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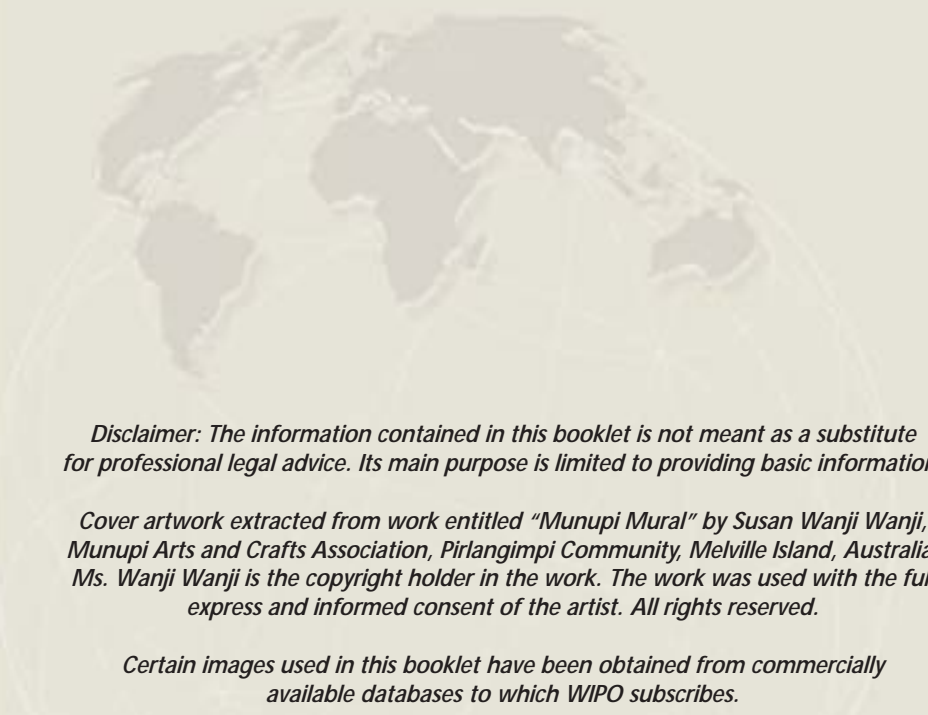

## INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS/FOLKLORE

Booklet n°

1

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





*Disclaimer: The information contained in this booklet is not meant as a substitute for professional legal advice. Its main purpose is limited to providing basic information.*

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## A Brief Overview

Indigenous art copied onto carpets, T-shirts and greeting cards; traditional music fused with techno-house dance rhythms to produce best-selling 'world music' albums; hand-woven carpets and handicrafts copied and sold as 'authentic'; the process for making a traditional musical instrument patented; indigenous words and names trademarked and used commercially.

These are the kinds of examples that indigenous and other traditional and cultural communities cite when arguing that traditional creativity and cultural expressions require greater protection in relation to intellectual property (IP).

The World Intellectual Property Organization (WIPO), which first began examining the relationship between IP and the protection, promotion and preservation of traditional cultural expressions (TCEs) (or 'expressions of folklore') several decades ago, has an active program of policy development, legislative assistance and capacity-building in this area.

The relationship between TCEs and IP raises complex and challenging issues. Expressions of traditional cultures/folklore identify and reflect the values, traditions and beliefs of indigenous and other communities.

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The challenges of multiculturalism and cultural diversity, particularly in societies with both indigenous and immigrant communities, require cultural policies to maintain a balance between the protection and preservation of cultural expressions – traditional or otherwise – and the free exchange of cultural experiences.

A further challenge is to balance a wish to preserve traditional cultures with a desire to stimulate tradition-based creativity as a contribution to sustainable economic development. Addressing these challenges provokes some deeper questions. To whom, if anyone, does a nation's cultural heritage 'belong'? What is the relationship between IP protection and the promotion of cultural diversity? Which IP policies best serve a creative and multicultural 'public domain'? How, if at all, should current IP systems recognize customary laws and protocols? When is 'borrowing' from a traditional culture legitimate inspiration and when is it inappropriate adaptation or copying? Is there a relationship between the 'preservation' of cultural heritage and the IP 'protection' of TCEs, and, if so, what is it?

*The terms 'traditional cultural expressions'/'expressions of folklore'*

This booklet uses the terms '**traditional cultural expressions**' (TCEs) and '**expressions of folklore**' interchangeably. Although 'expressions of folklore' has been the term used most commonly in international discussions and is found in many national laws, some communities have expressed reservations about negative connotations of the word 'folklore.' The use of 'traditional cultural expressions' or 'expressions of folklore' in this booklet is not intended to suggest any consensus among States, communities or other stakeholders on the validity or appropriateness of these or other terms. As many point out, the choice of an appropriate term or terms, and the identification of the subject matter that it/they cover, is ultimately a matter for decision by policymakers and relevant communities at the local and national levels.

This booklet identifies the key concepts, legal and cultural policy considerations and main legal options, based upon national, regional and international trends, relating to the protection of TCEs.

First, a brief historical perspective is presented.



## Timeline



- In **1967**, an **amendment to the Berne Convention for the Protection of Literary and Artistic Works** provided a mechanism for the international protection of unpublished and anonymous works. According to the framers of this amendment, reflected in Article 15.4 of the Convention, it aims at providing international protection for expressions of folklore/TCEs.
- In **1976**, the **Tunis Model Law on Copyright for Developing Countries** was adopted. It includes **sui generis** protection for expressions of folklore.
- In **1982**, an expert group convened by WIPO and the United Nations Educational, Scientific and Cultural Organization (UNESCO) developed a **sui generis** model for the IP-type protection of TCEs: the **WIPO-UNESCO Model Provisions, 1982**.
- In **1984**, WIPO and UNESCO jointly convened a **group of experts** on the international protection of expressions of folklore by IP. A draft treaty based on the Model Provisions, 1982 was at their disposal. Yet, a majority of the participants believed it premature to establish an international treaty at that time.
- In **December 1996**, WIPO Member States adopted the **WIPO Performances and Phonograms Treaty (WPPT)**, which provides protection also for a performer of an expression of folklore.
- In **April 1997**, the **'UNESCO-WIPO World Forum on the Protection of Folklore'** was held in Phuket, Thailand.
- During **1998** and **1999**, WIPO conducted **fact-finding missions** in 28 countries to identify the IP-related needs and expectations of traditional knowledge holders ('FFMs'). For purposes of these missions, 'traditional knowledge' included TCEs as a sub-set. Indigenous and local communities, non-governmental organizations, governmental representatives, academics, researchers and private sector representatives were among the more than 3000 persons consulted on these missions. The results of the missions were published by WIPO in a report entitled 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-finding Missions (1998-1999)' (FFM Report).

➤ In **1999**, WIPO organized **regional consultations on the protection of expressions of folklore** for African countries (March 1999), for countries of Asia and the Pacific region (April 1999), for Arab countries (May 1999), and for Latin America and the Caribbean (June 1999). Each of the consultations adopted resolutions or recommendations, which included the recommendation that WIPO and UNESCO increase and intensify their work in the field of folklore protection. The recommendations unanimously specified that future work in these areas should include the development of an effective international regime for the protection of expressions of folklore.

➤ In **late 2000**, the **WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore** (the Committee) was established. The Committee has made substantial progress in addressing both policy and practical linkages between the IP system and the concerns of practitioners and custodians of traditional cultures. Under the guidance of the Committee, the Secretariat of WIPO has issued a detailed questionnaire on national experiences, and undertaken a series of comprehensive analytical studies based on the responses to the questionnaire and other consultations and

research. The studies have formed the basis for ongoing international policy debate and assisted in the development of practical tools. Drawing on this diverse experience, the Committee is moving towards an international understanding of the shared objectives and principles that should guide the protection of TCEs. All these materials are available from the Secretariat of WIPO and at <http://www.wipo.int/tk/en/cultural/index.html>

➤ As part of its broader program on TCEs, WIPO also organizes workshops and seminars, expert and fact-finding missions, commissions case-studies, and carries out and provides legislative drafting, advice, education and training.

### **WIPO-UNESCO Model Provisions for National Laws, 1982**

In 1982, Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions (the Model Provisions, 1982) were adopted under the auspices of WIPO and UNESCO. They establish two main categories of acts against which TCEs are protected, namely 'illicit exploitation' and 'other prejudicial actions'. The Model Provisions have influenced the national laws of many countries. Several States and other stakeholders have suggested that the Model Provisions require improvement and updating.



## Key Concepts

### What are “traditional cultural expressions”?

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. From an IP perspective, in this dynamic and creative context it is often difficult to know what constitutes independent creation. Yet, under current copyright law, a contemporary adaptation or arrangement of old and pre-existing traditional materials can often be sufficiently original to qualify as a protected copyright work.

### *Characteristics of traditional cultural expressions (TCEs)/folklore*

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

This is a key point, and it lies at the heart of extensive policy debate – is the protection already available for contemporary tradition-based creativity adequate, or is some form of additional IP protection for the underlying and pre-existing materials necessary? See further below under ‘A Legal and Cultural Policy Framework’.





### *A working description of traditional cultural expressions/expressions of folklore*

While not constituting a formal definition as such, a working description of TCEs could be:

#### ***'Traditional cultural expressions'/'***

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

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

'Expressions of' traditional culture (or 'expressions of' folklore) may be either intangible, tangible or, most usually, combinations of the two – an example of such a 'mixed expression of folklore' would be a woven rug (a tangible expression) that expresses elements of a traditional story (an intangible expression).

### *Cultural heritage and economic development*

While the artistic heritage of a community plays significant social, spiritual and cultural roles, it can also, as a source of creativity and innovation, play a role in ***economic development***.

The use of traditional cultural materials as a source of contemporary creativity can contribute towards the economic development of traditional communities through the establishment of community enterprises, local job creation, skills development, appropriate tourism, and foreign earnings from community products.

Here IP can play a role. By providing legal protection for tradition-based creativity, IP protection can enable communities and their members to commercialize their tradition-based creations, should they wish to do so, and/or to exclude free-riding competitors. The marketing of artisanal products also represents a way for communities to show



and strengthen their cultural identity and contribute to cultural diversity. Here IP can assist in certifying the origin of arts and crafts (through certification trademarks) or by combating the passing off of fake products as 'authentic' (through the law of unfair competition), for example. Communities have used their IP to exercise control over how their cultural expressions are used, and to defend against insensitive and degrading use of traditional works.

Traditional cultural manifestations are also a source of inspiration and creativity for cultural industries, such as the entertainment, fashion, publishing, crafts and designs industries. Many businesses today, small, medium and large, in developed and developing countries, create wealth using the forms and materials of traditional cultures. For example, vibrant publishing, music and audiovisual industries in India and Nigeria draw upon local cultural materials.

### *A national cultural development project*

An example of a cultural development project is the poverty alleviation program 'Investing in Culture' for the Khomani San people in **South Africa**. This program is revitalizing the community's craft-making and enabling the community for the first time to generate its own income.

The relationship between tradition, creativity and the market-place is not always perceived to be a happy one. What is creativity from one perspective may be seen to erode traditional culture from another.

### *The commercial value of handicrafts*

Visual arts and crafts are an important source of income for Indigenous artists and communities in **Australia**, and the level of copyright and other IP protection they enjoy is of utmost importance to them, according to a report issued in 2002. It is estimated that the indigenous visual arts and crafts industry has a turnover of approximately US\$130 million in Australia, of which indigenous people receive approximately US\$30 million.

In **Colombia**, 'Artesanías de Colombia' is the national institution charged with the development and promotion of the handicrafts sector. In many cases in Colombia, craft items are the only tradable products of small communities. The handicrafts sector employs a majority of women, considered an important factor in wealth distribution in small-income or single-parent families.



*What is the relationship with ‘traditional knowledge’ (TK)?*

Indigenous and traditional communities often regard expressions of their traditional cultures/folklore as inseparable from systems of traditional knowledge (such as medical and environmental knowledge, and knowledge related to biological resources). In discussions about IP protection, however, expressions of traditional cultures/folklore are generally discussed distinctly from traditional knowledge (or TK). This is not to suggest that these should be artificially distinguished in the community context. It simply reflects the widespread experience that distinct legal tools and a different set of policy questions typically arise when IP protection is applied to safeguard TCEs on the one hand, and technical TK on the other. IP protection therefore complements traditional patterns of cultural expressions and traditional knowledge systems, and operates beyond the original community: it is not aimed to supplant or imitate the community's own

customs and practices. Wide experience has shown that the IP protection of TCEs raises certain specific questions of cultural policy and, unlike technical TK, involves legal doctrines closest to those underpinning the copyright and related rights systems. The general principles and specific solutions for TCEs and TK are likely to differ, therefore. It is important that the forms of protection provided for folklore be inspired and shaped by the appropriate legal and cultural policies and principles. In addition, a distinct focus on TCEs/folklore facilitates more specific, technical and concrete discussions, and engages more fully the experiences and perspectives of relevant stakeholders, such as Government offices and departments dealing with copyright, culture and education; indigenous and traditional bearers and performers of cultural traditions and artistic expressions; and folklorists, ethnomusicologists, archivists and other cultural scholars. In contrast to TK, there is already significant experience in developing and implementing IP protection specifically for TCEs/folklore at the international, regional and national levels (see ‘Timeline’ above).



For an introductory discussion on traditional knowledge, see the companion Booklet *“Intellectual Property and Traditional Knowledge”*



## Intellectual property 'protection'

Intellectual property (IP) refers to creations of the mind such as inventions, designs, literary and artistic works, and symbols, names, images, and performances.

IP is typically protected by laws that establish private property rights in creations and innovations in order to grant control over

their exploitation, particularly commercial exploitation, and to provide incentives for further creativity. Copyright, for example, protects the products of creativity, in the form of original literary and artistic works, against certain uses such as reproduction, adaptation, public performance, broadcasting and other forms of communication to the public. It can also

### *Copyright, adaptation and 'derivative works'*

***When is the use of traditional cultural materials legitimate inspiration and when is it inappropriate adaptation and copying?*** An author of a work normally has the exclusive right to control the making of adaptations of the work. Examples would be translations, revisions and any other forms in which a work may be recast, transformed or adapted. These are sometimes together referred to as 'derivative works.' 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 can result in a new distinct expression which is sufficiently 'original.' This helps to explain why a contemporary literary and artistic production derived from or inspired by traditional culture that incorporates new elements can be considered a distinct, original work and is thus protected.

However, the protection afforded to derivative works vests only in the new material or aspects of the derivative work. Thus, aside from new material that belongs to the author, a derivative work may also comprise material that already belongs to another rightholder or is 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, however, in general, this does not prevent 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 improvisation. In other words, 'borrowing from' and inspiration are permitted, adaptation and copying are not. Distinguishing between them is not always easy.



Photo: Mercedes Martinez Doral

*Saami women in traditional dress*

provide protection against demeaning or degrading use of a work, an issue that is often of concern in relation to traditional cultural materials. Not all aspects of IP protection are focussed directly on innovation and creativity, particularly the law of distinctive marks, indications and signs (laws governing trademarks, geographical indications and national symbols) as well as the related area of the repression of unfair competition. These aim at the protection of established reputation, distinctiveness and goodwill, such as may be enjoyed by a traditional community in the production of handicrafts, artworks and other traditional products.

The elements and principles of the copyright system are particularly relevant to the protection of TCEs because many are literary and artistic productions and therefore already or potentially the subject matter of copyright protection. This is why many countries already protect folklore within copyright law. Rights related to copyright, particularly the rights of performers, are also directly useful. The other main branch of IP law, industrial property, has also been used to protect TCEs – especially trademarks (such as collective marks) and geographical indications, industrial designs (including textile designs), and the suppression of unfair competition.

## What is the relationship between IP ‘protection’ and the ‘preservation and safeguarding’ of cultural heritage?

Within the context of cultural heritage, the notions of ‘preservation’ and ‘safeguarding’ refer generally to the identification, documentation, transmission, revitalization and promotion of cultural heritage in order to ensure its maintenance or viability. The preservation and safeguarding of cultural heritage and the promotion of cultural diversity are key objectives of several international conventions and programs as well as regional and national policies, practices and processes.

### *United Nations Educational, Scientific and Cultural Organization (UNESCO)*

UNESCO undertakes extensive work on the preservation of cultural heritage. WIPO’s cooperation with UNESCO on the protection of traditional cultural expressions includes the development, in 1982, of the WIPO-UNESCO Model Provisions. WIPO and UNESCO continue to cooperate as they have done in the past. For example, in 1999 WIPO and UNESCO jointly organized regional consultations on folklore. In 2003, Member States of UNESCO adopted an ‘International Convention for the Safeguarding of Intangible Cultural Heritage’.

WIPO's work is, in line with its mandate, principally concerned with the 'protection' of TCEs in the intellectual property sense.

There is an important relationship between IP 'protection' and 'preservation/safeguarding' in the cultural heritage context. For example, the very process of preservation (such as the recording or documentation and publication of traditional cultural materials) can trigger concerns about lack of IP protection and can run the risk of unintentionally placing TCEs in the 'public domain'; thus leaving others free to use them against the wishes of the original community. Or, unless handled carefully, it can mean that the person recording the traditional expression gains copyright over the form in which it is recorded (e.g. a photograph, film or sound recording of a TCE).



*The Zambian National Dance Troupe*

Photo: Wendy Wernland

### *The different meanings of 'protection'*

Take as an example a legend that was recorded centuries ago on a piece of cloth. 'IP protection' of the legend could be helpful in preventing others from reproducing the legend on a T-shirt. However, if only a few people know the legend and the language that should be used to recite the legend, 'protection' may take the form of measures that would assist people to pass on their knowledge of the legend and the language to the next generation. If the cloth begins to decay, 'protection' may take the form of measures to ensure that the cloth is preserved for future generations. In other instances, 'protection' could take the form of promoting the legend outside the community in order that others may learn about it and gain a greater understanding and respect for the culture of the originating community.

Clarity on what is meant by 'protection' is key, because the needs and expectations of TCE holders and practitioners can in some cases be addressed more appropriately by measures for preservation and safeguarding rather than IP protection.

## A Legal and Cultural Policy Framework

The legal protection of TCEs should be considered in an inclusive policy context, and not as an end in itself. This involves reflecting on such broader issues as:

- the preservation and safeguarding of cultural heritage;
- the promotion of cultural diversity;
- the respect for cultural rights;
- the promotion of artistic development and cultural exchange;
- the needs and interests of indigenous and traditional communities; and,
- the promotion of tradition-based creativity and innovation as ingredients of sustainable economic development.

### What are the needs and expectations of TCE/folklore custodians?

Indigenous and local communities have called for various forms of protection; these include:

- protection of traditional literary and artistic productions against unauthorized reproduction, adaptation, distribution, performance and other such acts, as well as prevention of insulting, derogatory and/or culturally and spiritually offensive uses;
- protection of handicrafts, particularly their 'style';

- prevention of false and misleading claims to authenticity and origin/failure to acknowledge source; and
- defensive protection of traditional signs and symbols.



*Traditional artisans and performers, Yunnan Province, China*

With regard to these kinds of examples, **three approaches** among indigenous and local communities were identified during the fact-finding missions and consultations conducted by WIPO since 1998:

- **IP protection to support economic development:** some communities wish to gain and exercise IP in their tradition-based creations and innovations to enable them to exploit their creations and innovations commercially as a contribution to their economic development.



- **IP protection to prevent unwanted use by others:** communities may wish to gain IP protection in order to actively exercise IP rights to prevent the use and commercialization of their cultural heritage and TCEs by others, including culturally offensive or demeaning use.

The first two approaches involve ‘positive protection’ – that is, obtaining and asserting rights in the protected material. Positive protection can therefore (i) serve as the legal basis for any commercial and other dealings that TCE holders may choose to pursue with other partners, and (ii) stop third parties from using TCEs in an unauthorized or inappropriate way. Defensive strategies, by contrast, aim at preventing others from gaining or maintaining adverse IP rights. Various positive and defensive strategies can be used together, depending on what the holders or custodians of TCEs want to achieve. A community’s secret or sacred TCEs may be protected defensively; while handicrafts may be positively protected as part of a community trading enterprise and against imitations or fakes.



Photo: Weng Wendland



*Mr. Cun Fablao, a designer from the Yunnan Province, China, received industrial design protection for his tradition-based silver-plated tea-set*

## The role of the ‘public domain’

An integral part of developing an appropriate policy framework within which to view IP protection and TCEs is a clearer understanding of the role, contours and boundaries of the so-called ‘public domain.’ The term ‘public domain’ is used here to refer to elements of IP that are ineligible for private ownership and the contents of which any member of the public is legally entitled to use. The ‘public domain’ in this context means something other than ‘publicly available’ – for example, content on the Internet may be publicly available but not in the ‘public domain’ from a copyright perspective. The ‘public domain’ is often characterized by indigenous and other stakeholders as having been created by the IP system and does not therefore respect the protection of TCEs that customary and indigenous laws require.



The debate about appropriate protection boils down to whether, and how, there should be changes to the existing boundary between the 'public domain' and the scope of IP protection. In other words, is the IP protection that is already available for contemporary tradition-based creativity and performances adequate? Does it strike the right balance and meet the needs of traditional communities and the general public? Does it offer the greatest opportunities for creativity and economic development? Or, is some new form of IP protection for the underlying and pre-existing materials necessary?

Responses to these complex questions are varied. Some argue the public domain character of folklore does not hamper its development. On the contrary, it encourages members of a community to keep alive 'pre-existing cultural heritage' by providing individuals of a community with copyright protection when they use various expressions of 'pre-existing cultural heritage' in their present-day creations or works. On the other hand, it is questioned whether all historic materials should be denied protection merely because they are not recent enough! On this view, new creations frequently rely on borrowed cultural and historic antecedents, and cultural communities deserve to be acknowledged, and to benefit from this use of their traditions.

### *Trends and experiences: Use of contracts*

In 1998, a *New Zealand* swimwear manufacturer, Moontide, launched a new range of women's swim suits made from material patterned with interlocking *koru* designs of the Maori people. The firm developed the swimwear line with a Maori entrepreneur, and it negotiated the use of the *koru* motif with an elder in the local community. Two concerns governed the design element's use: commercial viability and cultural respect. Part of the income from sales goes to the Pirirakau hapu (sub-tribe) of the Ngati Ranginui people.

Source: Shand, Peter, 'Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion', *Cultural Analysis*, Volume 3, 2002.



## Legal Options : National, Regional and International Trends and Experiences

Experience so far with TCE protection has shown that no single template or comprehensive 'one-size-fits-all' solution is likely to suit all the national priorities, legal and cultural environment, and the needs of traditional communities in all countries. Instead, effective protection may be found in a 'menu' of differentiated and multiple options for protection, perhaps underpinned by an internationally agreed set of common objectives and core principles.

The options include existing IP systems (including unfair competition), adapted IP rights (*sui generis* aspects of IP systems), and new, stand-alone *sui generis* systems, as well as non-IP options, such as trade practices and labeling laws, use of contracts, customary and indigenous laws and protocols, cultural heritage preservation laws and programs, common law remedies such as unjust enrichment, rights of publicity, blasphemy, and criminal law.

This section provides a few examples of some national, regional and international experiences so far with these various options.

First, however, a few words on a key initial step, the setting of objectives.

### Setting national policy objectives

The way in which a protection system is shaped and defined will depend to a large extent on the objectives it is intended to serve. Countries have expressed a variety of policy objectives underlying the protection of TCEs, including:

- Wealth creation, trading opportunities and sustainable economic development;
- Preservation, promotion and development of traditional cultures and folklore;
- Prevention of unauthorized exploitation, illicit use and abuse of TCEs/folklore;
- Promotion of respect for traditional cultures and the communities that preserve them;
- Safeguarding of the cultural identity and values of communities;
- Promotion of cultural diversity.

### *Laws are not enough: capacity-strengthening and institution building*

One of the main lessons learned from WIPO's work so far is that having laws for the protection of expressions of folklore is not enough. Laws have to be known about, and the communities and persons that are intended to benefit from them must be relatively easily able to gain, manage and exercise rights under the law. In addition, government services need to be able to give practical assistance to communities, and legal advisors need appropriate information to advise their clients. For the effective protection of expressions of folklore, therefore, broad awareness-raising and training are needed, as are legal aid and appropriate institutions that can help communities manage and enforce their rights.

### **Use of existing IP rights and *sui generis* adaptations of them**

#### *Protection of literary and artistic productions and designs*

As previously pointed out, a contemporary interpretation, adaptation, collection or arrangement of old and pre-existing traditional materials can often be sufficiently original to qualify as a protected copyright work. Also, under Article 15.4 of the Berne Convention, anonymous and unpublished works (like much folklore) can be protected.

Similarly, traditional designers working within their cultural heritage can register their new designs. Some indigenous and traditional words and symbols can be protected as trademarks.

In addition, the protection already available, internationally, under the WIPO Performances and Phonograms Treaty (WPPT) may be of great value. Folklore is often accessed and appropriated by third parties through its most recent traditional performance – for instance, when a performance of a traditional chant is recorded, the recording is what enables others to get access to that chant, so it is vital to determine how the recording is used and



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*The indigenous artist of this well-known work, based on traditional creation stories, (depicted on the left) successfully claimed infringement of copyright against the maker of the carpet (depicted on the right).*

*Because of cultural and spiritual offence, the court awarded extra damages to be shared by the artist's community according to its customary law.*

*Author: Ms. Banduk Marika. All rights reserved. This work is the copyright of the artist and may not be reproduced in any form without the permission of the artist and the clan concerned.*



distributed. Countries that ratify the WPPT must give performers of folklore the right to authorize sound recordings of their performances, and the right to authorize certain dealings with those recordings.

The need to protect communal rights is often called for. What possibilities are there? Under the copyright system, more than one person can be a copyright holder. Groups of persons, such as a traditional community, can form an association, trust or other legal entity, to hold copyright. In addition, courts have been prepared to recognize communal interests in a copyrighted work for the purpose of awarding damages, and communal copyright could also be the subject of a specific *sui generis* provision within copyright legislation (for example, one country is studying the possibility of granting communities the right to exercise moral rights to protect against inappropriate, derogatory or culturally insensitive use of tradition-based copyrighted material.) A State may also decide to protect collective interests by vesting rights in folklore in a national body or office which is tasked with furthering the interests of indigenous or traditional communities.

### *Protection against false or misleading claims as to authenticity or origin*

One of the kinds of appropriations that indigenous and traditional communities often complain of is the use of false and misleading

claims as to authenticity and/or origin. For example, a cheaply made souvenir item may carry a label falsely indicating that it is 'authentic', 'indigenous made', or originates from a particular community. Unfair competition law, as well as trade practices and labeling laws, are helpful here, as has been shown in several instances in practice (see box below).

### *Trends and Experiences: Unfair competition and trade practices laws*

A **company in Australia** has been prevented from continuing to describe its range of hand-painted or hand-carved souvenirs as 'Aboriginal' or 'authentic' unless it reasonably believed that the artwork or souvenir was painted or carved by a person of Aboriginal descent. Proceedings were instituted against the company under unfair competition and trade practices laws.

The **Indian Arts and Crafts Act, 1990 of the United States of America (USA)** protects Native American artisans by assuring the authenticity of Indian artifacts under the authority of an Indian Arts and Crafts Board. The Act, a 'truth-in-marketing' law, prevents the marketing of products as 'Indian made' when the products are not made by Indians as defined by the Act.

In addition, indigenous peoples have registered certification trademarks to help safeguard the authenticity and quality of their arts and crafts. In Australia, certification marks have been registered by the National Indigenous Arts Advocacy Association (NIAAA) and in New Zealand the Maori Arts Board, *Te Waka Toi*, is making use of trademark protection through the development of the *Toi Iho*™ Maori Made Mark. (See further: <http://www.toiho.com/>)



Reproduced courtesy of Te Waka Toi

TCEs often have a strong link with a specific locality. This means that geographical indications can also protect TCEs, in particular when they are in the form of tangible products such as handicrafts that have qualities derived from their geographical origin – for instance, the Olinalá craft products from that region in Mexico. While the protected geographical indication is usually the name of the location itself, certain TCEs could be directly protected as geographical indications, such as indigenous and traditional names, signs and symbols.

Indigenous peoples and traditional communities are concerned that unauthorized commercial enterprises take their words, names, designs, symbols and other distinctive signs, and use and register them as trademarks. This practice can be challenged under general trademark principles. But some authorities, such as in the Andean Community, New Zealand and the USA, have amended their laws to strengthen defensive protection, explicitly enabling the barring of unauthorized registration of indigenous signs and symbols as trademarks.

### *Protection against insulting, derogatory and offensive uses*

TCEs often embody spiritual qualities and the very cultural identity of a community. Therefore, insulting, derogatory and offensive use of TCEs can be a prime concern. Preventing such misuse, and promoting respect for cultural and spiritual values, may be the principal goal of protection for some countries and some communities. In fact, such 'defensive protection' might be the most important form of protection that some States and communities may wish for. Apart from laws against blasphemy and other such non-IP tools, some IP-based options are being

explored by States. For example, a communal moral right, as mentioned above, would enable communities to act against certain uses of indigenous cultural materials, much in the same way that moral rights enables an author to object to the distortion, mutilation or other derogatory use of his or her works. A further possibility is the creation of a register in which communities could record those TCEs the use of which should not be permitted for cultural and spiritual reasons.

## *Sui generis* measures and systems

Many countries and several regional organizations have elected to protect TCEs through *sui generis* measures. Most have done so within their copyright laws, following largely the Model Provisions, 1982. Others have elected to establish stand-alone IP-like laws and systems, examples of which are:

- the Indigenous Peoples Rights Act of 1997 of the Philippines;

### *Trends and experiences: Distinct sui generis systems*

Under the *Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002*, 'traditional owners' have the right to authorize or prevent, amongst others, the adaptation, transformation and modification of the protected TCEs. An external user must receive consent to make new derivative works (works based upon a TCE). Any IP rights in derivative works vest in the work's author. However, if the work is used for commercial purposes, the rights-holder must share benefits with the traditional owners, acknowledge the source of the TCEs and respect moral rights in the TCEs.



A 'mola'  
from Panama  
Courtesy: Ms. Zurinhe Areta,  
Geneva, Switzerland

The *Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000* establishes a registration system for TCEs. A special office has been created within the country's IP office to approve the applications and maintain the register. The procedure before the IP office does not require the services of a lawyer and there are no application fees.



- the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999;
- the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001; and,
- the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002.

### *Establishing sui generis systems*

In developing a *sui generis* system for the protection of TCEs, the following key issues could be addressed:

- What are the goals of protection?
- What material should be protected?
- Should it pass certain tests (e.g. not yet published) to be protected?
- Who owns and manages the rights?
- What rights do they get – and are there exceptions to those rights?
- Are there procedures or formalities to obtain rights?
- Who enforces the rights, and what sanctions apply?
- How long do rights continue?
- Is protection retrospective? What if third parties are already using TCEs?
- How can rights be recognized abroad?

## Recording and documentation of cultural expressions

Many stakeholders call for the recording and documentation of TCEs and the establishment of inventories, databases and lists.

The recording and documentation of cultural materials play an important role in strategies for the safeguarding of cultural heritage and traditional cultures.

Yet recording or documenting TCEs have implications for IP protection that need to be weighed carefully. TCEs are often intangible and orally maintained. Requiring some form of prior documentation and/or registration in order to establish IP rights, may contradict the oral, intangible and ‘living’ nature of many TCEs. Apart from the costs involved in documenting and recording TCEs, the copyright that may vest in the documentation and recordings may not vest in the communities themselves under copyright law and, in any event, extends only to the ways in which the TCEs are expressed and not to the values, meanings and other ‘ideas’ connoted by the TCEs. Documentation and recordings, on the contrary, and particularly if they are made available in digitized form, make the TCEs more accessible and available and may undermine the efforts of communities to protect them.





## Practical Steps for Setting Overall Directions

Based on the preceding materials, the following series of steps may help policymakers 'navigate' their way and illustrate the available options:

- ➔ **Step One:** determine national policy objectives, including the needs of communities that are the holders and custodians of folklore. Are they related to IP (or more concerned with other policy goals such as preservation of cultural heritage)? What subject matter is to be protected? Against which acts is protection sought? Is the protection aimed at positive or defensive protection, or a combination of the two?
- ➔ **Step Two:** identify options available under conventional IP systems, including unfair competition, as well as options for adapted or modified elements of existing IP.
- ➔ **Step Three:** analyze options available in non-IP systems relevant to meeting the desired goals, such as cultural heritage, consumer protection and marketing laws, and indigenous and customary laws.
- ➔ **Step Four:** determine whether a stand-alone *sui generis* system is necessary, or whether existing rights and modifications to them can meet the needs identified and strike the right balance. How would a *sui generis* system relate to conventional IP systems particularly in respect of overlapping subject matter?
- ➔ **Step Five:** identify which practical and operational measures, institutions and programs may be required to facilitate the effective use and implementation of the forms of protection already in place or to be established.
- ➔ **Step Six:** establish how national systems would interact to provide regional and international protection, through bilateral, regional or international legal frameworks.



## What Next ?

The Secretariat of WIPO continues to undertake, upon request, legal-technical cooperation activities for the establishment, strengthening and effective implementation of systems and measures for the legal protection of TCEs. As a component of this program, it is developing a comprehensive 'Practical Guide' for lawmakers, policy makers, communities and other stakeholders, and is also preparing more tailored guides for other interested parties, such as commercial users and handicraft organizations. In addition, the development of model contracts, codes of conduct and guidelines for use by folklore archives, museums and other institutions to assist them in managing the IP aspects of their cultural heritage collections is being explored.

At a policy level, the wealth of the legal analyses, national and regional submissions, reports and other materials considered by the WIPO Committee has already laid a solid foundation for international legal development. The Committee has taken up the task of distilling this practical understanding in the form of precise policy

and legislative options for enhanced protection of TCEs through adapted or expanded conventional IP systems, or through stand-alone *sui generis* systems. A common basis of core principles and shared objectives is coming into focus. These policy and legislative options could, should the Member States of WIPO so wish, form the basis of recommendations, guidelines, model provisions or other instruments for the national, regional and international protection of TCEs.

This legal development would build on the protection for folklore already provided in international treaties. It would lead to more effective protection of TCEs, basing it on a stronger shared understanding of the common principles and objectives of protection. This should help coordinate and strengthen international responses to concerns about failure to acknowledge and respect the cultural heritage of indigenous and traditional communities, and ensure that this heritage is used appropriately and equitably, while allowing cultural exchange and evolution to thrive.

## ***Further reading***

This booklet draws from many documents, studies and other materials prepared and consulted within the context of WIPO's work, and all of which are available from the Secretariat and at: <http://www.wipo.int/tk/en/cultural/index.html>. A list of the main materials used follows:

WIPO Secretariat, *"Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)"*.

WIPO Secretariat, Background Paper N° 1 *"Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions of Folklore"*

WIPO Secretariat, *"Final Report on National Experiences with the Legal Protection of Expressions of Folklore"* (WIPO/GRTKF/IC/3/10)

WIPO Secretariat, *"Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions"* (WIPO/GRTKF/IC/5/3)

WIPO Secretariat, *"Traditional Cultural Expressions of Folklore – Legal and Policy Options"* (WIPO/GRTKF/IC/6/3)

Janke, Terri, *"Minding Culture – Case Studies on Intellectual Property and Traditional Cultural Expressions"*, prepared for WIPO

Kutty, P. V., *"National Experiences with the Protection of Expressions of Folklore/Traditional Cultural Expressions – India, Indonesia and the Philippines"*, prepared for WIPO

International Trade Centre (UNCTAD/WTO) and WIPO Secretariat, *"Marketing Crafts and Visual Arts: the Role of Intellectual Property - A Practical Guide"*

