultimately, brought down so that they could be taken out to the common pastures of wealth distribution.

(d) Finally, *innovative lawmaking* has to be mentioned. Innovative lawmaking is not to be confounded with progressive lawmaking. The term innovative lawmaking only refers to the innovative method used in lawmaking; innovative lawmaking in this meaning and pre-emptive lawmaking may go hand in hand. Still, innovative lawmaking should be addressed separately since it throws some light on the technical and organizational side of the legal system's reaction to technology. Innovative lawmaking is, for example, neces-

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[8] For early accounts, see e.g. Max W. Laun, "Comment: Improving the International Framework for the Protection of Computer Software" (1987) University of Pittsburgh Law Review 48:4, pp. 1151–1184. As to the European situation, see e.g. Pamela Samuelson, "Comparing U.S. and E.C. Copyright Protection for Computer Programs: Are They More Different than They Seem?" (1994) Journal of Law and Commerce 13, pp. 279–300.

[9] Brian Winston, *Misunderstanding Media*, Cambridge, MA: Harvard University Press, 1986, at pp. 23 *et seq.*

[10] See *supra* note 5.

sary to adjust or to enlarge the reach of criminal law as an additional safeguard against the radical potential of technologies. In the interest of its own legitimacy, criminal law cannot be as easily adjusted by interpretation as other areas of law. Technological processes need to be closely examined and framed in a language that efficiently covers undesired actions. Innovative lawmaking may also occur as an overspill of pre-emptive lawmaking: the argument that information and communication technologies endanger the very essence of property has, for example – as a sort of windfall profit – led to new "innovative" legal concepts of property which had not been part of IP before, for example, new "*sui generis*" rights for computer chip design or databases.[11]

Predominance exists for the (c) type reaction at the national, regional and international levels of lawmaking in the interest of IP. This preference for protection reflects a limited stimulus-response model in which the technology is the challenge – here to a traditional understanding of IP – and protective lawmaking is the response. While so far these attempts to domesticate technological progress in the interest of IP may be deemed to have been successful, this success is being endangered while reaching out to integrate TCE into this traditional understanding of IP. As it can be seen from the extensive "fact-finding exercises" which WIPO has so far undertaken,[12] the phenomena and mechanisms of TCE are far too diverse to be easily integrated into existing frameworks, not to mention into a new internationally binding normative instrument. At the same time, it is clear – as described in detail in Burri-Nenova's contribution – that information and communication technologies provide potentials for TCE even if the exact dimensions of these potentials remain open to debate and will indeed be debated in this comment below. If the technological encapsulation of TCE progresses before IP law has fully grasped and digested the concepts of TCE then past successful efforts to domesticate aggressive potentials in the interest of the IP community will be endangered. At the same time, potential consuming audiences will have increased enough by then to consider (and practice) large-scale economic exploitation of TCE or at least of their surrogates. Worse, even if no such

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[11] See e.g. Bernd Hugenholtz, "The Great Copyright Robbery. Rights Allocation in a Digital Environment", Paper presented at the Conference *A Free Information Ecology in a Digital Environment*, New York University School of Law, 2 April 2000, available at http://www.ivir.nl/publications/hugenholtz/thegreatcopyrightrobbery.pdf.

[12] WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders, Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva: WIPO, April 2001. See also the more recent attempts to enquire into the state of legislation at the national and regional levels (e.g. WIPO, The Protection of Traditional Knowledge: Table of Written Comments on Revised Objectives and Principles, WIPO/GRTKF/IC/11/5(b), 18 May 2007, which may be seen as such a prolonged exercise in fact-finding.

widespread exploitation of TCE were to take place, the possibility would remain that communities producing TCE might be taken in as allies for those fundamentally opposed to IP as a long-term sustainable legal concept. So there was time pressure.

2.2 International Bad Conscience Lawmaking and Its Consequences

In this situation, the propagators of traditional IP law concepts simply had to enter the field of TCE and indigenous communities and continue to strive for success. While they might have entered this new field with confidence, this confidence was paired with bad conscience and has led to an example of what might be termed as "International Bad Conscience Lawmaking".[13]

This bad conscience has its own history: addressing TCE and indigenous communities has been the latest step in a series of attempts to address the undesirable consequences of colonialism and hegemonic politics. Similar attempts are remembered from the strife for "Free Flow of Information"[14] or the New World Information Order[15] of the late 1970s – both faded out with the (preliminary?) end of the Cold War Era. They remain present in the promises of a more equal digital world at the Geneva and Tunis World Summits of the Information Society of 2003 and 2005.[16] And there are undoubtedly other sufficient reasons for a bad conscience relating to technological offerings to the less favored regions of the world even if they are not directly related to information and communication technologies: the industrial mass production of alcohol, for instance; the percussion Colt-Walker revolver; the Winchester repeating rifle; the Maxim Machine Gun; and as an example of a more recent, highly adaptive, sustainable and robust technology, the Kalashnikov automatic rifle. These technologies had had and still have tremendous effects on what we

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[13] Obviously, international IP lawmaking may not be the only field of international lawmaking where this phenomenon occurs.

[14] See Herbert I. Schiller, *Communication and Cultural Domination*, New York: Sharpe, 1976, at pp. 24 *et seq.*

[15] Sean MacBride *et al.*, *Many Voices, One World. Towards a New More Just and More Efficient World Information and Communication Order*, London: Kogan Page, 1980. For a historical analysis, see e.g. Armand and Michèle Mattelart, *Histoire des théories de la communication,* Paris: Éditions La Découverte, 1995, at pp. 60–61; Ulla Carlsson, "The Rise and Fall of NWICO – and Then? From a Vision of International Regulation to a Reality of Multilevel Governance", paper presented at the EURICOM Colloquium: *Information Society: Visions and Governance*, Venice, 5–7 May 2003.

[16] See WSIS, Declaration of Principles, WSIS-03/Geneva/Doc/4-E, 12 December 2003; WSIS, Plan of Action, WSIS-03/Geneva/Doc/5-E, 12 December 2003; WSIS, Tunis Commitment, WSIS-05/Tunis/Doc/7-E, 18 November 2005; WSIS, Tunis Agenda for the Information Society, WSIS-05/Tunis/Doc,6(Rev.1)-E, 18 November 2005.

now somewhat tenderly call indigenous communities, and most certainly on their traditional forms of cultural expression. But bad conscience also seems sufficiently justified in the narrower context of international IP lawmaking recalling the political power games that preceded and finally led to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS) so aptly described by Drahos and Braithwaite as "information feudalism".[17]

If bad conscience seems justified, what makes it so problematic for the development of legal (and technological) policies for TCE? To answer this question it seems useful to move to another conceptual framework and view the lawmaking processes through a different lens. Since bad conscience is about guilt, a referential framework borrowing from pathopsychology might be instructive. The purpose of such a change of reference is, of course, merely heuristic. There is no intention to discredit all the well-meaning political activities caring for TCE. But the heuristic value of such an alienation, to use a term from drama theory,[18] has often been tested successfully, for instance, in ethnography. Ethnographers would describe their own contemporary "home" societies as if they were visiting a foreign tribe to make the exotic elements in their own societies more visible.[19] So it is a thought experiment based on the assumption that if what is usually seen as an undoubtedly normal policymaking process were indeed analysed under the assumption that these processes were not as normal as they seem, what sort of insights could be produced?

Of the several possible distortions in the perception of reality related to guilt, two seem to be particularly manifested in the policymaking for TCE: obsessive repetition in an attempt to deal with guilt[20] and – as a sort of protective counter-mechanism against the acknowledgement of guilt – the display of narcissistic behaviour.[21] The symptoms of both deviations are present at the

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[17] Peter Drahos and John Braithwaite, *Information Feudalism*, London: Earthscan, 2002. For their conclusions, see e.g. *ibid.* at p. 197: "It was important to define TRIPS as a matter of simple justice [...] It pulled off a huge structural shift in the world economy to move monopoly profits from the information-poor to the information-rich. As we go deeper into an information economy, the implications of this for widening inequality in the world system, even within the US and Europe will become more profound."

[18] Bertold Brecht, "Über das experimentelle Theater" in Bertold Brecht, *Gesammelte Werke*, Vol. 15, Frankfurt: Suhrkamp, 1939, pp. 285–305, at pp. 301–302.

[19] See e.g. Gérard Althabe, Daniel Fabre and Gérard Lenclud, *Vers une ethnologie du présent*, Paris: Maison Des Sciences de L'homme, 1992; Marce Augé, *Pour une anthropologie des mondes contemporains*, Paris: Flammarion, 1997.

[20] See e.g. Francesco Mancini and Amelia Gangemi, "Fear of Guilt from Behaving Irresponsibly in Obsessive–Compulsive Disorder" (2004) Journal of Behavior Therapy and Experimental Psychiatry 35, pp. 109–120.

[21] On the relation between (the lack of) guilt feelings and narcissism, see Richard Gramzow and June Price Tangney, "Proneness to Shame and the Narcissistic

same time (which is not a totally uncommon phenomenon in pathopsychology), but will be traced in two separate documents linked by the same purpose. Symptoms of obsessive repetition will be analysed in the WIPO approaches to TCE; narcissistic behaviour will be shown to be manifest in the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions.[22]

(a) Symptoms of a compulsive repetitive disorder may be traced in the general approach and the documents generated in the ongoing negotiation process at the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. WIPO had started – as already indicated – on this issue with a fact-finding mission in 1998. In 2001 the Intergovernmental Committee was established. In 2004 the Committee commissioned two sets of drafts, one entitled: "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Overview of Policy Objectives and Core Principles",[23] and the other one: "The Protection of Traditional Knowledge: Overview of Policy Objectives and Core Principles".[24] Since then, both sets of principles have undergone extensive commenting processes.[25] Current WIPO discussions in this field center on

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Personality" (1992) Personality and Social Psychology Bulletin 18:3, pp. 369–376. The *Diagnostic and Statistical Manual of Mental Disorders of the American Psychiatric Association* (4th edn, DSMIV-TR, Washington, DC: American Psychiatric Association, 1994) defines a Narcissistic Personality Disorder as follows: "At least 5 of the following should be present to qualify a person as suffering from a Narcissistic [*sic*] Personality Disorder: (1) Possesses a grandiose sense of self importance (for example: exaggerates his achievements and his talents, expects his superiority to be recognized without having the commensurate skills or achievements). (2) Pre-occupied with fantasies of unlimited success, power, brilliance and beauty or of ideal love. (3) Believes that he is unique and special and that only high status and special people (or institutions) could understand him (or that it is only with such people and institutions that it is worth his while to be associated with). (4) Demands excessive and exceptional admiration. (5) Feels that he is deserving of exceptionally good treatment, automatic obeisance of his (usually unrealistic) expectations. (6) Exploitative in his interpersonal relationships, uses others to achieve his goals. (7) Lacks empathy: is disinterested in other people's needs and emotions and does not identify with them. (8) Envies others or believes that others envy him. (9) Displays arrogance and haughtiness".

22 UNESCO, *supra* note 2.

23 WIPO, WIPO/GRTKF/IC/7/3, 20 August 2004. For the updated version, see WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/8/4, 8 April 2005, unaltered in WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007 and WIPO/GRTKF/IC/12/4(c), 6 December 2007, and reproduced in the Annex of this volume

24 WIPO, WIPO/GRTKF/IC/7/5, 24 August 2004.

25 See http://www.wipo.int/tk/en/consultations/draft_provisions/draft_ provisions.html.

national and regional implementations. In view of the constant changes in the focus and contents of WIPO's work, this analysis will restrict itself to the TCE document in the version mentioned above (hereinafter the WIPO TCE Objectives and Principles).

Although the latter WIPO Document, as well as the other documents from the current concentration on national and regional applications, display far-reaching conceptual uncertainties with regard to their objects, they nevertheless show an intensive and repetitive preoccupation with protection, an obsession, which is only equalled by the resistance of speakers from the indigenous communities to have their interests captured in the net of traditional protection concepts.[26] Although the WIPO TCE Objectives and Principles fully acknowledge the novelty of the problem,[27] the remedies proposed remain largely the same as those put forward during the days of the TRIPS and WIPO Agreements.

> The suggested specific principles would apply the guiding principles to these main issues. They draw extensively upon existing IP and non-IP principles, doctrines and legal mechanisms, as well as national and regional experiences, both practical and legislative. They recognize and take into account that some traditional cultural expressions/expressions of folklore and derivatives thereof are already protected by current IP laws, while addressing in particular, as many stakeholders have requested, the protection of subject matter that is not currently protected. The suggested principles, while extending protection for materials not currently protected by IP, are firmly rooted in IP law, policy and practice, and seek to strike the required balances in a manner that is complementary to and supportive of existing IP approaches.[28]

And the WIPO TCE Objectives and Principles continue:

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[26] See e.g. WIPO (2004), *supra* note 23, at para. 11: "Concerns have been expressed that attempts to codify and institutionalize protection of 'cultural identity' are undesirable and that a minimalist approach is preferable. An indigenous organization has put it best: 'Any attempt to devise uniform guidelines for the recognition and protection of indigenous peoples' knowledge runs the risk of collapsing this rich jurisprudential diversity into a single 'model' that will not fit the values, conceptions or laws of any indigenous society."

[27] See WIPO, *ibid.* at para. 17(g): "… recognize that private property rights in traditional cultural materials may run counter to the characteristics and nature of traditional cultures and the values of the communities that maintain, develop and use them, and, therefore, that private property rights should complement and be carefully balanced with non-proprietary and non-IP measures, as well as 'positive' and 'defensive' forms of protection".

[28] WIPO, *ibid.* at para. 16.

> regarding *scope of protection*, [we] recognize that varying and multiple levels and forms of protection may be appropriate for different kinds of TCE/EoF and depending also on the objectives intended to be served. For example, TCE/EoF of particular cultural or spiritual value or significance, such as sacred expressions, or secret TCE/EoF, may be the subject of strong forms of protection, in the form of exclusive rights or a principle of 'prior and informed consent', for example (to the extent that a community's control of access has been breached). Performances of traditional cultural expressions/expressions of folklore could also be the subject of strong protection, drawing directly from existing international law such as the WIPO Performances and Phonograms Treaty, 1996.[29]

These quotations on the principles and scope refer to the type of regulatory responses identified above (Section 2.1(c)) as pre-emptive domestication. Those are mechanisms, which had been developed in a climate of mutual reassurances as to the unquestioned legitimacy of national and regional legal policies introducing – without any apparent hesitation – the reduction of the concept of private copy, the reduction of legitimate exemptions, the protection of legal devices by technical devices (propagating their incorporation into intellectual management systems), the already mentioned "innovations" of *sui generis* rights, and finally (?) in a sort of infinite IP regress, the legal protection of the technical protection of the legal protection. And while by today, many of these mechanisms have come under increasing scrutiny as to their efficiency and effectiveness, their cost-benefit justifications and their fundamental legitimacy, in full denial of this reality such mechanisms kept on being suggested as tools to safeguard the TCE of indigenous people.

(b) In a sort of overreaction against its own bad conscience, the UNESCO Convention[30] on the other hand is displaying various symptoms of *narcissistic behaviour*:[31] In spite of its promising title and preambles the Convention avoids introducing anything which might possibly be read as the basis for a direct right to "persons belonging to minorities and indigenous peoples".[32] In good (or rather bad) international tradition, the UNESCO Convention continues to regard national governments as the trustees of "their" minorities and indigenous people. This "grandiose sense of self-importance"[33] is not without irony taking into account the harsh political evidence of conflicts between

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29 WIPO, *ibid.* at para. 17(p).

30 UNESCO, *supra* note 2.

31 Peter Leuprecht has even placed the UNESCO Convention into what he calls the "schizophrenic development of international law" (see Peter Leuprecht, "International Law: The Difficult Acceptance of Diversity" (2006) Vermont Law Review 30:3, pp. 551–564, at p. 563).

32 UNESCO Convention, at Article 2, Principle 3.

33 See *supra* note 21, at criterion 1.

indigenous people and their own governments.[34] But such is the tradition of international law which – with very few exceptions[35] – is in denial of a reality in which the greatest threat – and this is a threat which also is to have international repercussions – results from one's own government, a denial that the UNESCO Convention additionally protects with the principle of sovereignty.[36]

Furthermore, the mere use of a UNESCO instrument in the given political context can be read as a display of "fantasies of unlimited success, power [and] brilliance"[37]: it should have been obvious to those pushing for such an instrument that the result would not go beyond an exercise in cultural public relations. Such an exercise might serve internal policy purposes by giving supporting governments the opportunity to proclaim themselves as champions for endangered minorities (as long as these minorities do not decide to immigrate in significant numbers, one is almost inclined to add), and thus bringing those countries close to believing themselves to be unique and special.[38] But it remains of little consequence internationally as long as the United States, one of the main powers in the cultural field, and in addition a power with expressly hegemonic tendencies,[39] goes on undermining first the acceptance and then the future of this document.[40] And while, indeed, UNESCO conventions formally

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[34] See e.g. the account of Matthias Guenther, "The Professionalization and Commoditisation of the Contemporary Bushman Trance Dancer and Trance Dance, and the Decline of Sharing" in Thomas Widlock and Wolde Gassa Tedesse (eds), *Property and Equality, Vol. 2: Encapsulation, Commercialisation, Discrimination*, New York: Berghahn Books, 2005, pp. 208–230.

[35] See e.g. the Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950.

[36] UNESCO Convention, Article 2, Principle 2. Very optimistic that improvements can be achieved below the level of clearly defined rights: Doris Estelle Long, "Traditional Knowledge and the Fight for the Public Domain" (2006) The John Marshall Law School Review of Intellectual Property Law 5, pp. 317–329, at pp. 325 *et seq.*

[37] See *supra* note 21, at criterion 2.

[38] *Ibid.* at criteria 3 and 4.

[39] For further quotes from the US administration, see Peter Leuprecht, *supra* note 31, at pp. 557 *et seq.*

[40] It is not a coincidence that this power had rejoined the UNESCO (after twenty years of absence) on 1 October 2003. As the United States Ambassador Louise V. Oliver had made it clear in her policy statement of 6 June 2005, "three important things had changed during the twenty years we were absent from UNESCO. The first is that the world has changed. Global challenges require global solutions, and an intergovernmental organization like UNESCO is particularly appropriate in addressing these kinds of issues. The second is that UNESCO has changed, [...] UNESCO is on the path to reform. [...] The third is that the United States has changed, particularly since 9/11 and

are binding international instruments, it has to be remembered that the exact binding character is essentially a question of the material contents of each of these conventions. To this extent, Article 20(2) of the UNESCO Convention confirms the limited range of the document by clarifying that, "[n]othing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties". And to round off this impression, Article 25 provides an extremely meek moderation instrument for the Convention.[41]

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the war on terrorism. We as a country have become more aware of the need to explain to the world who we are as a people – our culture, our values, our ideas, and our concerns. We need to reach out to other countries, and to try to make our public diplomacy more effective. As a full member of UNESCO once again, the United States will be able to participate in international discussions and initiatives in all the areas covered by UNESCO's mandate. Our return to UNESCO will also enable us to learn more about the traditions, values, and cultures of other countries" (Louise v. Oliver, Policy Statement, US National Commission to UNESCO, Washington, DC, 6 June 2005). This statement certainly invites more questions than it answers when, for instance, it combines the "war on terrorism" with the intention to learn about other cultures. Perhaps this statement becomes clearer when connected to the results of the 2007 Annual Meeting of the US National Commission to UNESCO on 21 and 22 May 2007 with the recommendation to "[e]xplore the possibility that the 2009 or 2011 General Conference be held in a predominantly Muslim country (as long as not cost prohibitive)" (US National Commission for UNESCO, Meeting Minutes – Annual Meeting of the US National Commission to UNESCO, UNESCO as Capacity Builder: Pursuing its Mandate through Education, the Sciences, Culture and Communications, Washington DC: Georgetown University Marriott, 21 and 22 May 2007, at p. 1). A similarly pragmatic reason for joining again seems to be expressed in Ambassador Louise V. Oliver's comment on the UNESCO Convention in that same speech: "… we do not want UNESCO to evolve into a trade organization for an undefined category of 'cultural goods and services'. However, most of UNESCO's member states strongly support this proposed convention, partly because they feel threatened by modernization and globalization. They use the word 'culture' to refer to their identity, and they are determined to try to find ways to protect their identities. [...] Unfortunately, many of UNESCO's member states are enthusiastic about using UNESCO to establish a body of soft and hard international law in areas that come under its mandate. Although in rare instances there may be a need for some sort of international instrument, the United States will generally oppose the development of new normative instruments as we think they are divisive and undermine the collegial spirit of UNESCO."

[41] Article 25 of the UNESCO Convention reads as follows: "(1) In the event of a dispute between Parties to this Convention concerning the interpretation or the application of the Convention, the Parties shall seek a solution by negotiation; (2) If the Parties concerned cannot reach agreement by negotiation, they may jointly seek the good offices of, or request mediation by, a third party; (3) If good offices or mediation are not undertaken or if there is no settlement by negotiation, good offices or mediation, a Party may have recourse to conciliation in accordance with the procedure laid down in the Annex of this Convention. The Parties shall consider in good faith the

But it has to be conceded – and to that extent the concerns of the United States may not have been without any foundation – that the UNESCO Convention could at least serve as a rhetoric reference, even if only with limited reach, in international policymaking, disputes, soft and hard lawmaking for the future role of cultural goods in world markets and for the role of possible cultural exemptions to rules governing international trade in goods and services.[42] However, against such a background, the engagement for indigenous people by the UNESCO Convention can no longer be seen as an exercise in altruistic cultural policies but rather as a display of exploitative behavior driven by the need of those who are looking for an additional, even if only rhetorical, argument for their disputes.[43]

Both the narcissistic compensation of guilt displayed in the UNESCO Convention and the guilt-driven compulsive repetition approach in the WIPO TCE Objectives and Principles suggest an international policymaking that is guided by misconceptions. These conceptual difficulties in developing an appropriate normative approach to TCE are – at least synchronically – linked to misconceptions about the role of information and communication technologies for TCE.

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proposal made by the Conciliation Commission for the resolution of the dispute; (4) Each Party may, at the time of ratification, acceptance, approval or accession, declare that it does not recognize the conciliation procedure provided for above. Any Party having made such a declaration may, at any time, withdraw this declaration by notification to the Director-General of UNESCO."

[42] Alex Khachaturian, "The New Cultural Diversity Convention and its Implications on the WTO International Trade Regime: A Critical Comparative Analysis" (2006) Texas International Law Journal 42, pp. 191–209; arguing for even a greater importance, see Eireann Brooks, "Cultural Imperialism vs. Cultural Protectionism: Hollywood's Response to UNESCO Efforts to Promote Cultural Diversity" (2006) The Journal of International Business and Law 5, pp. 112–136, at pp. 123 *et seq.*

[43] See *supra* note 21, at criterion 6. With that criterion the additional criterion of having at least five criteria fulfilled to legitimately state the presence of a narcissistic behavior would also be met. About the issues at stake, see Christoph Beat Graber, "The New UNESCO Convention on Cultural Diversity; A Counterbalance to the WTO?" (2006) Journal of International Economic Law 9:3, pp. 553–574; Michael Hahn, "A Clash of Cultures? The UNESCO Diversity Convention and International Trade Law" (2006) Journal of International Economic Law 9:3, pp. 515–552.

3. THE ROLE OF INFORMATION AND COMMUNICATION TECHNOLOGIES FOR TRADITIONAL CULTURAL EXPRESSIONS – LIMITATIONS OF A "ZOOLOGICAL GARDEN" VIEW

Similar to the predominance of "protective" thinking in the normative approaches to TCE, there are illusions about protection when conceptualizing information and communication technologies as a problem solver for TCE. This illusory approach will be labelled here as "Zoological Garden" view, and not only so because of the emphasis on protection.

3.1 The "Zoological Garden" View

Zoological gardens started out as show cases to satisfy the curiosity about exotic foreign worlds. Such showcases were not restricted to the animal world, but – in botanical gardens – included vegetation, and in "ethnological shows" foreign artefacts and human beings.[44] The cultural understanding of such "gardens" and other exotic displays has changed over time. Today, such "gardens" are referred to rather as genetic resource storage devices, as biological backups against the natural or not so natural extinctions of species. And it would be quite inappropriate, today, to describe, particularly with these new terms, the interest in indigenous people – although, of course exclusively for the sake of medical progress, genetic sample taking from "interesting" populations is not unheard of.[45] As regards the cultural field, in post-colonial times, the correct and appropriate description for the renewed interest in indigenous people and their cultures would be the shared interest in the cultural heritage of mankind. This does not exclude regarding indigenous people at the same time as keepers of potentially valuable knowledge. And this is more than a mere rhetorical change: today, indigenous people are no longer taken hostage or invited to remain on sailing ships to be then presented to monarchs and their curious subjects. Today travel funds are set up and their representatives are invited to sit on committees to improve the efficiency and legitimacy of policymaking. The unfettered curiosity of former times seems to have been

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[44] Eric Baratay and Elisabeth Hardouin-Fugier, *Zoo. A History of Zoological Gardens in the West*, London: Reaktion Books, 2002, at pp. 73 *et seq.*

[45] See e.g. UN Permanent Forum on Indigenous Issues, 5th Session, New York, 15–26 May 2006, Collective Statement of Indigenous Organizations Opposing "The Genographic Project", Agenda Item 4, presented on behalf of Global Indigenous Caucus, Buffalo River Dine Nation, International Indian Treaty Council (IITC), Indigenous Peoples Council on Biocolonialism (IPCB) and the Knowledgeable Aboriginal Youth Association.

replaced by an allegedly more civil reflective instrumentalism.[46] Again, it has to be added that the inclusion of indigenous people is not only sought after by the proponents of traditional IP regimes but also by the opponents of such concepts: Groups arguing for the extension of the public domain and intellectual commons in search of international alliances are also eager to recruit indigenous people for their cause.[47]

3.2 Consequences for the Perception of the Usefulness of Information and Communication Technologies for TCE

Against this background, it is not surprising that such a "Zoological Garden" view is tainting the perception of the potential of information and communication technologies for TCE. As has been described in detail in Mira Burri-Nenova's contribution, information and communication technologies do have enormous potential for TCE: information and communication technologies are able to gather, register and preserve what is accessible to our senses. This comment is not arguing against such observations. In view of the political viability of indigenous communities, the wide distribution of suitable objects may well become an issue of mere cultural survival.[48] The observations here are therefore not meant to replace or argue against such a position but to supplement such observations by focusing on what is obscured because of the "Zoological Garden" view, obsessively preoccupied with protection and narrowed by narcissism.

There is no doubt that the range of the sensory spectrum will be even more fully exploited in the future by information and communication technologies improving three-dimensional perception and advancing the technology supported by sensory processing of smell and touch.[49] But to recommend information and communication technologies as increasingly more comprehensive

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[46] For further arguments against such a merely functional and instrumental understanding of participation of indigenous people, see Erik B. Bluemel, "Separating Instrumental from Intrinsic Rights: Toward an Understanding of Indigenous Participation in International Rule" (2006) American Indian Law Review 30, pp. 55–132.

[47] See e.g. Peter Drahos, "Freedom and Diversity – A Defense of the Intellectual Commons" (2006) Australasian Intellectual Property Law Resources. See also the material available at The Digital Library of the Commons at http://dlc.dlib.indiana.edu/contentguidelines.html.

[48] André Emmerich, "Improving the Odds. Preservation through Distribution" in Kate Fitzgibbon (ed.), *Who Owns the Past? Cultural Property and the Law*, New Brunswick, NJ: Rutgers University Press, 2005, pp. 247–253, at pp. 252–253.

[49] See e.g. Stephen Wilson, *Information Arts. Intersection of Art, Science and Technology*, Cambridge, MA: MIT Press, 2002, at pp. 59–60.

harvesters of reality is once again overemphasizing the protective function of these technologies, protection against loss, and protection to encapsulate expressions for better commoditization. Such a perception does not sufficiently take into account the importance of reality in TCE, as expressions of particular people, at a particular moment, at a particular occasion, at a particular place. This kind of "theatrical" authenticity is not recordable, and it does resist real-time transfer.[50] One is also surprised to note how much emphasis is put on the recording and distribution capacities of information and communication technologies, while at the same time "developed" economies witness the revival of the "live event" in their information and communication markets. While such events are, of course, still recorded and transmitted, their core value is increasingly acknowledged to be the physical presence at a given place and a given moment.[51]

Information and communication technologies are also of limited value for objects, which receive their value because of their physical and/or contextual uniqueness, often requiring not only ownership (in the traditional legal sense) but also possession. Here, too, it seems somewhat ironic that information and communication technologies receive so much attention while at the same time developed economies have long acknowledged the value of the authentic object in art markets.

Information and communication technologies cannot, by definition, transport this kind of authenticity.[52] While information and communication tech-

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[50] A contrary position seems to have been taken by Deidre Brown, "Te Ahua Hiko – Digital Cultural Heritage and Indigenous Objects, People and Environments" in Fiona Cameron and Sarah Kenderdine (eds), *Theorizing Cultural Heritage. A Critical Discourse*, Cambridge, MA: MIT Press, 2007, pp. 77–91; with, however very extensive qualifications (*ibid.* at p. 79, emphasis added): "It is my proposition that some, if not all, of these cultural values are transferred by digital replication, *to a lesser or greater degree, depending on circumstance*". As to the importance of authenticity for indigenous people, see e.g. Ernst W. Müller, *Le droit de propriété chez les Móngo-Bokóté* (traduit de l'allemand par Henri Plard), Bruxelles: Académie royale des Sciences coloniales, Classe des Sciences Morales et Politiques, Mémoires, Nouvelle Série, 1958, Tome IX, fasc. 3, at p. 47, where he describes how medicines and magic potions are seen to display their desired effects only if they are applied by or handed down from the medical man or magician.

[51] See e.g. Candace Jones, N. Anand and José Luis Alvarez, "Guest Editors' Introduction to Manufactured Authenticity and Creative Voice in Cultural Industries" (2005) Journal of Management Studies 42:5, pp. 893–899; Chris Gibson, "Decolonizing the Production of Geographical Knowledges? Reflections on Research with Indigenous Musicians" (2006), Geografiska Annaler, Series B: Human Geography 88:3, pp. 277–284, at pp. 281–282.

[52] See also Michael F. Brown, "Heritage Trouble: Recent Work on the Protection of Intangible Cultural Property" (2005) International Journal of Cultural Property 12, pp. 40–61, at pp. 47 *et seq.*

nologies still have their role to play, it has to be finally acknowledged that this role is a limited one for TCE. TCE may and will perish in such cases where the described kind of authenticity is essential and cannot be fully recreated in "real life" by their creators.

There is no reason to regret this. Rather it invites a shift of focus, a reordering of priorities, moving attention from TCE to those who finally express them: ensuring the continued physical existence of these people[53] is, while not the sole, certainly the essential precondition for the continuation of TCE.

4. THE DIALECTICS OF MISCONCEPTIONS: GRAINS OF CHANGE

Is the preoccupation with protection with all of its described consequences a necessity, due perhaps to essential structures inherent in information and communication technologies, in their microstructure in which data packages always travel *controlled*? Such a technicist view would, even in a polemic comment, be too simplistic. There are grains of change. And again, one can be found in the conceptualization of information and communication technologies and the other in the TCE issue itself.

(a) When looking for change it is a useful rule of thumb – not only for legal policy makers – to start looking at procedure whenever there are problems with material issues that seem to be too difficult to overcome. One realizes indeed a striking difference when comparing, for example, IP policymaking processes on TCE since the late 1990s with policymaking processes at pre-TRIPS times. Today's processes and procedures are more open to the general public, it has become possible to actually follow policymaking processes, to follow their document trails, to create and contribute to parallel audiences, even without being a member of an official delegation or – another novelty – of an accredited NGO. This new transparency of procedure and the broader reach should not be overestimated and should not be mistaken for actual participation or direct influence.[54] But the change in procedure is undeniable. This change is only partly due to an attempt at increasing the legitimacy of the policymaking process in the post-TRIPS era. This change is also due to the

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[53] As to the range of – imperfect – human rights and human rights concepts already available to indigenous communities, see Alessandro Fodella, "International Law: International Law and the Diversity of Indigenous Peoples" (2007) Vermont Law Review 30, pp. 565–594.

[54] For a more optimistic position on the possibilities to influence a human rights oriented IP agenda, see Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) UC Davis Law Review 40, pp. 971–1020.

fact that technology has made it impossible to maintain that broader transparency is just not technically feasible. If there is no access, if there is no transparency – so it will be obvious from now on – it is not for technical reasons, it will be for political reasons alone. Lack of technology is no longer an excuse.

At the same time, we observe that the Internet – as the current core expression of the communicative potential of information and communication technologies – is not only the carrier of new political images but has become a highly loaded conceptual symbol in its own right. In that capacity the Internet has made visible and almost tangible the current situation of international lawmaking processes to an extent that one could argue that these processes themselves have become like the Internet, or perhaps more carefully, that international law and policymaking processes have adopted some basic characteristics of the Internet. Lawmaking has become a multistakeholder, multiissue, multilevel communication process in which issues and participants compete for attention. Still, as on the Internet, international lawmaking processes rely on the impact of the great old brand names from the pre-Internet international lawmaking era, like UN, OECD, WIPO or the brands of the more regional organizations. This reliance on the old brand names – as in the Internet economy – can be understood as the expression of an imperfection in the current market for attention. However, the changing technological, economic and political conditions will allow test runs for new regulatory models and institutions to compete with the old ones. The debates and processes around the Internet election of members of the Internet Corporation for Assigned Names and Numbers' Board (ICANN Board) may be seen as such a test run. This test was flawed and essentially failed.[55] But it certainly was not the last attempt at competition for regulatory attention.

(b) The other grain lies in the issue itself. The interest in TCE and in indigenous communities, although not totally altruistic and innocent, as pointed out above, has shown a general flaw in international law: the limited reach and the limited means of international law when it comes to conflicts between citizens and groups of citizens and their own governments. As it has been put in the introductory statement to one of the most recent WIPO papers on TCE by Maui Solomon,

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[55] For information on ICANN, see http://www.icann.org. About these processes, see e.g. Jonathan Weinberg, "ICANN and the Problem of Legitimacy" (2000) Duke Law Journal 50, pp. 187–260; Dan Hunter, "ICANN and the Concept of Democratic Deficit" (2003) Loyola of Los Angeles Law Review 36, pp. 1149–1183; Herbert Burkert, "About a Different Kind of Water: An Attempt at Describing and Understanding Some Elements of the European Union Approach to ICANN" (2003) Loyola of Los Angeles Law Review 36, pp. 1185–1238.

> ... it is important to reflect and comment on some of the milestone events which have occurred over the past 15–20 years that have served to highlight the growing calls by indigenous peoples the world over for greater self-determination, protection of their cultures and identities, claims to land rights and other natural resources and challenging the exclusive sovereignty of nation states. In short, indigenous peoples have been engaged in the process of decolonisation for the past three decades. [...] [T]his challenge to the orthodoxy is justified by indigenous peoples on the ground of their "*historical continuity, cultural autonomy, original occupancy, and territorial grounding*". Nation States often feel threatened by assertions of indigenous peoples of their right of self determination and will counter these claims by asserting their own right to govern, impose order, enforce rules, and expect compliance in advancing the national interest of all citizens. It is thus not surprising that the International Decade of Indigenous Peoples (1993–2003), was marked by an intense struggle between indigenous peoples and nation states. Nowhere is this struggle more accentuated than in the negotiations over the development of the draft UN Draft Declaration of the Rights of Indigenous Peoples (DDRIP), which began in 1984 and are still continuing. Last year New Zealand, along with Australia and the United States, made an intervention to the Working Group on Indigenous Populations (WGIP) seeking to prescribe the definition of "self-determination" in the DDRIP, so as to "*preserve the political unity and territorial integrity of any State*". The concern was that indigenous peoples may use this Article as a pretext to secede from the nation state or otherwise challenge its authority. In response, the Aotearoa Indigenous Rights Trust issued a statement stating that given the obvious imbalance of power between states and indigenous peoples it was not clear why some states (including New Zealand) were "*preoccupied with perceived threats to states, rather than the very grave and pervasive threats to Indigenous Peoples*".[56]

Indeed, as long as there is no unqualified interest in the sustained existence of indigenous people, the interest in their cultural expressions must seem to those people – and not only to them – to be but a legacy hunt.

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[56] WIPO, The Protection of Traditional Knowledge: Table of Written Comments on Revised Objectives and Principles, *supra* note 12, Appendix, at p. 3 (emphases in the original, footnotes omitted).

11. Commercializing cultural heritage? Criteria for a balanced instrumentalization of traditional cultural expressions for development in a globalized digital environment

Miriam Sahlfeld

1. INTRODUCTION

Taking the term "development" literally, presupposes a speaker's attitude that "developedness", progress and being developed is "good" and desirable and that achieving little or none of this is "bad" and needs to be improved. The term as used by representatives of the industrialized nations therefore has always had a slightly condescending connotation that all who are not developed should develop.

It would, of course, be wrong to assume that development is understood as the process of introducing western standards in developing countries in every aspect of life, from the provision of running water to McDonalds, TV soaps, traffic jams and representative democracy.[1] There seems, however, to be agreement by representatives of countries in different stages of development that a high rate of child mortality, hunger and incurable diseases are dreadful and undesirable, and that development towards a reduced death rate, sufficient food and healthier people is desirable. Some of the conditions in third world countries are the result of colonial influence and failed attempts at developing the occupied territories and the people living in them. Whatever the cause of the prevailing circumstances, intensified migration to western countries confirms that people from developing countries consider life to be better in developed Europe and North America.

[1] Complementary to the ambiguous term of development is the equivocal definition of poverty. Western definitions of poverty and development often disregard the kind of society that creates the values. See Mary Douglas, "Traditional Culture – Let's Hear No More About It" in Vijayendra Rao and Michael Walton (eds), *Culture and Public Action*, Stanford: Stanford University Press, 2004, pp. 85–109, at p. 90.

Development may be the right term to refer to all matters regarding basic needs and survival. It would, however, be something else to say that consumption and production of western culture as transmitted by radio, cinema, TV movies and the Internet into the third world signify a step towards more development or are a prerequisite for tackling the problems of poverty, hunger, disease and high infant mortality. While there is a dire need for education, the same cannot be said of western culture and entertainment. There is plentiful national culture in developing countries, both traditional and modern. The recent Convention of the United Nations Economic, Social and Cultural Organization (UNESCO) on the Protection and Promotion of the Diversity of Cultural Expressions[2] confirms in its Article 1(f) "the importance of the link between culture and development for all countries, particularly for developing countries", referring of course to the national (or ethnic) culture(s) of developing countries. Article 2.5(5) introduces the principle of the complementarity of economic and cultural aspects of development, stating that, "culture is one of the mainsprings of development", and that therefore, "the cultural aspects of development are as important as its economic aspects, which individuals and peoples have the fundamental right to participate in and enjoy".

Consequently, this chapter essay will not be dealing with the development *of* traditional cultural expressions (TCE), but *by means of* TCE. When assuming for the sake of this contribution that the principle of complementarity holds true, the central question is what the impact of TCE, as defined by the competent WIPO Intergovernmental Committee[3] on overall, i.e. economic and

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[2] UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions, adopted at the 33rd Session of the General Conference of UNESCO, Paris, 20 October 2005, entered into force 18 March 2007 (hereinafter *UNESCO Convention on Cultural Diversity*).

[3] WIPO uses the following descriptions:

(a) "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

(ii) musical expressions, such as songs and instrumental music;

(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances; whether or not reduced to a material form; and

(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

(aa) the products of creative intellectual activity, including individual and communal creativity;

human or social development, could be. The main short-term goals on the current Development Agenda for achievement by 2015 are the eight so-called Millennium Goals, which include: to eradicate extreme poverty and hunger, to achieve universal primary education, promote gender equality and empower women, reduce child mortality, improve maternal health, combat HIV/AIDS, malaria and other diseases, ensure environmental sustainability, and to develop a Global Partnership for Development. Reading this list of miseries to be overcome, TCE would not seem to be the first choice of tool.

Specialized agencies of the United Nations such as UNESCO[4] and the United Nations Conference on Trade and Development (UNCTAD), as well as the World Bank, however, look at TCE from a broader perspective. TCE might have an impact on the social and economic situation, and thus the potential for playing a role in combating poverty and hunger. TCE generally fit well with the concept of sustainable development as they rely only on local material, nonmaterial and human resources and leave the traditional hierarchies untouched. The possible significance of TCE for a sound cultural identity, an enabling environment for development and a stable government on the one hand, their role in promoting economic development on the other hand, and the compatibility of these two roles require greater attention.

In Part Two, I will be investigating whether TCE can support and facilitate such desirable processes as building cultural identities and maintaining social cohesion on the one hand and as an economic asset alleviating poverty on the other. Based on the results, I will attempt to reconcile the two types of development, human and economic, by means of TCE. The third part considers the specific consequences of the digital revolution for the link between development and TCE. Finally, I try to assess the remaining desiderata for TCE from a development perspective, and whether the latest WIPO Draft on the protection of TCE provides an adequate solution.

(bb) characteristic of a community's cultural and social identity and cultural heritage; and

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community. See WIPO, The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles, WIPO/GRTKF/IC/8/4, 8 April 2005 (unaltered in WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, and WIPO/GRTKF/IC/12/4(c), 6 December 2007, and reproduced in the Annex of this volume), Annex, at Article 1 (Subject Matter of Protection).

[4] See e.g. UNESCO Convention on Cultural Diversity, at Article 2(5).

2. TCE AND HUMAN AND ECONOMIC DEVELOPMENT

As discussed above, development is a multifaceted, easily misunderstood term. In the context of TCE, I will focus on two forms of development, human and economic. The term "development" is very ambiguous, as it is often unclear whether it means that a person or a people or even an area is developing itself, or whether it or they are being developed by others. Furthermore, as mentioned above, development implies that there are persons or people that are less developed and those that are more developed. A statement on level of development thus implies a certain set of values. Extreme poverty, hunger, high infant and maternal mortality rates and diseases are evils that all value systems must tackle.[5] Beyond combating these extreme hardships, it is difficult to outline what exactly development should accomplish. Quite clearly, lack of development cannot be reduced to the absence of material wealth, as this absence constitutes normality in many traditional communities.[6] In addition, the cause of destitution is not just insufficient food. Social behaviour, namely rejection, exclusion, and isolation can cause poverty.[7] Poverty can only be defined in a given social and cultural context[8] by a comparison among individuals or societies that have similar preconditions. The problem then is to find a measurable variable applicable in all such comparisons independent of the actual factors for wealth. Such a variable, in Amartya Sen's theory of poverty, is the freedom of choice[9] with the understanding that more choice is richer and less choice is poorer. It is, however, not easy to establish a barometer for individual choice. When using the category of choice, more choice economically may indeed mean less poor. With regard to culture and society or pathways to a meaningful life, freedom to choose is better than repression, but more options to choose from, i.e. alternative pathways to a meaningful life, are not necessarily a source of happiness. With regard to TCE, Sen's approach

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5 However, even in this respect different value systems come up with different explanations for diseases, for instance. Tribal medicine men or women are made responsible for it and claim that they can heal it. The Catholic Church has been using the threat of AIDS to combat promiscuity, presenting the disease as a punishment.

6 See also the interpretation given to Article 1 of the Cotonou Agreement (Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States and the European Community and its Member States, signed in Cotonou, Benin, 23 June 2000) in *Cotonou Agreement: A User-Guide for Non-State-Actors*, compiled by the European Centre for Development Policy Management, November 2003, at p. 13. See also Article 9(2) of the Cotonou Agreement.

7 Douglas, *supra* note 1, at p. 101; Amartya Sen, *Development as Freedom*, New York: Random House, 1999, at pp. 247 *et seq*.

8 Douglas, *ibid.*

9 Amartya Sen, *Commodities and Capabilities*, Oxford: Oxford University Press, 1999.

therefore does not seem convincing. A more helpful theory might be the related approach of Mary Douglas, who defines poverty as the individual's inability to make the exchanges that define a member of society.[10] Positively put, development is the effort to enable individuals to make the exchanges that define members of a given society. These exchanges may be of relevance either for economic subsistence or for shaping a cultural identity.

Both forms of development are intertwined: education may lead to a better economic situation or *vice versa*, a higher income may allow for higher levels of education in the next generation. If one can argue that sound cultural identity has a stabilizing effect within a society, positive economic development might be the consequence. Poverty in turn might render it impossible to live along the lines of one's own cultural identity and so on. In the following sections, I will consider first human and then economic development.

2.1 TCE as a Factor Supporting Human Development?

As mentioned above, we feel a certain uneasiness about using the term "human development".[11] Earlier generations might have been inclined to come up with an enlightened vision or one imbued with Christian tradition on what makes us human, what constitutes higher human development or the state of civilization that we should aspire to as opposed to barbarianism. In other words, the aim of (human) development is not quite clear. As put forward above, the least ideologically tainted of many answers is that human development is the effort to enable the individual to live a meaningful life as defined by the society in which he or she is living. In accordance with Douglas' definition, development is being gradually successful if people acquire the position that allows them to make the exchanges and communications that define a member of society. Under the heading of human development, I will thus investigate the role TCE can play in the development of individual human beings and societies as a whole.

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[10] Douglas, *supra* note 1, at p. 102.

[11] Human development is often understood as addressing the issues measured by the Human Development Index (HDI), including: first, a long and healthy life, as measured by life expectancy at birth; second, knowledge, as measured by the adult literacy rate (with two-thirds weight) and the combined primary, secondary, and tertiary gross enrolment ratio (with one-third weight); third a decent standard of living, as measured by the log of gross domestic product per capita at purchasing power parity in USD. The report is being published by the United Nations Development Programme in its annual Human Development Report. With regard to TCE, the HDI focuses largely on western values and denies that human individual and societal development is possible beyond the HDI categories.

2.1.1 Individual human development

In this context and in line with the above definition, we assume that an individual who has an adequate amount and a satisfying quality of exchanges with others is also better able to develop a cultural identity that transmits values to hold on to and that gives life a meaning than one who is deprived of such exchanges.[12] Cultural identity is the attitude of a person or a people to issues such as place, gender, race, history, nationality, sexual orientation, religious beliefs and ethnicity. Obviously, TCE transmit the relative importance of these issues and the way they are being practised within a society.[13] TCE also play a role in the pathways for meaning provided for by each culture by which individuals may satisfy their needs for positive affect, prestige, and meaning. Small-scale, hunter-gatherer societies provide only a few such pathways: excellence in hunting, storytelling, or as a healer. Societies that are more complex offer a greater array of pathways. Whatever its size, complexity or environment, a central task of any culture is to provide its members with a sense of meaning and purpose in the world. What happens when a people's way of life becomes impossible,[14] when pathways to meaning are no longer available? The literature on mental health problems of indigenous peoples makes clear that such a situation leads to both psychopathology and mortality.[15] The devaluation and commodification of traditional culture and its expressions are one example of the closure of pathways to meaning and purpose.

Hence, if we agree that it is an acceptable aim of human development to enable a person in such a way that he or she can live a meaningful life along the cultural lines of the traditional community, contented with the leeway for self-realization assigned by it, then cultural identity[16] can be said to be a factor

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12 See Alex Cohen, "The Mental Health of Indigenous Peoples: An International Overview" (1999) Cultural Survival Quarterly 23:2; David Pedersen, "Mental Health Amongst the Indigenous Peoples of Latin America" (1993) Working Paper No 19, Series on International Mental and Behavioral Health, Harvard University.

13 Johanna Gibson, "Freedoms and Knowledge, Access and Silence: Traditional Knowledge and Freedom of Speech" in Fiona Macmillan (ed.), *New Directions in Copyright Law*: *Vol. 2*, Cheltenham, UK: Edward Elgar, 2006, pp. 198–221, at p. 199.

14 There are many ways of destroying pathways to a meaningful life, such as disease, genocide, loss of territory, and repression of language and culture. A modern society example of a loss of pathways to a meaningful life is the soft revolution that took place in many ex-soviet countries. However, a successful adaptation to a new set of values happens quickly, often after one generation.

15 See *supra* note 12.

16 Regarding the overvaluation of culture as an integrative factor in modern societies, see Gaetano Romano, "Braucht die Gesellschaft eine gemeinsame Kultur?" in Hans-Joachim Hoffmann-Novotny (ed.), *Das Fremde in der Schweiz, Ergebnisse Soziologischer Forschung*, Zurich: Seismo, 2001, pp. 241–259, who argues that adapting to the multitude of equivalent functional societal systems is what is required of migrants.

for human development. In particular, the fragmented cultural identities of migrant youths demonstrate that the distancing from the original cultural identity and the resulting fragmented cultural identity often leads to a lack of self-esteem and other psychological disorders.[17] Ethnologists have noted similar effects especially with indigenous people who – in the first generations following government reforms affecting their lifestyles – were not able to draw a meaning from alternative pathways to meaningful life that were unknown to their society.[18] Consequently, from the perspective of individual human development, it is desirable that only existing TCE that are of actual significance to their custodians be protected against misappropriation, decontextualization and in some cases even against commercial use. The influence of commodifying TCE on individual human development and cultural identity will of course be smaller if the commodified culture no longer has deeper meaning for the people.[19]

2.1.2 Human development of societies

If we accept the prior conclusion that the fragmentation of cultural identity, for instance, by the unauthorized commodification of still relevant TCE, can lead to destabilized personalities that are no longer able to lead a meaningful life, as a mass phenomenon this will *prima facie* influence entire communities and societies. The mental disorders of migrants are ideal to demonstrate the effect of a loss of cultural identity, as in many cases a new identity gradually substitutes for the old one. Where, however, TCE are being disenchanted and ridiculed in their original setting, i.e. as a result of commercialization, there may be no immediate fitting substitute, possibly leaving the society concerned in a state of meaninglessness, dysfunction and disarray.[20]

It is, of course, highly debatable as to what the landmarks along the path of social development should be. A preference expressed by a government or religious group for a certain type of society or form of government may justifiably be criticized for promoting an ideology that is not that of the indigenous

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[17] In the case of migrants, the new set of values does not replace the values and ways of their original homes. The latter stay alive through contacts with the former home and therefore may collide with the values and pathways to living proposed by the receiving culture. See e.g. Tahire Erman, "Rural Migrants and Patriarchy in Turkish Cities" (2001) International Journal of Urban and Regional Research 25:1, pp. 118–133; Steven Vertovec, "Transnationalism and Identity" (2001) Journal of Ethnic and Migration Studies 27:4, pp. 573–582.

[18] See Cohen, *supra* note 12.

[19] See the examples by Doris Estelle Long, "The Impact of Foreign Investment on Indigenous Culture: An Intellectual Property Perspective" (1998) North Carolina Journal of International Law and Commercial Regulation 23, pp. 229–280, at p. 243.

[20] Similarly, The World Bank, *Culture and Sustainable Development, A Framework for Action*, Washington, DC: The World Bank, 1999, at p.13.

population. While democracy and media pluralism have proven quite beneficial to many first world countries, it is difficult to predict whether all human communities would thrive under democratic rule.[21] With this in mind, it is highly questionable whether TCE and traditional culture can be said to generally have a decisive supportive role in shaping democratic government.

From the negative viewpoint, however, it may be true to say that in societies where the original cultural basis and the ways of providing meaning have ceased to exist, individuals will find it difficult to form a functioning society, whatever its social system or form of government.[22] The ensuing lack of self-esteem and of secure values for reference will in general impede participation in an organization that stands up for a common good.[23] A sound cultural identity, including through TCE, is certainly beneficial to social engagement.

Democratic government and the often related respect for human rights are in theory a most desirable framework for the pursuance of traditional culture by national minorities and the respect of TCE, apart from female circumcision or whaling and other traditional cultural practices that stand in opposition to human rights and other fundamental values.

The enabling environment for democratic government in turn is also heavily dependent on the specific local political culture, as sociological[24] and game

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[21] Alexis de Tocqueville has tried to find out what factors sustain democracy in the United States: "De causes principales qui tendent à maintenir la république démocratique aux Etats-Unis*"* Chapitre IX, *De la démocratie en Amérique I*, 2ème partie, 1835, at p. 113.

[22] See Recital 1 of the Charter for the Cultural Renaissance for Africa (AUCMC/EXP.CHAR.1(I), 14 December 2005): "Convinced that any human society is necessarily governed by rules and principles based on traditions, languages, ways of life and thought in other words on a set of cultural values which reflect its distinctive character and personality".

[23] The World Bank, *supra* note 20, pp. 14–15, according to which it is a World Bank programme objective to "[s]trengthen social capital – in particular, to provide a basis on which poor, marginalized groups can pursue activities that enhance their self-respect and efficacy and to strengthen respect for diversity and social inclusion so that they can share in the benefits of economic development".

[24] See the early work on the subject by Gabriel Almond and Sidney Verba, *Civic Culture*, Boston: Little Brown, 1965. While in the 1970s and 1980s it seemed irreconcilable with the equality of men and peoples to assume more or less conduciveness to democracy, more recent works emphasize the important role of culture for the development of democracy. See Robert Putnam, Robert Leonardi, and Raffaella Y. Nanetti, *Making Democracy Work: Civic Traditions in Modern Italy*, Princeton: Princeton University Press, 1993; Ronald Inglehart, *Culture Shift in Advanced Industrial Society*, Princeton: Princeton University Press, 1990; Ronald Inglehart, *Modernization and Postmodernization: Cultural, Economic and Political Change in Forty-Three Societies*, Princeton: Princeton University Press, 1997. See also the UNESCO Convention on Cultural Diversity, at Recital 10.

theoretical[25] research suggests, while empirical evidence on this subject is scarce.[26] Ironically, Inglehart[27] finds that relative economic or material security of larger parts[28] of a society is conducive to democratization. This finding presupposes development towards democracy by two consecutive steps: first, the attainment of a certain level of economic development, which allows for democratization as the second step. The next section looks at whether it is possible to reach a certain level of economic development by means of TCE without compromising culture generally and TCE specifically.

2.2 TCE as a Factor Supporting Economic Development?

According to our findings on what development is,[29] economic development by means of TCE is the attempt to increase quantitatively and qualitatively the exchanges deemed necessary for sustaining a livelihood in a society by means of TCE. Before we look at actual business models, three general observations need to be made on the concept of commercializing TCE: the cultural predisposition of a community to economic development, commodity fetishism and the problem of heterogeneous societies.

2.2.1 General observations

(i) Cultural predisposition of a community to engage in economic development We must keep in mind that the term "economic development" often mirrors what a western businessperson thinks could be done with TCE in order to raise people out of material poverty.[30] Research, however, has shown that many development programmes would prove useless as some people do not

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25 Avner Greif, "Cultural Beliefs and the Organization of Society: A Historical and Theoretical Reflection on Collectivist and Individualist Societies" in Mary C. Brinton and Victor Nee (eds), *The New Institutionalism in Sociology*, New York: Russell Sage, 1998, pp. 77–104, at p. 96.

26 Ronald Inglehart, "Culture and Democracy" in Samuel P. Huntington and Lawrence E. Harrison (eds), *Culture Matters: How Values Shape Human Progress*, New York: Basic Books, 2000, pp. 80–94, at p. 92.

27 "With rising levels of economic development, cultural patterns emerge that are increasingly supportive of democracy, making mass publics more likely to want democracy and more skilful at getting it." See Inglehart, *supra* note 26, at p. 95. For examples such as that of India, where democracy certainly preceded economic development, other explanatory models are needed.

28 Economic wealth alone, of a given country, does not pave the way to democracy as evidenced by e.g. the Gulf countries.

29 See *supra* note 2.

30 The World Bank, *Culture Counts: Financing, Resources and the Economics of Culture in Sustainable Development*, Washington, DC: The World Bank, 1999.

want to live in greater prosperity,[31] but rather wish to hold on to their traditional culture.[32] The phenomenon has been called the "culture of apathy",[33] "cultural inertia" or even "chronic depression".[34] The remedies should not be sought in the field of economics, since they seem to reduce the issue to a binary one with a choice of either living according to traditional values, for example without the notions of property and profit, in a state of material poverty *or* striving to escape material poverty by developing and embracing a western type of culture to the detriment of traditional values.[35] It may even be the case, depending on the structure of a society, that economic development, in the sense of prosperity or accumulation of wealth that can be used for profitable investment, is incompatible with local culture. The culturally transmitted obligations of redistributing gains to kinfolk avoids disparities of wealth and socially disruptive envy and makes it impossible to economize along western lines, by loaning and repaying money to build a business.[36] While it is now widely recognized[37] that for the implementation of efficient and sustainable measures supporting economic development it is essential to

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[31] Douglas, *supra* note 1, at p. 87. Complementary to Douglas's research question, Max Weber inquired why western culture is a fertile soil for capitalism. See Max Weber, *The Protestant Ethic and the Spirit of Capitalism*, 1905 (translated by Talcott Parsons, London: Allen and Unwin, 2nd edn, 1976) and Max Weber, *Economy and Society*, 1914 (translated by Ephraim Fischoff, Berkeley: University of California Press, 1978).

[32] As Gunnar Myrdal noted in a publication as early as 1968, there is insufficient knowledge about what people value highly in a given society, as quoted in *Asiatiskt Drama. En undersökning om nationernas fattigdom, ekonomiska och sociala problem i Sydasien*, i sammandrag av Kjell Eriksson *et al*., Stockholm: Utrikespolitiska Institutet, Rabén & Sjögren, 1970, at p. 10.

[33] Edward C. Banfield, *The Moral Basis of a Backward Society*, Chicago: The Free Press, 1958; Oscar Lewis, "The Culture of Poverty" in Daniel Patrick Moynihan (ed.), *On Understanding Poverty: Perspectives from the Social Sciences*, New York: Basic Books, 1968.

[34] For both terms, see Douglas, *supra* note 1, at pp. 87–88.

[35] Douglass C. North, *Institutions, Institutional Change and Economic Performance*, Cambridge: Cambridge University Press, 1990; Clifford Geertz, "Ideology as a Cultural System" in Clifford Geertz (ed.), *The Interpretation of Cultures*, New York: Basic Books, 1973.

[36] On the experiences of Edward C. Banfield in southern Italy and George Foster in Mexico, see Daniel J. O'Neil, "Culture Confronts Marx" (1995) International Journal of Social Economics 22, at pp. 50–51, which were very pessimistic about changing the traditional culture.

[37] See the World Bank, *A Sourcebook for Poverty Reduction Strategies*, Washington, DC: The World Bank, 2002, at Chapter 1: Poverty Measurement and Analysis.

assess correctly the determinants of poverty,[38] the impact of cultural determinants in this context is often underestimated.

(ii) Commodity fetishism Another reservation with regard to the commercialization of TCE should be noted: the brutal change from a transparent self-supporting economy to a system of trade and export oriented production, as described for a Panamanian village, may help materially so little that it can by no means compensate for the concomitant destruction of the cultural and societal tissue.[39]

The same thought, although more theoretically founded, was put forward much earlier by Karl Marx who argued that in capitalist societies commodities and the markets determine the social life of men and not the other way around.[40] He departed from the ideal situation of a small economy based on the exchange of commodities, where the use-value of a product of labour or a service is decisive and farmers or artisans perceive themselves as producers of useful objects. When products are no longer manufactured for exchange within a small community but rather for trade, they become commodities and are assigned an exchange value (i.e. the price paid on the market place) which often differs considerably from the use-value of the commodity.[41] The abstraction between the use-value and the exchange value is what Marx, alluding to primitive religions and myths, calls "commodity fetishism". According to Marx, the detrimental consequence is that in such an industrialized economic system producers and consumers have no immediate human contact, conscious agreement and rewarding agreement that they provide for one

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[38] The determinants should be identified in the framework of the so-called Poverty Reduction Strategy Papers (PRSP), which are now required by the World Bank and the International Monetary Fund. PRSP describe a country's macroeconomic, structural and social policies and programmes to promote growth and reduce poverty, as well as associated external financing needs. See Burama K. Sagnia, "Culture and Poverty Alleviation in Africa – A Review of the Cultural Effectiveness of Poverty Reduction Strategy Papers in West and Central Africa", Report prepared for the Conference on African Culture Sector Development, Goree Island, Dakar, Senegal, 5–7 March, 2007, paras. 97 and 117.

[39] The famous example is that of badly managed development in Panama, where labour was diverted from producing rice for home production to producing sugar cane for manufacture and export. See Stephen Gudeman, *The Demise of a Rural Economy – From Subsistence to Capitalism in a Latin American Village*, London: Routledge, 1978.

[40] Karl Marx, *Capital*, *Vol. 1: A Critique of Political Economy*, London: Pelican Books, 1976 (English version), at Section 4: The Fetishism of Commodities and Its Secret.

[41] The classical example is that of a lump of gold which is highly valued although it is completely useless compared to needles in a given situation.

another. Instead, the products become property on the market. The producers of one good have to buy the property others have made, on the market. They have a relation only to the commodity, which is confused with a social relationship whose medium the commodity is. The commodity seems to be imbued with human powers, becoming a fetish of those powers. Human agents are denied awareness of their social relations, becoming alienated from their own social activity.

It has been argued that in our western economies people have become more and more aware of this abstraction in recent years. Ascribing value to the means, location, or method of production allegedly challenges this process of fetishization by urging consumers to purchase products that reflect the social lives of the producers.[42] While natural products, namely foodstuffs, clothes, furniture and the like, are successfully marketed in western countries with reference to correct labour conditions and environmentally sound production, this only constitutes a partial de-fetishization. The organic farmer still has to shop for his or her other needs and his or her customers are not offering a product of their own in return, but the value. Knowing about the precise origin and the labour conditions and the provenance of raw materials[43] does not override the abstraction. The de-fetishization takes place mostly on the consumer side, while workers still produce for unknown people and receive their wages to shop for alimentation and clothing on the market.

Commodity fetishism becomes most interesting when applied to TCE.[44] While it may be common to exchange rice for fish, to trade with TCE would probably seem odd to many custodian communities. The characteristic conflict between TCE and copyright presents itself here again: the collective intertemporal authorship of TCE often precludes the application of property and ownership concepts altogether.[45] The value of TCE will often not lie in their material features. Rather the object depicted or described, the cultural rite

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[42] Rosemary J. Coombe, Steven Schnoor, and Ahmed Mohsen, "Bearing Cultural Distinction: Informational Capitalism and New Expectations for Intellectual Property" (2007) UC Davis Law Review 40, pp. 891–917, at p. 893; Anne Meneley, "Extra Virgin Olive Oil and Slow Food" (2004) Anthropologica 46:2, at pp. 165, 173.

[43] Coombe *et al*., *ibid.* at p. 904, using the example of the US-produced brand American Apparel.

[44] A more general debate relates to the role of culture in development. A neoliberal perspective treats culture as an "instrument" to further other development objectives and thereby emphasizes its instrumental function. The structural–functionalist perspective on the other hand, treats culture as an organic and holistic entity that cannot be compartmentalized and instrumentalized to fulfil other goals and objectives, and therefore emphasizes its intrinsic function, arguing for its right to grow and develop, just like other sectors of development. See Sagnia, *supra* note 38, at p. 28.

[45] Daphne Zografos, "The Legal Protection of Traditional Cultural Expressions: Is Copyright the Answer?" in *supra*, note 13, pp. 181–197, at pp. 184–185; Michael F.

involved in its making, or the initiation of the artist will attribute a different type of value to the expression. Even if it is customary according to local culture to sell objects that depict TCE, such as amulets that are ascribed certain protective forces or items necessary for worship, there is still a difference in selling them to complete strangers who have no relation whatsoever to the cultural and religious context.

To put it plainly, TCE-based products belong to a category of objects that are alien to the capitalist trading system. Those proposing trade in TCE as a factor in economic development should therefore consider two questions: first, whether the custodian community is familiar with trading in TCE-based products and second, if so, whether it is familiar with the capitalist economy. Some authors from an indigenous background have therefore proposed to reject western development aid altogether and to develop an indigenous global economy that would be based on a different set of values.[46]

(iii) Qualifying as TCE or not? The problem of heterogeneous societies

Allevi-ating poverty through the commercialization of cultural assets is a real possibility if they are no longer considered as representing TCE that might require special legal treatment. The evaluation of a given expression as belonging to a traditional culture might vary within a society that shares the same cultural roots. For instance, groups of that society that have moved to urban areas, received a different kind of education, or belong to a different social class, might be familiar with the cultural heritage without valuing it in the same manner as their cultural relatives in rural areas do. Such a "modernized" group or individual could be inclined to commercialize the eviscerated cultural heritage for the beneficial purpose of poverty alleviation while other members of that society might consider it as breaking a taboo. Even if there is a segment within each culture that undisputedly does not fall within the scope of TCE, drawing the line is a very delicate business.

Brown, *Who Owns Native Culture?*, Cambridge, MA: Harvard University Press, 2003; Sybille E. Schlatter, "Copyright Collecting Societies in Developing Countries: Possibilities and Dangers", in Anselm Kampermann Sanders and Christopher Heath (eds), *New Frontiers of Intellectual Property Law: Industrial Property and Cultural Heritage, Geographical Indications, Enforcement and Overprotection*, Oxford: Hart, 2005, at p. 54; pleading for a concept of authorship accommodating cultural differences, see Megan M. Carpenter, "Intellectual Property Law and Indigenous Peoples: Adapting Copyright Law to the Needs of a Global Community" (2004) Yale Human Rights and Development Law Journal 7, pp. 51–78, at p. 63.

[46] Valerie J. Phillips, "Parallel Worlds: A Sideways Approach to Promoting Indigenous-Nonindigenous Trade and Sustainable Development", University of Tulsa Legal Studies Research Paper No. 2007–02, available at http://ssrn.com/abstract=1019077.

Although a consensual evaluation of cultural assets as TCE and/or economic assets appears to be difficult, using cultural assets as a tool for economic development has been strongly supported by development projects of the World Bank.[47] Several joint conferences of the World Bank and UNESCO have acknowledged the dual function of culture[48] and led to an altered World Bank policy towards culture that explicitly gave up its prior "do no harm" approach to culture.[49] The new policy combines the funded preservation of physical culture, the promotion of tourism, mainstreaming attention to culture, and supporting culture as a tool for building cultural identity and social cohesion.[50] Although neglecting the misappropriation scenario, the World Bank acknowledges that culture has a role to play in cultural identity, social cohesion and openness to development, even if there is too little research in that respect. The World Bank has adopted no special policy to assess the significance of a given cultural asset to different groups within a cultural community, although mainstreaming attention to culture could in certain instances cover the issue.

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47 The World Bank list of funded programmes relating to cultural heritage and sustainable development can be found at its: http://www.worldbank.org

48 Starting in autumn 1998, the World Bank in cooperation with UNESCO hosted an international conference entitled "Culture in Sustainable Development: Investing in Cultural and Natural Endowments" with a focus on the economic use of historical sites or physical rather than intangible culture, considering, however, also living arts, such as literature and music. See Ismail Serageldin and Joan Martin-Brown (eds.), *Culture in Sustainable Development: Investing in Cultural and Natural Endowments*, Proceedings of the Conference, World Bank/UNESCO, 28–29 September 1998, Washington, DC: The World Bank, 1998. Folklore or TCE as a category possibly needing legal protection were not dealt with. Milagros Del Corral, Investing in Cultural Industries, *ibid*. at p. 78, apparently deemed the intellectual property regime to be sufficient. In October 1999, another conference was held on "Culture Counts: Financing, Resources and the Economics of Culture in Sustainable Development" where "threats and tensions" of culture and sustainable (economic) development were addressed (see World Bank, *supra* note 31, at pp. 17–26). The same Conference also raised in its Thematic Working Group: Cultural Economics, Identity, and Poverty Reduction the issue of TCE and its implications for human and economic development as well as the question of adequate protection through intellectual property rights (see *ibid.* at p. 201). The World Bank Framework for Action even proposes as programme objective to "strengthen social capital in particular, to provide a basis on which poor, marginalized groups can pursue activities that enhance their self-respect and efficacy and to strengthen respect for diversity and social inclusion so that they can share in the benefits of economic development". See World Bank, *supra* note 20, at p. 13.

49 *Ibid*. at Annex A, p. 38.

50 *Ibid*. at p. 7.

Similarly, African States[51] and the Representative of ACP countries[52] have adopted documents on the promotion of cultural or creative industries for economic development that contain no mention of the issue of TCE and/or of intellectual property (IP) rights. The same is true for the so-called Poverty Reduction Strategy Papers (PRSP) that the World Bank now requires prior to the allocation of concessional assistance from the World Bank and the International Monetary Fund (IMF). Culture, which figures in the model PRSP, is predominantly mentioned as a tool for economic development, either in its own right (music or film industry) or as an instrument to attain other broader economic objectives,[53] rather than as a value in itself.

The lack of reference to TCE and to the WIPO norm-setting work in the above-mentioned documents allows for two assumptions: one, that the cultural or creative industries are so clearly distinguishable from TCE – at least from the point of view of one fraction of the cultural community – that the objections arising from commercialization of TCE are totally unfounded in this context. The other assumption would be that there is a tendency to disregard such objections as they interfere with the commercial use of TCE. A look at the definition of TCE in the latest WIPO Draft[54] and at its objectives and principles[55] supports the latter option. Products of cultural and creative industries

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[51] African Union, Charter for the Cultural Renaissance of Africa, AUCMC/EXP.CHAR.1(I), Addis Ababa, 13–14 December 2005. Cultural Industries for Development in Africa – Dakar Plan of Action, adopted by the OAU, Summit of the Heads of State and Government, Dakar, Senegal, June 1992; Nairobi Plan of Action for Cultural Industries in Africa, adopted at the First Ordinary Session of the African Union Conference of Ministers of Culture, 10–14 December 2005.

[52] Santo Domingo Resolution, 2nd Meeting of ACP Ministers of Culture, ACP/83/046/06 [Final] PAHD Dept., 13 October 2006.

[53] Sagnia, *supra* note 38, at pp. 5, 28. He mentions the exceptions of Mali and Ghana, whose PRSP accord culture a central role *inter alia* in promoting social cohesion and harmony (at paras 71, 76, 78–80).

[54] See WIPO, *supra* note 3, at Article 1(a)(iv)(aa–cc) for the cumulative preconditions in the Draft, which allow for different interpretations of the actual relevance of a cultural expression depending on the group of a cultural community to which one belongs.

[55] *Ibid.* at Annex, objective (xi): "Promote community development and legitimate trading activities where so desired by communities and their members, promote the use of traditional cultural expressions/expressions of folklore for community-based development, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations". See also the "Principle of Balance" and WIPO (*ibid.*), at para. 13: "They [TCE] can also be economic assets – they are creations and innovations that can, if so wished, be traded or licensed for income-generation and economic development. They may also serve as an inspiration to other creators and innovators who can adapt the traditional expressions and derive new creations and innovations."

may very well feature TCE. A consideration of the issue in the context of frameworks for action on cultural industries and PRSP therefore does not constitute an excessively high expectation. We should keep in mind that the business models addressed below may rely on assets whose commercialization could be contested on the ground of deviating relevance of the asset for a given cultural heritage.

2.2.2 TCE-based products for sale

TCE can be turned into tradable artistic or artisanal products, in which traditional culture and knowledge are expressed, appear or are manifested.[56] If we ignore for a moment the question whether an artist or craftsperson, under the laws of the cultural community, is actually allowed to produce and sell objects that fit the definition of TCE, then producing and selling decorative items or CDs of music[57] qualifying as TCE could offer a livelihood for many. Such goods could be sold via retailers to the first world[58] or sold to tourists locally. The recurring theft of unique cultural objects is the vivid manifestation of the existing demand. The disadvantage of the so-called cultural industries lies in their obedience to the arbitrary rules of fashion. An item or a piece of music might be popular for some time and then become a shelf warmer. Such changes cannot be anticipated with the poor information resources at hand in the rural areas of developing countries where cultural industries or artisanship could provide income to some people.

2.2.3 TCEs' role in cultural tourism

Cultural tourism is an expanding sector and is being pushed by international development organizations.[59] While cultural industries and the sale of products

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[56] Article 4(4) of the UNESCO Convention on Cultural Diversity.

[57] See the examples in Frank J. Penna and Coenraad J. Visser, "Cultural Industries and Intellectual Property Rights" in Bernhard Hoekman, Aaditya Mattoo, and Philip English (eds), *Development, Trade and the WTO – A Handbook*, Washington DC: The World Bank, 2002, pp. 390–402, at p. 390; Bartholomew Dean, "Digitizing Indigenous Sounds: Cultural Activists and Local Music in the Age of Memorex" (2001) Cultural Survival Quarterly 24:4.

[58] See Carol Hendrickson, "Maya Export in US-Mail Catalogue" in David Howes (ed.), *Cross-Cultural Consumption: Global Markets and Local Realities*, London: Routledge, 1996, at pp. 106–121. It should also be mentioned that organizations promoting fair trade are not only importing agricultural goods and appliances for daily use from baskets to combs, but also decorative art or traditional toys that might qualify as TCE.

[59] In 1999, the World Bank, UNESCO and UNCTAD had already seen the benefits of combining protection of cultural heritage and poverty alleviation through tourism. See Outcome of the High-Level Meeting on Tourism and Development in the Least Developed Countries, Gran Canaria, 26–29 March 2001, A/CONF.191/BP/4, 5

to tourists have a positive effect on developing economies,[60] cultural tourism also embraces performing arts, such as dance and music performances involving TCE, for tourists.

Some analysts criticize cultural tourism because of the negative consequences of commodifying cultural forms for tourist consumption.[61] It has been argued that cultural tourism merely represents another form of capitalist appropriation in which "the physical environment, and within it human societies and historical remains, [become] subtly redefined as global patrimony – universal property".[62] Once prominence is given to the physical and human environments and people begin to market their own cultural distinctions, a potentially insidious self-branding process begins.[63] As Rosemary Coombe notes, in the Basque area of France people were engaged in a state-sponsored cultural tourism programme that was supposed to improve local economic opportunities.[64] There is a risk of creating artificial pristine cultural environments that retard rather than facilitate human development and may denigrate and objectify the "actors" involved.[65] If it is no longer a naturally living culture, the tourists' demands might shape the cultural identity they want to see, thereby destroying the true remnants of local culture.[66] Innovation and diversification of the basis for economic development cannot be achieved by making a region dependent on cultural tourism.

For an intact traditional culture, frequent encounters with tourists inevitably lead to the traditional community being confronted with alternative and possibly even competing paths to a meaningful life, thereby putting into perspective the traditional way of life.

Other authors claim that cultural tourism provides a possibility for otherwise marginalized people to gain some political weight and influence in decision-making on their area.[67] An Indonesian people, however, experienced the opposite. Government authorities regarded their traditions as a welcome source of income. They planned TCE-based performances for tourists that

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April 2001, at pp. 3 and 6. See also UNEP on Eco-Tourism, at http://www.uneptie.org/pc/tourism/ecotourism/home.htm.

60 Long, *supra* note 19, at p. 240, footnote 27.

61 Coombe *et al*., *supra* note 42, at pp. 908–912.

62 Magali Daltabuit and Oriol Pi-Sunyer, "Tourism Development in Quintana Roo, Mexico" (1990) Cultural Survival Quarterly 14:1, p. 910.

63 Coombe *et al., supra* note 42, at p. 909.

64 *Ibid.* at p. 910. Similar developments, although involving more choice on the part of participants, are the so-called traditional carnivals in places where reformation had put an end to them.

65 *Ibid.*

66 *Ibid.*

67 Barbara R. Johnston, "Introduction: Breaking Out of the Tourist Trap" (1990) Cultural Survival Quarterly 14:1.

violated traditional rules.[68] In the end, the benefits of eco-tourism will depend strongly on the local situation: what is the attitude of local people to their culture? How is political power distributed in the area concerned?[69] Recent experiences in this respect have led to a detailed UNESCO Recommendation regarding "Culture, Tourism and Development".[70] Successful use of TCE as an economic resource within the framework of cultural tourism will therefore mainly depend on the decision-making capacity of the custodian communities and their attitude towards their cultural heritage.

2.2.4 Licensing TCE from developing countries

A third type of revenue generation could arise from trading IP rights with regard to TCE. While international copyright law often fails to protect TCE because of their nature,[71] fragmented legal protection can be offered by national and tribal laws on the use of TCE if they happen to cover the issue of commercial use of TCE. Licensing TCE to interested business partners against the payment of royalties can create an income for developing countries. The multilayered legal regimes will make it difficult for foreign business partners to find out about licensing terms if any exist. Even if rights management by collecting societies might seem desirable as it takes away the burden of administration from the creative custodian community, it is almost impossible to ascertain internationally that the royalties are fairly distributed.[72] Licensing TCE of a certain cultural community, independent of the type of protection framework, could be a profitable business.

2.3 Interim Findings – Reconciling Human and Economic Development

Depending on the community, trading with objects of traditional cultural expression may enable economic development if a consensus on the character of the TCE and their commodification can be reached in a heterogeneous

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[68] Kathleen M. Adams, "Cultural Commoditization in Tana Toraja, Indonesia" (1990) Cultural Survival Quarterly 14:1.

[69] See the comparison between two cultural communities in China in Margaret Byrne Swain, "Commoditizing Ethnicity in Southwest China" (1990) Cultural Survival Quarterly 14:1.

[70] First Meeting of the UNESCO/UNITWIN Network "Culture, Tourism and Development", Sustainable Development and the Optimizing of Cultural Diversity: How Well Is Tourism Adapting to These New Challenges?", Paris, 18 March 2005, Final Report and Recommendation, available at http://portal.unesco.org/culture/en/ev.php-URL_ID=32065&URL_DO=DO_ TOPIC&URL_SECTION=201.html.

[71] Zografos, *supra* note 45, at pp. 184–185.

[72] Schlatter, *supra* note 45, at p. 58.

cultural community. The commercial opportunities need to match the requirements for human development. The long-term effect of losing meaning and values for future generations is not balanced by short-term economic gain based on commercialization of TCE. Development programmes suggesting the use of TCE to alleviate material destitution will have to evaluate carefully the cultural community, its homogeneity, the significance of TCE and traditional culture in daily and religious life and the community's familiarity with producing for foreign markets. Only in communities where trading and earning the exchange value are tolerated concepts of a meaningful life, where culture and/or religion do not determine such concepts, can trade in TCE be suggested as a tool for economic development without causing greater harm. As mentioned above, depending on the traditional community concerned, the scope of tradeable objects may not even overlap with the definition of TCE.[73] A development strategy that seeks to promote economic development even at the price of watering down cultural identity – with democratization as the justifying long-term objective – usurps the freedom of cultural communities to choose when and how they want to open up to economic development and progress.

2.4 TCE and Sustainable Development

Today, programmes and projects supporting development have to show that, besides a positive impact on living conditions in the target area, they deserve the label of sustainable development. The endless debate on the definition of sustainable development masks the fact that there is also considerable agreement. The most common definition of sustainable development is "… meeting the needs of the present generation without compromising the ability of future generations to meet their own needs".[74]

TCE-products using locally available material and a local labour force are environmentally sound and even counter migration, but their dependence on fashion might render them less sustainable as a trustworthy source of income. However, the question of whether developmental measures need to take into account their effect on local culture and cultural diversity in order to be sustainable seems as yet to be unanswered. The UN Division for Sustainable Development does not list culture or cultural diversity as one of the sustainable development issues.[75] However, other UN bodies take quite a different position.

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[73] See *supra* note 3 WIPO's working definition in Article 1(a)(iv)(bb).

[74] That is also the position of the European Union. See European Council, Presidency Conclusions, 10633/1/06REV 1, 17 July 2006.

[75] See UN Department of Economic and Social Affairs, Division for Sustainable

UNESCO refers explicitly to the link between traditional knowledge and cultural diversity on the one hand and sustainable development on the other.[76] The text of the Convention on the Protection of Cultural Diversity clearly requires State Parties to the Convention to integrate culture into sustainable development.

The International Trade Centre, a joint agency of UNCTAD and the WTO, recognizes clearly in its position paper of 2004 entitled "Challenges and opportunities in export development of Creative Industries" that the craft or artisan product sector contributes to sustainable development and poverty reduction, especially because of the sustainably produced raw materials used.[77] A 2004 UNCTAD paper on Creative Industries and Development calls cultural diversity a key pillar of sustainable development.[78]

The World Bank acknowledged the role of culture for sustainable development even earlier, and now subscribes to mainstreaming attention to culture. As mentioned above, it held an important conference on culture and sustainable development and has published widely on the issue.[79] In the EU documents, explicit reference is made to the respect of cultural diversity as an

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Development, at http://www.un.org/esa/sustdev/sdissues/sdissues.htm. Similarly, a major compendium on sustainable development Nico Schrijver and Friedl Weiss, *International Law and Sustainable Development: Principles and Practice*, Leiden: Martinus Nijhoff, 2004 does not address culture or cultural diversity.

[76] Recital 8 of the UNESCO Convention on Cultural Diversity already included the statement: "Recognizing the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion". Article 2(6) even refers to the Principle of Sustainable Development: "Cultural diversity is a rich asset for individuals and societies. The protection, promotion and maintenance of cultural diversity are an essential requirement for sustainable development for the benefit of present and future generations." Article 13 then contains an admittedly rather weak obligation of state parties to integrate culture in sustainable development: "Parties shall endeavour to integrate culture in their development policies at all levels for the creation of conditions conducive to sustainable development and, within this framework, foster aspects relating to the protection and promotion of the diversity of cultural expressions".

[77] International Trade Centre, Position Paper: Challenges and Opportunities in Export Development of Creative Industries: ITC's Future Technical Assistance for the Product Sector, December 2004, available at http://www.intracen.org/CreativeIndustries/PositionPaper.pdf.

[78] UNCTAD, Creative Industries and Development, TD(XI)/BP/13, 4 June 2004, at p. 12. The projected interorganizational International Observatory on Creative Industries (IOCID) that was to have coordinated UN activities regarding creative industries never became operational.

[79] See World Bank, *supra* note 48, *et seq.*; William Hurlbut, "Cultural Properties in Policy and Practice: A Review of World Bank Experience" (2002) Précis 220, pp. 1–4.

element of sustainable development.[80] Eco-tourism has come to signify both a concept in which not only is the environment a concern, but in which a very specific approach to *social* sustainability is advanced.[81]

What do these statements mean in practice? What they should mean is that any development project, whether or not it promotes culture, should take into account its effects on local culture and assess whether the projected measure allows the present generation to meet its needs without compromising the ability of future generations to meet theirs. More specifically, with regard to TCE this means that a project should not lightly sacrifice cultural identity and a pathway to meaning for future generations for a more or less long-lasting benefit.

The World Bank claims that it has given up its so-called "do-no-harm" approach in favour of a policy that, where possible, takes into account cultural heritage. Interestingly, the importance of cultural heritage is emphasized when culture is being used for economic development, for instance, to fuel cultural industries. The Panamanian example mentioned above shows that poorly run non-cultural development projects can dramatically change local culture. For example, the concentration on production of a certain crop in farming can affect traditional harvest festivities. TCE-based economic development may become unsustainable if it forces people to put on an act and ties them to a past that has no meaning for them.[82]

In short, TCE and cultural heritage are readily put forward as evidence of the sustainability of development projects. However, when TCE are indirectly affected by non-cultural development projects, the consequences are often not properly assessed.

3. THE DIGITAL DIMENSION – RISKS AND BENEFITS

As shown above, TCE can contribute to economic development and respect for TCE is essential for human development. In terms of economic development, trade in products based on TCE and cultural tourism can already constitute a source of income.

If we add digitization to the picture, the consequences for the role of local culture in general and for development by means of TCE in particular are ambiguous. Digitization and increased mobility challenge local culture with a global culture. While it has been convincingly argued for modern societies that

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[80] Council of the European Union, Review of the EU Sustainable Development Strategy, 10917/06, 26 June 2006, Annex, at p. 1.

[81] See Global Development Research Centre, with definitions of eco-tourism by several NGOs, available at http://www.gdrc.org/uem/eco-tour/etour-define.html.

[82] See again Coombe's example of Basques in France, *supra* note 42, at p. 910.

local spaces and local cultures are not threatened or replaced by global culture, but instead become something especially valued,[83] it is unclear whether local and global culture could fruitfully complement each other in traditional societies. Information and communication technologies (ICT) and the capitalist ideology[84] and the predominantly global cultural content they transport may be rejected as too foreign in handling and content or too readily accepted to the detriment of local content and culture that is largely absent from the Internet.

For economic development by means of TCE, the Internet and digitization are on the one hand a great opportunity: distribution and reception of sound, images and text become accessible at high speed and low cost. On the other hand, not only members of indigenous communities take advantage of the new technologies. Misappropriation of TCE and its exploitation have become easier than ever before. The tools for misappropriation currently mainly lie in the hands of the "predators", while indigenous communities are often poorly equipped with devices and Internet access.

3.1. Human Development by Means of TCE and the Digital Dimension

ICT for development (ICT4D) is currently a highly fashionable trend in development policies.[85] With regard to human development, the educational possibilities of the medium are in the focus. The so-called "one laptop per child" initiative designed for educational purposes by former MIT professor Nicholas Negroponte is the best example for this type of development policy.[86] The main concerns in the field of ICT4D still revolve around the lack of technical receiving devices and a connection to the Internet.[87] Despite attempts to provide broadband access[88] and personal computers,[89] especially in Africa,

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[83] Gaetano Romano, "Alte Grenzen im Raum und neue Grenzen der Kommunikation" (2002) e-punto: e-Zeitschrift für Kommunikation zwischen Theorie und Praxis. See also Meneley, *supra* note 42, at p. 165.

[84] Karin Gwinn Wilkins and Young-Gil Chae, "Questioning Development Industry Attention to Communications Technologies and Democracies" (2007) International Journal of Communication 1, pp. 342–359, at p. 354.

[85] The Global Alliance for ICT and Development (GAID), see http://www.un-gaid.org/.

[86] See http://www.laptop.org/.

[87] Alex Keck and Calvin Djiofack, "Telecommunication Services in Africa: The Impact of Multilateral Commitments and Unilateral Reform on Sector Performance and Economic Growth", Staff Working Paper Economic Research and Statistics Division World Trade Organization, 10 November 2006.

[88] See the information by GAID (*supra* note 85) on maritime broadband cables that are supposed to connect first the coastal areas of the African continent.

[89] The GAID plans to establish hundreds of telecasters worldwide in order to connect rural communities to the Internet (*ibid.*).

the mobile phone[90] seems to have become the primary device used by Africans to access the Internet, as other types of Internet connections remain too slow and too expensive. While this is probably an economically sound decision, the hitch is the limited uses to which mobile phones can be put when it comes to cultural content.

It is conceivable that local content created in developing countries could also cover TCE for educational purposes. Children could learn about their culture if this does not happen naturally in daily life.[91] For the ICT-based creation and reception of local content on TCE in local languages,[92] a more advanced technical device than a mobile phone plus a broadband Internet connection is necessary. It is therefore doubtful whether the digital dimension can greatly add to human development if mobiles are the only devices that are widely available. A positive impact on a TCE-based human development seems even less probable.

Even if the ICT situation were to be greatly improved[93] the encounter with TCE by the people of the custodian community would ideally not take place via digital devices, but through personal experience. In this context, the digital dimension can only have a supportive function, such as showing films or pictures of certain places, practices or dances in museums or in archiving stories and songs. It should also be remembered that not all languages are traditionally written and read and therefore cannot easily be represented in text format on the computer.[94] As far as traditional cultural texts in such non-

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[90] In this regard, see Miriam Sahlfeld, "How Does ICT Work for Development? Challenges and Opportunities" (2007) African Technology Development Forum 4:1, pp. 22–36. See also Victor Konde, "What Type of National ICT Policies Maximize ICT Benefits?" (2007) African Technology Development Forum 4:1, pp. 39–48.

[91] Children might be able to learn through examples adapted to their cultural context, while hardcover textbooks often give accounts of green meadows and cool forests, utterly unknown to children growing up in North Africa for example. See James Wolfensohn, in his address to the Conference on Culture and Sustainable Development (World Bank, *supra* note 20).

[92] Multilingualization is one of the goals agreed upon at the World Summit on the Information Society (WSIS), see WSIS, Tunis Agenda for the Information Society, WSIS-05/TUNIS/DOC/6(Rev.1)-E, 18 November 2005, at paras 29, 49, 53.

[93] Referring to traditional communities in first world countries, such as the Saami in Scandinavia or the Aborigines in Australia.

[94] Xavier Fantognan, "A Note on African Languages on the Worldwide Web" in UNESCO, Measuring Linguistic Diversity on the Internet, Paris: UNESCO, 2005, at pp. 105–108; Marcel Diki-Kidri, "L'accès au cyberspace des langues peu dotés", presentation for Union Latine of UNESCO at the ITU and UNESCO Global Symposium on Promoting the Multilingual Internet, Geneva, 9–11 May 2006, at p. 4. A good barometer is the number of languages in which Google is available.

privileged languages are concerned, the digital dimension plays a minor role. In addition, personal oral transmission from generation to generation can be an important factor in the recreation of traditional stories. Fixation in a written form could even hinder the weaving of personal experience into the narratives.

The misappropriation scenario becomes more likely in a digital environment. We have discussed above the possible ill effects on human and social development. The possibility that human development will actually suffer greatly from representations of TCE in an unsuitable environment, such as depiction of sacred symbols on a shower curtain or use of sacred songs as jingles for a commercial, cannot be excluded.[95] Decontextualizing, ridiculing or belittling TCE may lower the self-esteem and lead to a superficial identification with intruding world culture,[96] a confusion of values instead of a reinforcement of traditional culture. It depends on local customs whether a misappropriation that might qualify as a sacrilege will be sanctioned. The reactions can be strong and even violent as demonstrated by Muslim reaction to degrading representations of the Prophet in Danish newspapers in 2005.[97]

It might be argued that TCE-holding communities will never know about some of the uses of their TCE and therefore would not be affected by them. Such an argument, however, fails to see that the actual knowledge of the community as well as the intent of the misappropriating person is irrelevant for the existence of a violation in the eyes of TCE holders. With the currently available ICT tools, any product that uses TCE will be traceable on the Internet, spread and become known eventually. The loss of a secret, for example, will therefore become nearly irreversible. It should, however, be noted that it is also becoming technologically feasible to search for imagery, sounds and texts.[98] Such technology could assist TCE-holding communities and create the basis for a notice-and-take-down-procedure.[99]

3.2 Economic Development by Means of TCE and the Digital Dimension

The hope that the new technologies may foster development, when it comes to

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[95] Another example is the Aborigine Morning Star Pole on a commemorative banknote (*Yumbulul v. Reserve Bank of Australia*, 1991, 2 I.P.R. 481).

[96] On this phenomenon, see Long, *supra* note 19, at p. 241.

[97] "The Limits to Free Speech, Cartoon Wars", *The Economist*, 9 February 2006.

[98] For combating child pornography, the investigating authorities use a program that allows them to search the Internet for pictures, which they obtained in earlier cases. A similar technology could be applied to find visualized traditional cultural expressions, see http://www.perkeo.net/.

[99] This is the procedure applied to other types of illegal content, be it an infringement of copyright or child pornography.

TCE, is much greater for economic opportunities than for human development. With regard to developing countries, in particular, it should be noted that in communities that do not enjoy benefits of scale, incurred costs such as costs of compliance, of presence, monitoring, information, etc. are usually taken care of cultural phenomena instead.[100] In that context, regular personal interaction between traders is of great importance.[101] This personal element, however, is lost, as Marx showed, if trading occurs over longer distances, and especially when using the new technologies. As trade by ICT does not allow for the customary parameters of trust, its empowerment might be met with reservations by members of some cultures.

3.2.1 Sale of TCE-based products

The sale and marketing of TCE-based products becomes considerably easier if ICT resources are at hand. The use of the Internet as a platform greatly increases the number of potential buyers. Information on goods and sometimes even the goods themselves travel much faster and more cheaply than ever before, thereby allowing for more cost-efficient production and administration.

Photographs of tangible items might fill online galleries or shops. For example, a website for decorative art and artisanship can reach out to all interested traders or individuals. To bring the items to the Internet is a once-only effort. For purchases, contact with the artist or producer could be made using a mobile phone. The insufficient technical equipment would therefore not have the same negative impact as it does on human development. If the standard of the ICT equipment is high, the producer could even search for potential customers over the Internet.[102] Similarly, the producers and traders could anticipate volatile trends and adapt to them, if the rules regarding TCE allow for such leeway.

Another product easily sold over the Internet is music, which is made available on a CD as a tangible good. Digital technology also allows special marketing techniques to be used, such as offering to give users a free sample before they buy a CD. Another method is to sell individual songs that are downloadable against a payment. If an artist has the (quite expensive) technical equipment and know-how necessary to record and present his or her music in this way on the Internet, intermediaries such as record labels become super-

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100 North, *supra* note 35.

101 Douglas, *supra* note 1, at p. 99.

102 This feature of the Internet is commonly described as the "long tail" phenomenon. See Chris Anderson, *The Long Tail: Why the Future of Business Is Selling Less of More*, New York: Hyperion, 2006 and Mira Burri-Nenova's contribution to this volume.

fluous. As second-generation mobile phones are not ideal for receiving and sending songs, the main clientele for this type of marketing will only be found in the wealthier countries until the ICT situation has improved. It should be noted that the institution of collecting societies also exists in some developing countries, where, by law or statute, all economic (and sometimes even moral) rights are entrusted to the collecting societies.[103]

Stories and myths are a type of TCE less readily marketable to the developed world[104] as the language barrier comes into play. There are, however, charitable Christian-funded projects to translate stories and bring them to the European and other first-world markets. Translated, only TCE-inspired novels from traditional communities are usually covered by copyright. So far, the digital dimension has thus not much altered the marginal trade in traditional stories and myths.

3.2.2 Marketing cultural tourism

Cultural tourism can greatly profit from the new technologies. Documentation of a route to different sites within a country with photographs, maps and information on traditional meals and customs will motivate travellers to book a trip. Such websites can establish links to online shops where the sale of decorative arts, music and even videos of performances can be promoted. Even forums for "alumni" on a route can be established, thereby allowing them to keep in contact with former travellers. Unfortunately, such sites require a certain degree of maintenance, which small entities may find difficult to assure.

3.2.3 "Digital misappropriation" and economic development through TCE

With the digitization of content and existence of the Internet as a tool for distribution, the risk of misappropriation has increased dramatically now that any tourist can use his or her mobile phone to photograph[105] and record[106] TCE he or she comes across. In addition, exploiting the captured TCE commercially can be accomplished quickly, thereby usurping the chance to

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103 Schlatter, *supra* note 45.

104 For a review of the situation for African publications, see Henry Chakava, "Production and Distribution of Cultural Publications in Africa: In Search of Lasting Partners", paper presented at the ARTerial Conference on Vitalizing Africa's Cultural Assets, 5–7 March 2007, at http://www.hivos.nl/index.php/nederlands/english/arterial/presentations_conference.

105 It should be noted, however, that not the TCE itself, but the performance of it is protected against unauthorized recording, broadcasting and communication to the public under Article 2 and Articles 6–10 of the WIPO Performances and Phonograms Treaty (WPPT), adopted in Geneva, 20 December 1996.

106 Penna and Visser, *supra* note 57, at p. 392.

use TCE as an asset for economic development. Simple and cheap technical devices are on the market to capture TCE of all kinds, and rework and distribute them over the Internet. There are multiple examples of how communities holding TCE could have made a fortune had they been holders of an IP right to the TCE in question.[107] Protection of TCE against unauthorized appropriation is consequently a prerequisite for successfully using TCE to further economic development in a digital environment.

4. DESIDERATA FOR TCE PROTECTION FROM A DEVELOPMENT POINT OF VIEW AND ITS REALIZATION BY THE WIPO DRAFT PROVISIONS

TCE as an incredibly diverse resource is already benefiting people. What are the legal and methodological requirements if TCE is to remain a foundation for human and social development on the one hand and to foster economic development on the other? The WIPO draft regarding the protection of TCE has been thoroughly covered by this volume. I will add to this body of information from the perspective of my topic. The situation of communities holding and producing TCE varies widely, as discussed above. The WIPO negotiations have also demonstrated that there is no one-size-fits-all position for developing countries and indigenous peoples. Instead of arguing for a concept that would fit a certain type of developing country or a certain type of TCE, I will try to focus on the desiderata from a more abstract – human and economic – development point of view that tries to take into account the different approaches.

4.1 International Protection: Yes or No?

My first point is rather a truism: all actors involved – custodians of TCE, their communities, and business people in the industrialized countries – need legal certainty.

Some communities, such as the Australian Aborigines and some of the North American Indians,[108] have evolved their own, more or less complete, regulations. If we consider the cases where international regulation is lacking,

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107 *Ibid.*

108 WIPO, Presentations on National and Regional Experiences with Specific Legislation for the Legal Protection of Traditional Cultural Expressions (Expressions of Folklore), WIPO/GRTKF/IC/4/INF/2, 25 November 2002. See also WIPO, Final Report on National Experiences with the Legal Protection of Expressions of Folklore, WIPO/GRTKF/IC/3/10, 25 March 2002.

and the huge amount of national, communal or tribal rules and their often non-written character, TCE-holding communities run the risk that business and individuals will not respect the confusing layers of regulation. Regulation at the international level therefore seems to be a desideratum first and foremost for TCE-users and organizations from outside the traditional communities that are involved in commercial usage, but somewhat less so for users from the custodian communities themselves. However, Australian courts have not satisfactorily applied local TCE laws.[109] The need for international regulation can be seen as a service to TCE-users, sometimes even to users within custodian communities, and as a safeguard measure for TCE-holding communities to ensure that their rights will become more enforceable, especially when the predators come from abroad and using digital technology can carry TCE with them and spread them at their own discretion.[110]

4.2 International Protection: Yes, But How?

Secondly, how are TCE to be protected? Here the diversity of approaches to different types of TCE, and their valorization, come into play. It has been rightly pointed out by Amartya Sen that cultural diversity within regional and historic cultural differences must be taken into account when approaching the issue of poverty and development.[111] Transposed to the context of TCE, this means that there is no "one-size-fits-all" solution regarding the protection of TCE.[112] In addition, it should be noted that a protection-based idea of ownership, such as international property rights, introduces a concept of subjectivity of the individual that is incompatible with the way individual subjectivity is experienced in traditional communities.[113]

Some communities have a very restrictive attitude and no experience when it comes to allowing foreigners access to their heritage.[114] Such communities

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[109] *Yumbulul v. Reserve Bank of Australia* (*supra* note 95) and *Milpurrurru v. Indofurn Pty Ltd.* (1995, A.I.P.C. 91). In the latter, the ruling noted that, "the statutory remedies do not recognize the infringement of ownership rights of the kind which reside under Aboriginal law in the traditional owners of dreaming stories" (at p. 39081).

[110] In the same line, the Provisional Committee on Proposals Related to a WIPO Development Agenda (pcda) (Revised Draft Report, WIPO PCDA/1/6Prov.2, Annex I, Cluster B2, 20–24 February 2006) requests the WIPO Intergovernmental Committee to adopt an internationally binding instrument on the protection of genetic resources, traditional knowledge and folklore as soon as possible.

[111] Sen, *supra* note 7, at pp. 247–248.

[112] Compare the different Chinese experiences described by Swain, *supra* note 69.

[113] Gibson, *supra* note 13, at p. 201.

[114] Aborigines and some North American Indian tribes.

might have no interest in creating economic gain via TCE, as holding on to traditional values is more important for them. Another community might have a very positive attitude to trade that is fully compatible with selling sculptures of goddesses throughout the world. An international legal framework has therefore to reserve a certain leeway for countries or custodian communities to define the scope of protected TCE and the degree of protection they want to award to their TCE. The heterogeneity of individuals within each cultural community creates an additional problem.

The latest WIPO document[115] prudently allows for leeway in two respects: which TCE will be protected and to what degree. Firstly, the custodian community decides whether to inventory a traditional cultural expression at all. By choosing to mention the TCE to the relevant inventorying authority, the community determines whether advanced protective measures become possible.[116] By choosing between registration, notification or not mentioning a traditional cultural expression, the community determines its degree of protection.

Vesting so much power in the communities is simultaneously a curse and a blessing. Only the communities themselves are able to determine the correct degree of protection and freedom for a certain expression, depending on the value they attribute to it. However, decision-making in this respect risks being much contested, especially as the boundaries of the cultural sphere do not always run along national boundaries. Different fractions of the community may not agree or different communities may block the commercial use of TCE that others consider an asset for economic development. If a TCE is registered by one community at one agency, another community that uses the same TCE as a commercial product, but is governed by another agency, may run the risk of being sued by the former. Even rural communities and people living in cities might have a different attitude to their heritage. The WIPO draft does not contain any clarifying rule in this respect and lacks an obligation to provide a forum for dispute settlement. If the decision for registration is made from the bottom up, the process leading to consensus may be lengthy thereby prolonging the time during which TCE are exposed to misappropriation without protection. If a national authority decrees, from the top down, what is

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115 The Development Agenda does not directly address the norm-setting process regarding TCE. It emphasizes, however, the necessity of preserving the public domain, which would also affect the TCE debate. See Provisional Committee on Proposals Related to a WIPO Development Agenda (PCDA), Third Session, Geneva, 19–23 February 2007, PCDA/3/Summary, Annex, Summary by the Chair, at para. 11.

116 WIPO, *supra* note 3, at Article 3, which contains the graduations of protection.

protected, and how, this type of decision could lead to serious unrest[117] or result in violations of the laws of custodian communities. The draft in its current form does not address these issues.

4.3 Not Overprotected

It is sometimes argued that there is a tendency to overprotect TCE in developing countries. In comparison western TCE allegedly enjoy less protection. The difficulty of making a valid comparison starts with finding a western traditional cultural expression that would actually matter to us. If Red Bull used a scene from the Last Supper for an advertising spot, this might actually offend the Christians in the industrialized nations.

If the conclusion that TCE is condensed cultural identity that *inter alia* provides pathways to a meaningful life for traditional communities is correct, this conclusion provides us with the answer to the problem of overprotection. As described by Cohen, the value systems of traditional communities accept only a few possible pathways to a fulfilled life, while our modern and more complex societies accept a multitude of pathways and allow for more picking and choosing among pathways. Generally accepted TCE, if they exist at all in modern societies, do not – like TCE of existing traditional communities – need international legal protection as they have less significance for people's identities and for leading a meaningful life.

It should be noted however that most traditional cultures are in touch with the globalized world. These contacts require a reaction, be it rejection of the globalized culture or slow adaptation. Legally freezing traditional culture against the will of communities will hinder human and economic development. The regime for legal protection should therefore allow for a (periodic) re-examination of TCE, possibly in response to requests of individual communities.

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[117] An illustrative example is that of the Bamiyan Buddha statutes in Afghanistan. The Taliban regime destroyed them, as they represented no actual cultural value to them, but instead stood in opposition to interpretations of Islamic law. Talibans would not have registered the Buddhas under the WIPO regime. There was an outcry from Buddhists all over the world. Had Buddhists lived in a neighbouring country, scenes of unrest would have been the minimum we would have seen. The WIPO regime, however, prohibits damage even to not-mentioned TCE (see Article 3(c) of WIPO, Revised Objectives and Principles, *supra* note 3).

5. CONCLUSION

Despite the spreading of world culture, TCE still are of great importance for human development, both individual and societal, in many societies. Before any attempt is made to use TCE as a basis for economic development by third parties such as international organizations, national governments or non-governmental organizations, a thorough assessment needs to be made of whether the cultural community concerned can bear commodification in general with the consequences discussed above, and the commodification of TCE in particular.

As regards protection of TCE, the WIPO Draft is a step into the right direction. With the leeway given with regard to the scope of protected TCE and with its different levels of protection, it takes into account the various attitudes towards TCE and could accommodate different development policies.

The lack of a dispute settlement process among inventorying agencies for application in case of conflicting claims, and the absence of a decision on the entity to be charged with determining the scope of protected TCE and the level of protection (custodian community or national government) remain some of the desiderata from a development point of view.

If we acknowledge that in most societies there is currently a general trend away from uncommodifiable TCE, the biggest lacuna of the draft is its lack of flexibility with regard to the status to TCE, once inventoried. Eternally freezing TCE at a certain level of protection runs counter to the very essence of development, human and economic.

12. Traditional cultural expressions and their significance for development in a digital environment: examples from Australia and Southeast Asia

Christoph Antons*

1. INTRODUCTION: THE PROBLEM OF DEFINING "TRADITIONAL CULTURAL EXPRESSIONS" AND "TRADITIONAL KNOWLEDGE"

While there are great expectations for traditional cultural expressions (TCE) and their significance for development, at the international level there is still little agreement as to how they are to be defined, the beneficiaries of potential forms of protection delineated, cultural integrity simultaneously commercialised and protected, and the benefits from increasing commercialisation distributed. In her chapter, Miriam Sahlfeld points out some of these problems, which are also identified in other chapters of this volume. In the following, I will comment on these problem areas by using Sahlfeld's chapter as a point of departure and reference point and by providing examples from my current research focusing on Australia and Southeast Asia. First, there is the question, discussed by Martin Girsberger earlier in this volume, of whether "traditional cultural expressions" can be easily separated from what the World Intellectual Property Organization (WIPO) now defines as traditional knowledge (TK) "in the strict sense". Terms referring to "tradition" are all somewhat problematic, as will be outlined later in this chapter. Therefore, this debate appears as a rather technical one conducted by intellectual property experts, on how to fit the various categories of "tradition" into the relatively narrowly defined categories of intellectual property. In spite of such categorisation by intellectual property experts, most of the literature dealing with TCE – including

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Sahlfeld's chapter – from time to time depart from this narrower characterisation to include other forms of TK as defined by WIPO, including medicinal knowledge and knowledge of herbs. This indicates once again, as Sahlfeld correctly concludes, that the adoption of "one size fits all" approaches is indeed difficult. Holistic notions of TK incorporating forms of TCE have been advocated by indigenous groups and human rights organisations,[1] and analysts have pointed out that forms of "art" and cultural expressions are, in the indigenous world-view, inseparable from the social and natural environment in which they are produced.[2] The indigenous world-view had inspired early WIPO working definitions of "traditional knowledge", which were based on fact-finding missions to Asia and the South Pacific[3] as well as on an influential report by the now defunct Aboriginal and Torres Straits Islander Commission (ATSIC) in Australia.[4] However, it was soon realised that holistic notions of cultural rights are difficult to bring into line with the various categories of intellectual property law. Consequently, as early as 2003, WIPO again began to distinguish between copyright-related "folklore" (having however shifted to the more politically correct term "traditional cultural expressions") and industrial property-related traditional knowledge in the "strict sense" (covering, according to WIPO, "technical traditional knowledge").[5] Contributing to the division has also been the fact that various other United Nations (UN) agencies, such as the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the United Nations Environment Programme (UNEP), work on various aspects of traditional knowledge but, unlike WIPO, not on the whole, complex issue.

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[1] Terri Janke, *Our Culture, Our Future: Report on Australian Indigenous Cultural and Intellectual Property Rights*, Sydney: Michael Frankel and Company, 1998, citing the Special Rapporteur of the UN Sub-Commission on the Prevention of the Discrimination of Minorities, Erica-Irene Daes.

[2] Darrell A. Posey, "Can Cultural Rights Protect Traditional Cultural Knowledge and Biodiversity?" in Halina Nieć (ed.), *Cultural Rights and Wrongs*, Paris: UNESCO and London: Institute of Art and Law, 1998, at p. 43.

[3] WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: Report on Fact-finding Missions on Intellectual Property and Traditional Knowledge (1998–1999), Geneva: WIPO, 2001.

[4] See Janke, *supra* note 1.

[5] WIPO, Revised Version of Traditional Knowledge: Policy and Legal Options, WIPO/GRTKF/IC/6/4 Rev., 19 February 2004, at p. 5. See also Christoph Antons, "Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia" in Christopher Heath and Anselm Kamperman Sanders (eds), *New Frontiers of Intellectual Property Law: IP and Cultural Heritage, Geographical Indications, Enforce-ment and Overprotection*, Oxford and Portland, OR: Hart, 2005, pp. 37–52, at p. 51.

2. WHAT CULTURE? NATIONAL AND LOCAL REPRESENTATIONS OF CULTURE AS A FOCAL POINT FOR RIGHTS DISCOURSES

Even more ambiguous than the relationship between traditional knowledge and intellectual property is, however, the notion of "culture" and the associated question of the beneficiaries of the various forms of commercialisation. In most models such beneficiaries are supposedly those who are the bearers of the culture. In this regard, Sahlfeld's chapter speaks of "national culture", with reference to the UNESCO Convention on Intangible Cultural Heritage of national (or ethnic) culture(s). Precisely here, however, lies a great problem in the debate. What are frequently regarded as "national" cultures are, of course, necessarily constructs based on "nations", and even well-established nation states, such as those of much of Europe, have a history of just 150 to 200 years. Of far more recent origin, however, are those in much of the developing world, where the greatest wave of decolonisation took place after World War II and where many new "nations" have been formed only during the past two or three decades. Unfortunately for the new entities, their nation-building processes are taking place at a time when the established nation states of Europe and North America are beginning to move towards even larger regional frameworks and to some extent to relinquish some of the prerogatives of the nation state. In this setting, the forces of globalisation of commerce create opportunities for smaller regional players to define their existence outside a larger nation state. Consequently, most of the new nation states within the developing world have been unstable ever since they gained their independence. In a country like Indonesia, for example, attempts have been made since the 1950s to create a national culture. These attempts were based in particular on the newly introduced national language *Bahasa Indonesia*[6] and the national motto *Bhinneka Tunggal Ika* (Unity in Diversity), ironically, itself expressed in Sanskrit, a language no longer spoken but connected to the past of ancient feudal kingdoms on Java and Bali, with few remaining links to the rest of Indonesia.[7]

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[6] *Bahasa Indonesia* was based on a particular form of Malay, called *Bazaar Malay* during the colonial period, which was the *lingua franca* for indigenous traders throughout the archipelago. A youth congress of the Indonesian independence movement adopted it in 1928 as the future national language with the slogan "Indonesia, satu bangsa, satu bahasa, satu tanah-air" ("Indonesia, one people, one language, one motherland"), see Bernhard Dahm, *History of Indonesia in the Twentieth Century*, London: Praeger Publishers, 1971, at p. 66.

[7] In this context, Paul M. Taylor also points to the purposeful use of imported culture. See Paul M. Taylor (ed.), *Fragile Traditions: Indonesian Art in Jeopardy*, Honolulu: University of Hawaii Press, 1994, at pp. 2–3. However, the use of Sanskrit

Indonesia successfully established *Bahasa Indonesia* as the basis for the national identity and for Indonesian writers and poets as one important form of artistic expression. Nevertheless, many differences between regions and communities have remained and they find expression in other forms – in arts and crafts, such as music, painting, sculpture and weaving, which are more frequently expressions of local identity, with such local identity also often connected to a particular religion or a denomination. Even one of Indonesia's most popular local music genres, *dangdut*, characterised at least for a time as "the identifiably national, modern Indonesian popular music" was in its 1980s mainstream version often associated with Islam and Islamic politics, due to the political and religious orientation of one of its most successful interpreters.[8] Traditional sculpture and paintings also often use religious symbolism; while clothing and textiles are strongly related to local customs, which themselves reflect local cultural/religious life. Local garments from India and Southeast Asia, for example, became an international success with the "hippie" and "pop" fashions of the 1960s and 1970s. While these garments were and are worn out of their original context by tourists and boutique shoppers,[9] locals still associate them with ethnicity and ethnic politics. For example, the clothing and textiles of the Hmong, a minority population in the mountains of Thailand, Laos and Cambodia, have particular ethno-political resonances, particularly in Laos where the Hmong are often associated with a mercenary army, which fought alongside the Americans during the war in Indochina in the hope of gaining an independent *Hmong* state.[10]

Another reason why governments of many developing countries have been relatively slow to engage in the international debate about TCE is that such debate was often linked to the concept of "indigenousness" because of the dominant position of examples supplied from Australian, Canadian, US and New Zealand contexts. Often the best documented, they were also, because of their English language context, regarded as the most easily accessible examples of local traditional knowledge. In Asia in particular, the concept of

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in the Indonesian coat of arms appears no stranger than the use of Latin in the coat of arms of the United States. What is important, however, is that it appeals to a tradition, which represents only a part, if a dominant one, of the giant Indonesian archipelago.

[8] Krishna Sen and David T. Hill, *Media, Culture and Politics in Indonesia*, Oxford: Oxford University Press, 2000, at pp. 174–176.

[9] Erik Cohen, "From Tribal Costume to Pop Fashion: The 'Boutiquisation' of the Textiles of the Hill Tribes of Northern Thailand" in Erik Cohen, *The Commercialized Crafts of Thailand: Hill Tribes and Lowland Villages*, Honolulu: University of Hawaii Press, 2000, at pp. 89–98.

[10] Jan Ovesen, "All Lao? – Minorities in the Lao People's Democratic Republic" in Christopher R. Duncan (ed.), *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities*, Ithaca and London: Cornell University Press, 2004, pp. 214–240, at pp. 225–226 and 235–236.

"indigenous people" (or "peoples") has been greeted with much scepticism.[11] At the sessions of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, the Delegation of Indonesia for example stressed the need to consider the historical background when defining "indigenous people" and that "the tendency of the present use of the term originated in a colonial context, in which the ruling majority of colonialists had to be differentiated from the so-called original people living on the land before the colonialists came". However, in many countries the majority or even the whole population was indigenous.[12] Similarly, the Delegation of India pointed out that the terms "indigenous and local communities" were "terms that had a connotation derived from the colonial era when an attempt was made to distinguish between colonists and the original people inhabiting a particular country". This was not a relevant model in Asia and not applicable at all in some large parts of that continent.[13] Elsewhere, Thailand has made it clear in declarations to the UN that it recognises its tribal groups as ethnic groups but that they "are not considered to be minorities or indigenous peoples but as Thais who are able to enjoy fundamental rights […] as any other Thai citizen".[14] Colonialism also established in many countries a sizeable and powerful presence of what the Dutch sociologist Wertheim termed "trading minorities",[15] who acted as intermediaries for the colonial trading companies in the colonial economy and, despite becoming citizens of the newly independent countries, were often discriminated against in various forms of legislation.[16] This is a well-known phenomenon and trading

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[11] Benedict Kingsbury, "The Applicability of the International Legal Concept of 'Indigenous Peoples' in Asia" in Joanne R. Bauer and Daniel A. Bell (eds), *The East Asian Challenge for Human Rights*, Cambridge: Cambridge University Press, 1999, pp. 336–377; Benedict Kingsbury, "Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy" (1998) The American Journal of International Law 92:3, pp. 414–457; Antons, *supra* note 5; Christoph Antons, "Traditional Knowledge, Biological Resources and Intellectual Property Rights in Asia: The Example of the Philippines" (2007) Forum of International Development Studies 34, pp. 1–18, at pp. 5–6.

[12] WIPO, IGC. Second Draft Report, WIPO/GRTKF/IC/8/15 Prov. 2, 5 October 2005, at pp. 26–27.

[13] *Ibid.* at p. 30.

[14] Statement of the Government of Thailand of 12 May 1992 cited in Kingsbury, *supra* note 11, at p. 353.

[15] Willem F. Wertheim, "The Trading Minorities in South-East Asia" in Hans-Dieter Evers (ed.), *Sociology of South-East Asia: Readings on Social Change and Development*, Kuala Lumpur: Oxford University Press, 1980.

[16] Christoph Antons, "Ethnicity, Law and Development in Southeast Asia" in Frans Hüsken and Dick van der Meij (eds), *Reading Asia: New Research in Asian Studies*, Richmond, Surrey: Curzon Press, 2001, pp. 3–28.

communities of Chinese, Arabs and Indians became particularly prominent in this role in developing countries ranging from East Africa, via Southeast Asia and the Pacific islands to Latin America. In countries such as Indonesia and Malaysia, this led to the frequent use of terms such as *pribumi* (Indonesia) and *bumiputra,* literally: sons of the soil (Malaysia), to distinguish all "indigenous" communities from these "newcomers".[17]

However, the problem with the term "indigenous" is by no means confined to former colonies. In the country known today as Thailand, various Thai-speaking communities (including the people later known as the Siamese), as well as communities from various other language groups, migrated voluntarily and/or were forced out in waves from areas of what is today Southern China. Some of these groups came earlier, others later, than the Siamese, who accounted for approximately 30–35 per cent of the population when the nation state Siam (now Thailand) was formed.[18] For similar reasons, and speaking for the Malay world, the anthropologist Geoffrey Benjamin believes that while the use of the term "indigenous" there is well intentioned, it "does not fully capture the social and political issues that attach to tribes people" and he prefers to use the term "tribal" in a manner that strips it of any negative connotations.[19]

3. THE RESILIENCE OF ORAL AND WRITTEN TRADITIONS

The issue is further complicated by the fact that the debate about TCE and development is not just one that concerns "tribal" cultures. TCE embrace all aspects of tradition and a very wide range of different traditional cultures from what remains of such so-called "tribal" cultures via the surviving cultures of vanished feudal kingdoms in Southeast Asia (such as the Javanese and Balinese culture) to well-established traditional expressions as part of national mainstream cultures (as with the examples of ancient Sanskrit or Chinese

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17 *Ibid*. at pp. 14–17.

18 Charles F. Keyes, "Cultural Diversity and National Identity in Thailand" in Michael E. Brown and Sumit Ganguly (eds), *Government Policies and Ethnic Relations in Asia and the Pacific*, Cambridge, MA and London: MIT Press, 1995, pp. 197–232, at p. 200.

19 Geoffrey Benjamin, "On Being Tribal in the Malay World" in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives*, Singapore: Institute of Southeast Asian Studies and Leiden: International Institute of Asian Studies, 2002, pp. 7–76, at pp. 12–15.

calligraphy). Erik Cohen in his work on Thailand distinguishes between "court arts" and "folk crafts".[20] Court arts were "made of rare and expensive materials by highly skilled artisans for royal, aristocratic or sacerdotal patrons" and were "decorative status symbols for the ceremonial or cultic needs of palace and temple". Cohen mentions as examples gold and silver, mother of pearl inlay, niello ware, lacquer ware and silk and brocade weaving,[21] although he also discusses silk weaving among his second category of traditional crafts in Thailand, which he calls the "lowland crafts" to distinguish them from the "highland crafts" of the "hill tribes". All of these "arts" and "crafts" would loosely be understood as "traditional", but there are huge differences between them when it comes to the circle of producers, material used, forms of commercialisation and, importantly, the consumers and buyers of such "arts and crafts".[22]

In many societies, the line between traditional "court arts" and "folk crafts" is no longer easy to draw and is declining in importance, especially in those countries structured as republics, but also because in many cases, members of the new elite may use symbols and material previously restricted to the nobility as symbols of their wealth. It must be assumed, therefore, that much "court art" would also fall under the current WIPO definition of TCE, which is mentioned in the chapter by Sahlfeld. Many of these cultural expressions are highly sophisticated and sometimes older than similar cultural expressions in European cultures, and they have survived hundreds of years of foreign migration, colonialism, cultural assimilation by new nation states and tourism. Therefore, they are quite obviously highly resilient and adaptive and the at times paternalistic language advocating various forms of "protection" seems misplaced in this context. All too often, the imagined beneficiary of protection of TCE appears as a group of hunters and gatherers with no writing system of its own and little contact with the outside world. Such groups are further portrayed as passive recipients of the influences and forces of modernisation, which threaten their cultures and create the need for "protection". As anthropologists and also the authors of several of the chapters in this volume point out,[23] such tribes no longer exist and the almost exclusive use of "tribal art" to

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[20] Susan Conway writing specifically on textiles makes the same distinction between "village" and "court": Susan Conway, *Thai Textiles*, Bangkok: River Books Press, 2001, at p. 184.

[21] Cohen, *supra* note 9, at p. 8.

[22] *Ibid.* at pp. 5–16.

[23] Peter Rebech, Fred Bosselman, Jes Bjarup, David Callies, Martin Chanock, and Hanne Petersen, *The Role of Customary Law in Sustainable Development,* Cambridge: Cambridge University Press, 2005; Jeffrey Sissons, *First Peoples: Indigenous Cultures and Their Futures*, London: Reaktion Books, 2005.

exemplify a country's TCEs is strongly opposed by developing nations as not representative of the whole range of their arts and crafts. In fact, in creating a "national culture", it was particularly the "court arts" of the most powerful ethnic group within the new nation state that became symbolically prominent[24] (as with the Siamese in Thailand and the Javanese in Indonesia).

The examples of the court cultures and minority cultures of Southeast Asia also show that the strong focus in the TCE literature on the orally transmitted cultures of societies without writing systems of their own is equally unjustified. Of course, such Aboriginal societies also exist in Southeast Asia, but many of the ethnic cultures there also express and transmit their traditions in writing and often in their own script, which differs from that of the nation state. This is not only true of minority cultures such as the Islamic *Moros* in the Southern Philippines, the Islamic population of Southern Thailand, the *Karen* of Burma and Thailand[25] or the Iu-Hmien (Yao) of Laos, Thailand and Vietnam,[26] but also of the script cultures of dominant groups, which have for various reasons not been adopted by the nation state, such as that of the Javanese in Indonesia.

While Asian "court cultures" and minority cultures with written traditions are more easily accepted within the nation states, Aboriginal cultures can be equally resilient. Vivien Johnson has called the culture of Australian Aborigines "the most enduring human culture on earth".[27] She describes the Papunya Tula art movement, which started in the Aboriginal settlement of Papunya in Central Australia in the early 1970s, as an example. Aboriginal settlements such as this were founded during the era of assimilationist policies in Australia. The settlements were attempts to resettle people from many different communities by creating artificial new ones. There were huge problems within these settlements because of insufficient resources, social tensions and violence. Johnson describes how Aboriginal elders of the settlements quickly realised the promotional and educational potential of art for the

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[24] Robyn J. Maxwell, *Textiles of Southeast Asia: Tradition, Trade and Transformation*, Hong Kong: Periplus Editions, 2003, at p. 402.

[25] Chumpol Maniratanavongsiri, "Religion and Social Change: Ethnic Continuity and Change among the Karen in Thailand" in Don N. McCaskill and Ken Kampe (eds), *Development or Domestication? – Indigenous Peoples of Southeast Asia*, Chiang Mai: Silkworm Books, 1997, pp. 237–267, at p. 239; Charles F. Keyes, *The Golden Peninsula: Culture and Adaptation in Mainland Southeast Asia*, Honolulu: University of Hawaii Press, 1995, at p. 56.

[26] Choy C. Saetern, "The Lu-Mien (Yao) Ethnic Group: World Experiences" in McCaskill and Kampe, *ibid*. at p. 459.

[27] Vivien Johnson's accompanying essay to Vivien Johnson, *Dreamings of the Desert: Aboriginal Dot Paintings of the Western Desert*, Adelaide: Art Gallery of South Australia, 1996, at p. 16.

survival of interest in their culture, particularly among the youth: "In the re-education camp of their colonisers they began their own re-education program – in Aboriginality".[28] In the same vein, anthropologists have correctly pointed out that Aboriginal, indigenous or "tribal" communities are not merely passive recipients of modernity, but that it requires positive steps and much negotiation with the nation state to avoid assimilation and incorporation into the state apparatus. Geoffrey Benjamin summarises this situation eloquently when he writes that "being tribal is a matter of social action, rather than a passive condition of existence".[29]

4. THE DANGERS OF OVERSIMPLIFICATION AND ESSENTIALISM

In all of this, it is necessary to be aware of the danger of essentialising cultures. This tendency is omnipresent in the TCE debate for a number of reasons. First, as we saw earlier, in its usual attempt to simplify social complexity, the law creates rights, which are drafted and available for certain categories of beneficiaries. With TCE and cultural rights in general, access to those benefits is usually dependent on the authenticity of the claim. Expressions of culture have to be "authentic", traditions to have been observed "since time immemorial" and the chain linking the claimant to land, environment or cultural expressions must be unbroken and uninterrupted "from generation to generation". Small wonder then that claimants are tempted to fit their culture into the categories that the law has created and to fulfil the expectations of lawyers with regards to authenticity.[30] Such categorising and simplification of the social reality of living cultures favours the "tribal" over urban minority cultures[31] and the "indigenous" over traditional court cultures or the traditions of migrant communities. New Zealand anthropologist Jeffrey Sissons has pointed out that, "contemporary indigenity is not simply about preserving traditions and meanings", but also "about their ownership and the ability to transform them in contexts, where indigenous authenticity is policed and regulated by

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28 *Ibid*. at p. 22.

29 Benjamin, *supra* note 19, at pp. 9 and 12.

30 Sonia Smallacombe, "On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge about Aboriginal Cultural Heritage" in Duncan Ivison, Paul Patton, and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples*, Cambridge: Cambridge University Press, 2000, pp. 152–162, at p. 160; Peter Sutton, *Native Title in Australia: An Ethnographic Perspective*, Cambridge: Cambridge University Press, 2003, at p. 22.

31 Smallacombe, *ibid*. at p. 155.

outsiders".[32] He speaks of "oppressive authenticity" and criticises the attempts of the UN Working Group on Indigenous Populations to stretch the meaning of "indigenous" in accordance with its expanding membership, and their development of what he calls "eco-indigenism" with its "possibility for almost any people with a subsistence based culture to claim membership in international indigenous forums".[33]

Secondly, there is the appropriation of selected symbols of local culture as representations of national culture for an international audience. Selected aspects of Australian Aboriginal culture have been used to market, for example, the national airline Qantas, the Sydney Olympics and, of course, tourism to Australia.[34] "Exotic" and appealing aspects of local culture are equally important in the marketing campaigns of Southeast Asian tourism companies and of airlines such as Garuda[35] and Thai Airways ("Smooth as Silk").

Finally, are "sound" cultural identities really in need of protection and are migrants or communities in transition really in danger of losing them? After all, what precisely is a "sound cultural identity" and is it really possible to lose it? The disorientation of many migrants referred to in Sahlfeld's chapter is, in my opinion, not based on a loss of cultural identity, but rather the opposite. Those migrants who are poor and uneducated, religiously and ethnically different and experiencing discrimination in a new environment may return to a strengthened perception of their own identity largely for political reasons.[36] Equally political is the threat of loss of language in minority groups, which leads to demands for self-determination and autonomy. However, migrants or minorities, which do not experience such threats, are perfectly able to simply add new layers to their continuing identity, just as one would learn new languages. These experiences of migrants and transitional minorities can apply equally to indigenous and/or non-indigenous communities, although the danger of racial stereotyping and discrimination may be greater in the indigenous ones.

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32 Sissons, *supra* note 23, at p. 15.

33 *Ibid*. at pp. 16–17.

34 Smallacombe, *supra* note 30, at p. 154.

35 See the example of a 1990 Garuda advertisement for holidays in Torajaland on the island of Sulawesi in Shelly Errington, "Unravelling Narratives" in Taylor, *supra* note 7, pp. 139–164, at p. 139.

36 Kyra Landzelius, "Introduction: Native on the Net?" in Kyra Landzelius (ed.), *Native on the Net: Indigenous and Diasporic Peoples in the Virtual Age*, London and New York: Routledge, 2007.

5. THE IMMEDIATE FUTURE: SYNCRETISM AND MULTI-LAYERED CULTURAL EXPRESSIONS AND THEIR LEGAL SIGNIFICANCE

Returning to the field of cultural expressions and to "authenticity", in reality, we encounter much syncretism[37] of cultures and of cultural expressions, which is not a new phenomenon related to globalisation, but is as old as the intercultural communication which produces it. Some of the most popular and successful art forms of the twentieth century, such as jazz, salsa and Brazilian popular music are well-known examples of cultural hybrids. Asian cultures are no different and owe much to influences from neighbouring countries, foreign trading communities and, last but not least, the various colonial powers. This is nowhere more obvious than in Southeast Asia, whose hybrid cultures were referred to by Europeans during the last century by terms such as "Further India", "Indonesia" or "Indochina". Southeast Asians are well aware of the multicultural mixture which their artistic creations represent. *Dangdut*, a contemporary and popular music genre in Indonesia, has already been mentioned. According to Krishna Sen and David Hill, it accounts for over one-third of the domestic Indonesian market for music recordings.[38] However, while it is celebrated as "the authentic music of the Indonesian people", it is widely acknowledged that it is inspired by Indian "Bollywood" film music. Sen and Hill in fact believe that "its persistent popularity is partly due to its hybrid character, constantly incorporating and synthesising other musical genres that may compete with it, in any section of the Indonesian market".[39] A similar syncretistic music genre for the older generation is *Keroncong*, a style of music inspired by Portuguese *Fado* and reaching back to the Portuguese presence in Indonesia in the sixteenth century.[40] Further examples of successful and innovative syncretistic music genres include the adaptation of folk songs from the North-West province of Shaanxi in China (*xibeifeng*).[41] Similarly, *Batik* is often regarded as a typical Indonesian textile craft, yet the

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37 The term "syncretism" is preferred here to the frequently used terms "hybridity" or "hybrid cultures", which evoke the impression of a passive reception of cultural influences or of an artificial "breeding" process initiated from outside and do not adequately recognise the role of indigenous and local people in driving the reform and renewal of their traditions.

38 Sen and Hill, *supra* note 8, at p. 174.

39 *Ibid*. at p. 175.

40 *Ibid*. at p. 166, at footnote 9.

41 Mercedes M. Dujunco, "Hybridity and Disjuncture in Mainland Chinese Popular Music" in Timothy J. Craig and Richard King (eds), *Global Goes Local: Popular Culture in Asia*, Hong Kong: Hong Kong University Press, 2002, pp. 25–39.

designs in Java show Indian, Chinese, Arab and European influences, in particular on the north coast of Java, an area that the Indonesians call the *Pasisir* and where the main trading ports of Java are located.[42]

Using as a starting point a sober rather than alarmist analysis of "threats to culture", the globalising environment may present more opportunities than dangers. The current worldwide interest in so-called Third World and indigenous art and music will continue to create new and vibrant syncretistic art forms as a result of intercultural communication. Communities around the world will find ways to exploit these opportunities, while at the same time safeguarding their cultural identities. Experience in many developing countries shows that the proliferation of so-called "authentic material" may quickly diminish its value. In the end, consumers from the industrialised and industrialising world prefer more upmarket versions of such cultural expressions, which are marketed in a more luxurious setting and crafted to suit foreign tastes. Much of this material may be based on tradition, but designs and choice of material clearly make it a new and original product in the sense of copyright and design law. With much of the material other than music, there may also be insufficient commercial value in it to reward individuals or communities seeking intellectual property protection. Heritage legislation sensitive to the local environment, defensive mechanisms against misappropriation, and other similar protective measures may be more helpful than intellectual property laws in resolving the issues of appropriate respect for religious connotations and appropriate use of material, which is not merely of a decorative character.[43]

It also seems that for the governments of many developing nations, TCE are regarded as less important than other forms of TK, such as agriculture, biodiversity or medicinal knowledge. There is no question that there are tremendous opportunities for the creative industries in these settings. However, these opportunities will arise mainly via the creation of new syncretistic, including Internet-based, expressions, rather than via an artificially preserved notion of "traditional culture". Thus far, the few countries that have attempted to implement notions of "community intellectual rights" have not made much progress with their legislation.[44] The reasons are varied, but often have to do with a

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[42] Anne Richter, *Arts and Crafts in Indonesia*, San Francisco: Chronicle Books, 1994, at pp. 90–91; Rens Heringa and Harmen C. Veldhuisen, *Fabric of Enchantment: Batik from the North Coast of Java*, Los Angeles: Los Angeles County Museum of Art, 1996.

[43] See, however, the critical remarks by Smallacombe, *supra* note 30, at pp. 156–162, concerning the application of heritage legislation.

[44] For the example of the Philippines, Indonesia and India, see Antons, *supra* note 5, and Christoph Antons, "Sui Generis Protection for Plant Varieties and Traditional Agricultural Knowledge: The Example of India" (2008) European Intellectual Property Law Review 29:12, pp. 480–485.

connection to land rights and tensions with other sectors of developing economies, such as mining.

This leads to a further important point: the role of the nation state. The conflict between the global and the local has been referred to in many of the chapters in this volume. However, it is sometimes forgotten that the national government is the mediating force between the global and the local. Most of the mechanisms proposed in international conventions, such as royalty-collecting agencies and funds, are implemented by national governments. Customary law then becomes the discursive tool used by communities to negotiate with their governments on the one hand and to state their claims at the international level on the other hand.[45] In the implementation of development-oriented TCE schemes, the role of the nation state can be benign, for example in seeking forms of protection for the dealings of locals with multinational agencies, but it can also have negative consequences, as mentioned by Miriam Sahlfeld in her chapter. There may be a very important role here for WIPO and other UN-based organizations, for NGOs, community-based organisations, and for the various human rights agencies mentioned by Christoph Beat Graber in his chapter, in promoting standards to mitigate these conflicts, decentralise decision-making processes and to give communities a real say, at the very least with regard to prior informed consent and benefit-sharing issues.

6. DIGITISATION OF TRADITIONAL CULTURAL EXPRESSIONS

Miriam Sahlfeld has correctly identified some of the pros and cons of the digitisation of TCE in her chapter. There is no question that the new media will have a huge impact on cultural politics and that important cultural standards will become more difficult to defend. A good example is the recent conflict between video website YouTube and the governments of Thailand, Turkey and India, because of videos disrespectful to the King of Thailand, Mustafa Kemal Atatürk and Mahatma Ghandi, respectively.[46] Equally, in the field of TCE, there is sometimes a tension between approaches advocating freedom of

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[45] Charles Zerner, "Through a Green Lens: The Construction of Customary Environmental Law and Community in Indonesia's Maluku Islands" (1994) Law and Society Review 28:5, pp. 1079–1122.

[46] See *The Nation*, "YouTube blocked because of clip 'offensive to monarchy'", 5 April 2007; *Turkish Daily News*, "YouTube suspended in Turkey", 8 March 2007; *The Times of India*, "YouTube angers I&B with its tasteless Gandhi video", 13 January 2007.

expression and the public domain, and indigenous concerns about privacy and adequate and appropriate representation of cultural material. Nevertheless, analysts have pointed out that new licensing models, such as the Creative Commons and appropriately drafted Internet protocols sensitive to the cultural issues at hand, will go a long way towards reconciling many of the conflicting interests.[47] Many leading Internet service providers have drafted such protocols or are in the process of drafting them. This again may be a process that can be monitored and assisted by the communities themselves and by national and international agencies and experts, so that certain standards in this area will quickly emerge. However, access to the new technologies remains difficult for many remote living communities,[48] especially where technological access problems are exacerbated by communication problems stemming from minority languages or from writing systems different from those used at the national level. Technically, many of these issues can be addressed, and efforts to make the Internet accessible to such communities are under way,[49] but more time is required for these efforts to bear fruit. Finally, with complicated fields such as TCE, in addition to the new digital technologies one should not forget the considerable assistance that simple intellectual property-based tools can provide. Here, it is necessary to look beyond the discussion surrounding copyright. For example, collective trademarks guaranteeing quality standards and geographical indications applied to handicrafts and artistic expressions are increasingly used in developing countries. These are simple tools to build customer confidence in quality standards, which are necessary in an increasingly sophisticated market.

7. CONCLUSION

In conclusion, there are many opportunities for TCE to contribute to the development process. Equally, one can be cautiously optimistic about the significance of the Internet and other emerging forms of telecommunications technology as instruments that local and traditionally living communities can use to fight marginalisation, seek empowerment, and promote artistic products

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47 See Eric Kansa, "Indigenous Heritage and the Digital Commons" in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia Pacific Region*, The Hague: Kluwer Law International, 2008, as well as Brian Fitzgerald and Susan Hedge, "Traditional Cultural Expression and the Internet World" in Antons, *ibid*.

48 Alopi S. Latukefu, "Remote Indigenous Communities in Australia: Questions of Access, Information and Self-determination" in Landzelius, *supra* note 36, pp. 43–60.

49 See *ibid*. and Kansa, *supra* note 47.

and TCE. The further development of these tools will require current access problems in remote communities, especially in developing countries, to be addressed. It will further require adequate licensing models and protocols to restrict the various forms of usage, where necessary. Nevertheless, tradition is not static and the use of TCE in an online environment will necessarily also lead to the transformation and further development of tradition. Again, protocols and other defensive mechanisms may help here to ensure basic standards of decency and appropriate use. At the same time, carefully selected intellectual property rights can be used in addition to these mechanisms to market the vibrant new syncretistic cultural expressions now emerging from the developing world.

ANNEX

Excerpts from documents of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore

ANNEX 1: DRAFT PROVISIONS FOR THE PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE[1]

Policy Objectives and Core Principles

Contents

I. Objectives

[1] These draft provisions are reproduced unaltered (without commentaries) from the Annex of documents WIPO/GRTKF/IC/8/4, 8 April 2005, WIPO/GRTKF/IC/9/4, 9 January 2006, WIPO/GRTKF/IC/10/4, 2 October 2006, WIPO/GRTKF/IC/11/4(c), 26 April 2007, and WIPO/GRTKF/IC/12/4(c), 6 December 2007, considered by the Intergovernmental Committee on Intellectual Property and Genetic Resources and Folklore at its Eighth, Ninth, Tenth, Eleventh and Twelfth Sessions.

(viii) Encourage community innovation and creativity
(ix) Promote intellectual and artistic freedom, research and cultural exchange on equitable terms
(x) Contribute to cultural diversity
(xi) Promote community development and legitimate trading activities
(xii) Preclude unauthorized IP rights
(xiii) Enhance certainty, transparency and mutual confidence

II. General Guiding Principles

(a) Responsiveness to aspirations and expectations of relevant communities
(b) Balance
(c) Respect for and consistency with international and regional agreements and instruments
(d) Flexibility and comprehensiveness
(e) Recognition of the specific nature and characteristics of cultural expression
(f) Complementarity with protection of traditional knowledge
(g) Respect for rights of and obligations towards indigenous peoples and other traditional communities
(h) Respect for customary use and transmission of TCEs/EoF
(i) Effectiveness and accessibility of measures for protection

III. Substantive Principles

1. Subject Matter of Protection
2. Beneficiaries
3. Acts of Misappropriation (Scope of Protection)
4. Management of Rights
5. Exceptions and Limitations
6. Term of Protection
7. Formalities
8. Sanctions, Remedies and Exercise of Rights
9. Transitional Measures
10. Relationship with Intellectual Property Protection and Other Forms of Protection, Preservation and Promotion
11. International and Regional Protection

I. OBJECTIVES

The protection of traditional cultural expressions, or expressions of folklore,[2] should aim to:

Recognize value

(i) recognize that indigenous peoples and traditional and other cultural communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity;

Promote respect

(ii) promote respect for traditional cultures and folklore, and for the dignity, cultural integrity, and the philosophical, intellectual and spiritual values of the peoples and communities that preserve and maintain expressions of these cultures and folklore;

Meet the actual needs of communities

(iii) be guided by the aspirations and expectations expressed directly by indigenous peoples and by traditional and other cultural communities, respect their rights under national and international law, and contribute to the welfare and sustainable economic, cultural, environmental and social development of such peoples and communities;

Prevent the misappropriation of traditional cultural expressions/expressions of folklore

(iv) provide indigenous peoples and traditional and other cultural communities with the legal and practical means, including effective enforcement measures, to prevent the misappropriation of their cultural expressions and derivatives therefrom, control ways in which they are used beyond the customary and traditional context and promote the equitable sharing of benefits arising from their use;

Empower communities

(v) be achieved in a manner that is balanced and equitable but yet effectively empowers indigenous peoples and traditional and other cultural communities to exercise rights and authority over their own traditional cultural expressions/expressions of folklore;

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[2] In these provisions, the terms "traditional cultural expressions" and "expressions of folklore" are used as interchangeable synonyms, and may be referred to simply as "TCEs/EoF". The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

Support customary practices and community cooperation

(vi) respect the continuing customary use, development, exchange and transmission of traditional cultural expressions/expressions of folklore by, within and between communities;

Contribute to safeguarding traditional cultures

(vii) contribute to the preservation and safeguarding of the environment in which traditional cultural expressions/expressions of folklore are generated and maintained, for the direct benefit of indigenous peoples and traditional and other cultural communities, and for the benefit of humanity in general;

Encourage community innovation and creativity

(viii) reward and protect tradition-based creativity and innovation especially by indigenous peoples and traditional and other cultural communities;

Promote intellectual and artistic freedom, research and cultural exchange on equitable terms

(ix) promote intellectual and artistic freedom, research practices and cultural exchange on terms which are equitable to indigenous peoples and traditional and other cultural communities;

Contribute to cultural diversity

(x) contribute to the promotion and protection of the diversity of cultural expressions;

Promote community development and legitimate trading activities

(xi) where so desired by communities and their members, promote the use of traditional cultural expressions/expressions of folklore for community-based development, recognizing them as an asset of the communities that identify with them, such as through the development and expansion of marketing opportunities for tradition-based creations and innovations;

Preclude unauthorized IP rights

(xii) preclude the grant, exercise and enforcement of intellectual property rights acquired by unauthorized parties over traditional cultural expressions/expressions of folklore and derivatives thereof;

Enhance certainty, transparency and mutual confidence

(xiii) enhance certainty, transparency, mutual respect and understanding in relations between indigenous peoples and traditional and cultural communities, on the one hand, and academic, commercial, governmental, educational and other users of TCEs/EoF, on the other.

II. GENERAL GUIDING PRINCIPLES

(a) Principle of responsiveness to aspirations and expectations of relevant communities
(b) Principle of balance
(c) Principle of respect for and consistency with international and regional agreements and instruments
(d) Principle of flexibility and comprehensiveness
(e) Principle of recognition of the specific nature and characteristics of cultural expression
(f) Principle of complementarity with protection of traditional knowledge
(g) Principle of respect for rights of and obligations towards indigenous peoples and other traditional communities
(h) Principle of respect for customary use and transmission of TCEs/EoF
(i) Principle of effectiveness and accessibility of measures for protection

III. SUBSTANTIVE PROVISIONS

ARTICLE 1: SUBJECT MATTER OF PROTECTION

(a) "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:

(i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
(ii) musical expressions, such as songs and instrumental music;
(iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,
(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;

which are:

– (aa) the products of creative intellectual activity, including individual and communal creativity;
– (bb) characteristic of a community's cultural and social identity and cultural heritage; and
– (cc) maintained, used or developed by such community, or by

individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

ARTICLE 2: BENEFICIARIES

Measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of the indigenous peoples and traditional and other cultural communities:[3]

(i) in whom the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and

(ii) who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.

ARTICLE 3: ACTS OF MISAPPROPRIATION (SCOPE OF PROTECTION)

Traditional cultural expressions/expressions of folklore of particular value or significance

(a) In respect of traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that the relevant community can prevent the following acts taking place without its free, prior and informed consent:

(i) in respect of such traditional cultural expressions/expressions of folklore other than words, signs, names and symbols:

– the reproduction, publication, adaptation, broadcasting, public performance, communication to the public, distribution, rental, making available to the public and fixation (including by still photography) of the traditional cultural expressions/expressions of folklore or derivatives thereof;

– any use of the traditional cultural expressions/expressions of folklore or adaptation thereof which does not acknowledge in an appropriate way the community as the source of the traditional cultural expressions/expressions of folklore;

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[3] The broad and inclusive term "indigenous peoples and traditional and other cultural communities", or simply "communities" in short, is used at this stage in these draft provisions. The use of these terms is not intended to suggest any consensus among Committee participants on the validity or appropriateness of these or other terms, and does not affect or limit the use of other terms in national or regional laws.

- any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions/expressions of folklore; and
- the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or adaptations thereof;

(ii) in respect of words, signs, names and symbols which are such traditional cultural expressions/expressions of folklore, any use of the traditional cultural expressions/expressions of folklore or derivatives thereof, or the acquisition or exercise of IP rights over the traditional cultural expressions/expressions of folklore or derivatives thereof, which disparages, offends or falsely suggests a connection with the community concerned, or brings the community into contempt or disrepute;

Other traditional cultural expressions/expressions of folklore

(b) In respect of the use and exploitation of other traditional cultural expressions/expressions of folklore not registered or notified as referred to in Article 7, there shall be adequate and effective legal and practical measures to ensure that:

(i) the relevant community is identified as the source of any work or other production adapted from the traditional cultural expression/expression of folklore;

(ii) any distortion, mutilation or other modification of, or other derogatory action in relation to, a traditional cultural expression/expression of folklore can be prevented and/or is subject to civil or criminal sanctions;

(iii) any false, confusing or misleading indications or allegations which, in relation to goods or services that refer to, draw upon or evoke the traditional cultural expression/expression of folklore of a community, suggest any endorsement by or linkage with that community, can be prevented and/or is subject to civil or criminal sanctions; and

(iv) where the use or exploitation is for gainful intent, there should be equitable remuneration or benefit-sharing on terms determined by the Agency referred to in Article 4 in consultation with the relevant community; and

Secret traditional cultural expressions/expressions of folklore

There shall be adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret traditional cultural expressions/expressions of folklore.

ARTICLE 4: MANAGEMENT OF RIGHTS

(a) Prior authorizations to use traditional cultural expressions/expressions of folklore, when required in these provisions, should be obtained either directly from the community concerned where the community so wishes, or from an agency acting at the request, and on behalf, of the community (from now on referred to as "the Agency"). Where authorizations are granted by the Agency:
  (i) such authorizations should be granted only in appropriate consultation with the relevant community, in accordance with their traditional decision-making and governance processes;
  (ii) any monetary or non-monetary benefits collected by the Agency for the use of the traditional cultural expressions/expressions of folklore should be provided directly by it to the community concerned.

(b) The Agency should generally be tasked with awareness-raising, education, advice and guidance functions. The Agency should also:
  (i) where so requested by a community, monitor uses of traditional cultural expressions/expressions of folklore for purposes of ensuring fair and appropriate use as provided for in Article 3(b); and,
  (ii) establish the equitable remuneration referred to in Article 3(b) in consultation with the relevant community.

ARTICLE 5: EXCEPTIONS AND LIMITATIONS

(a) Measures for the protection of TCEs/EoF should:
  (i) not restrict or hinder the normal use, transmission, exchange and development of TCEs/EoF within the traditional and customary context by members of the relevant community as determined by customary laws and practices;
  (ii) extend only to utilizations of TCEs/EoF taking place outside the traditional or customary context, whether or not for commercial gain; and,
  (iii) not apply to utilizations of TCEs/EoF in the following cases:
  – by way of illustration for teaching and learning;
  – non-commercial research or private study;
  – criticism or review;
  – reporting news or current events;
  – use in the course of legal proceedings;
  – the making of recordings and other reproductions of TCEs/EoF for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and
  – incidental uses, provided in each case that such uses are compatible

with fair practice, the relevant community is acknowledged as the source of the TCEs/EoF where practicable and possible, and such uses would not be offensive to the relevant community.

(b) Measures for the protection of TCEs/EoF could allow, in accordance with custom and traditional practice, unrestricted use of the TCEs/EoF, or certain of them so specified, by all members of a community, including all nationals of a country.

ARTICLE 6: TERM OF PROTECTION

Protection of traditional cultural expressions/expressions of folklore should endure for as long as the traditional cultural expressions/expressions of folklore continue to meet the criteria for protection under Article 1 of these provisions, and,

(i) in so far as TCEs/EoF referred to in Article 3(a) are concerned, their protection under that sub-article shall endure for so long as they remain registered or notified as referred to in Article 7; and,

(ii) in so far as secret TCEs/EoF are concerned, their protection as such shall endure for so long as they remain secret.

ARTICLE 7: FORMALITIES

(a) As a general principle, the protection of traditional cultural expressions/expressions of folklore should not be subject to any formality. Traditional cultural expressions/expressions of folklore as referred to in Article 1 are protected from the moment of their creation.

(b) Measures for the protection of specific traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance and for which a level of protection is sought as provided for in Article 3(a) should require that such traditional cultural expressions/expressions of folklore be notified to or registered with a competent office or organization by the relevant community or by the Agency referred to in Article 4 acting at the request of and on behalf of the community.

(i) To the extent that such registration or notification may involve the recording or other fixation of the traditional cultural expressions/expressions of folklore concerned, any intellectual property rights in such recording or fixation should vest in or be assigned to the relevant community.

(ii) Information on and representations of the traditional cultural expressions/expressions of folklore which have been so registered or notified should be made publicly accessible at least to the extent

necessary to provide transparency and certainty to third parties as to which traditional cultural expressions/expressions of folklore are so protected and for whose benefit.

(iii) Such registration or notification is declaratory and does not constitute rights. Without prejudice thereto, entry in the register presumes that the facts recorded therein are true, unless proven otherwise. Any entry as such does not affect the rights of third parties.

(iv) The office or organization receiving such registrations or notifications should resolve any uncertainties or disputes as to which communities, including those in more than one country, should be entitled to registration or notification or should be the beneficiaries of protection as referred to in Article 2, using customary laws and processes, alternative dispute resolution (ADR) and existing cultural resources, such as cultural heritage inventories, as far as possible.

ARTICLE 8: SANCTIONS, REMEDIES AND EXERCISE OF RIGHTS

(a) Accessible, appropriate and adequate enforcement and dispute-resolution mechanisms, border-measures, sanctions and remedies, including criminal and civil remedies, should be available in cases of breach of the protection for traditional cultural expressions/expressions of folklore.

(b) The Agency referred to in Article 4 should be tasked with, among other things, advising and assisting communities with regard to the enforcement of rights and with instituting civil, criminal and administrative proceedings on their behalf when appropriate and requested by them.

ARTICLE 9: TRANSITIONAL MEASURES

(a) These provisions apply to all traditional cultural expressions/expressions of folklore which, at the moment of the provisions coming into force, fulfill the criteria set out in Article 1.

(b) Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force of these provisions and which would not be permitted or which would be otherwise regulated by the provisions, should be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties.

ARTICLE 10: RELATIONSHIP WITH INTELLECTUAL PROPERTY AND OTHER FORMS OF PROTECTIONS, PRESERVATION AND PROMOTION

Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.

ARTICLE 11: INTERNATIONAL AND REGIONAL PROTECTION

The rights and benefits arising from the protection of traditional cultural expressions/expressions of folklore under national measures or laws that give effect to these international provisions should be available to all eligible beneficiaries who are nationals or habitual residents of a prescribed country as defined by international obligations or undertakings. Eligible foreign beneficiaries should enjoy the same rights and benefits as enjoyed by beneficiaries who are nationals of the country of protection, as well as the rights and benefits specifically granted by these international provisions.

[End of draft provisions]

ANNEX 2: TRADITIONAL CULTURAL EXPRESSIONS/ EXPRESSIONS OF FOLKLORE ISSUES[4]

1. Definition of traditional cultural expressions (TCEs)/expressions of folklore (EoF) that should be protected.
2. Who should benefit from any such protection or who holds the rights to protectable TCEs/EoF?
3. What objective is sought to be achieved through according intellectual property protection (economic rights, moral rights)?
4. What forms of behavior in relation to the protectable TCEs/EoF should be considered unacceptable/illegal?
5. Should there be any exceptions or limitations to rights attaching to protectable TCEs/EoF?

[4] Reproduced from WIPO, Decisions of the Tenth Session of the Committee, 30 November–8 December 2006, Geneva, at Annex 1, p. 1.

6. For how long should protection be accorded?
7. To what extent do existing IPRs already afford protection? What gaps need to be filled?
8. What sanctions or penalties should apply to behavior or acts considered to be unacceptable/illegal?
9. Which issues should be dealt with internationally and which nationally, or what division should be made between international regulation and national regulation?
10. How should foreign rights holders/beneficiaries be treated?

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