CHAPTER VI

SUI GENERIS PROTECTION OF TRADITIONAL CULTURAL EXPRESSIONS

I. Introduction

Asian and African countries in the last two decades have raised concerns about the rapid loss of traditional knowledge and global cultural diversity and concerns about unauthorized or inappropriate patenting or use of traditional knowledge and folklore with little or no benefit sharing with the original right-holders. In order to control the adverse effects of unabated globalization on traditional knowledge and expressions of folklore, search for solutions have led developing countries to consider the existing intellectual property regime. Some have however pointed that attempts to protect TK and TCEs through IPRs is akin to “trying to fit square pegs in round holes” (Githaiga 1998: para. 100; Posey 1999: 12). "Assimilation" of the value of indigenous and traditional knowledge within stern notions of property is argued by scholars as an inadequate and often destructive means by which to protect TK. Intellectual property laws have been criticized for imposing pre-conceived notions of individuality upon the customary values and knowledge that vest in communities (Gibson 2005: 125).

In WIPO’s FFM s conducted from September to October 14, 1998 in the South Asian region, the usefulness of IPRs in protecting TK and expressions of culture received fractured support. Three countries were approached, namely: Bangladesh, India and the Sri Lanka. These countries believed that though there was a relevance of IP protection for TK, there was a need for a system of rewards based on the principle that conserving biological diversity is possible only when the associated knowledge systems are rewarded (Chand et.al. 1996). Other concerns expressed included the need for protection from distortion and other prejudicial actions against expressions of folklore; management of cross-cultural transactions between traditional and modern knowledge systems and protection of human and moral rights, beyond assumptions of individualism specific to certain cultures.1

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The FFMs showed countries struggling with conceptual dilemmas in the realm of IPR such as those relating to the fixation requirement and the extent of possible protection for oral traditions, as "one form of 'expression' of folklore; protection of performers' rights in traditional dances and music in relation to unauthorized fixation and unauthorized reproduction of these fixations and the need to explore the role of derivative works in relation to folklore protection (WIPO, South Asia FFM, 1999: 14).

II. National Experiences in Copyright Protection of TCEs

Of the sixty six States which responded to the WIPO Questionnaire on National Experiences, twenty three were evaluated as providing specific legal protection for EoF as intellectual property in their national laws or regulations. Of these States, the vast majority provide protection within their national copyright legislation. However, the modalities of protection differ widely. In some cases expressions of folklore, are simply referred to as a form of copyright work, and most of the normal rules of copyright apply to them. Apart from perhaps affording EoF an unlimited term of protection, there are few or no additional provisions crafted specifically to take into account the special character of expressions of folklore. Examples of these countries would include Barbados, Côte d'Ivoire, Indonesia and the Islamic Republic of Iran.

Another group of States has included within their copyright legislation provisions specifically designed for expressions of folklore. Examples would include Burkina Faso, Ghana, Kenya, Namibia, Mozambique, Mexico, Senegal, Sri Lanka, Togo, the United Republic of Tanzania and Viet Nam. In most of these cases, the provisions are based, to differing degrees, upon the 1982 WIPO-UNESCO Model Provisions and they deal in some detail with issues such as acts in respect of which EoF are protected, exceptions and limitations, the authorization of utilizations of EoF and sanctions, remedies and

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2 The Questionnaire was intended to elicit information on national experiences from States which provide specific legal protection for expressions of folklore, and those that do not. In particular, views on the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions, which were adopted in 1982 were requested.

3 See Table I, Chapter VI of the Study, at 236.

jurisdiction. Some of these States have a provision or provisions that correspond with Article 15.4 of the Berne Convention – for example, the UK.  

The protection provided by copyright (the economic rights to prevent or authorize, *inter alia*, the reproduction, adaptation, communication to the public and others, and the moral rights of attribution and integrity), seems to some extent, suited to meeting many of the needs and objectives of indigenous peoples and traditional communities. The possibility under copyright to be compensated for use of TCEs either through receiving royalties or through damages for infringement also meets certain needs and objectives. In recent surveys of the existing protection of TK and folklore, a number of countries have provided further examples of how IP tools have been utilised to promote and protect traditional knowledge and folklore. These include the use of copyright protection in Canada to protect tradition-based creations including masks, totem poles and sound recordings of Aboriginal artists; the use of industrial designs to protect the external appearance of articles such as head dresses and carpets in Kazakhstan and the use of GIs to protect traditional products such as liquors, sauces and teas in Venezuela and Vietnam. Some like Ethiopia do not allow copyright over Ethiopian folklore (*Fikre Gebru vs. Mohammed Awol-Wuger*). Instead, Ethiopia requires prior authorization by the Ministries of Culture and Information for any reproduction or adaptation of folklore in exchange for the payment of fee (citing Endeshaw, Wuger, 2004: 189).

Of the countries that have been responded to the WIPO Questionnaire on National Experiences in the protection of folklore in the South Asia region, Sri Lanka has specific copyright protection for expressions of folklore. In Sri Lanka, the Code of Intellectual Property Act, No. 52 of 1979, as amended by the Code of Intellectual Property (Amendment) Act No. 17 of 1990 provides for the protection of expressions of folklore. It defines folklore as “all literary and artistic works created in Sri Lanka by various communities, passed on from generation to generation and constituting one of the basic

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elements of traditional cultural heritage” (Section 6). The Sri Lankan Copyright Act recognizes both economic and moral rights, which are exercised by the Minister in charge of culture, as provided by Section 12(1) of the Act. However, during WIPO’s FFM, the need for an improved legislation was expressed by the Folklore Panel of the Sri Lankan Arts Council, which pointed out, “[t]here are provisions in the national copyright law, but the provisions are not working because there is unauthorized commercialization everywhere today. Therefore more effective administration of rights should be considered" (Folklore Panel, Arts Council of Sri Lanka, Colombo quoted in WIPO South Asia FFM 1999: 13). Bangladesh has in place legislation to protect its biological and genetic resources with no specific focus on expressions of folklore (Twarog and Kapoor 2004: 188). Pakistan has expressed the need for preserving folk songs and other expressions of folklore but continues to be without a specific legislation to protect folklore.

Other States, indigenous and local communities and other stakeholders also suggest that copyright law is limited in its potential for protecting TCEs. States which are reluctant or opposed to the idea of applying existing IPRs or creating a new form of IPRs to protect TK base their arguments on both conceptual and practical reasons, namely the essential incompatibility between the concepts of Western IPRs and the practices and cultures of local and indigenous communities (The Crucible Group 2001). For some opponents, bringing communities and their resources into the fold of the market economy could overwhelm and ultimately destroy those societies (Nijar 1996: 24). Others argue that, given the difficulties inherent in establishing IPRs protection for TK, national IPRs legislation and international conventions should just ensure that such knowledge is not unduly appropriated and preserved outside the IPRs system (Correa 2001: 9).

Concerns that copyright fails to provide defensive protection for expressions of folklore have also been expressed at WIPO. While the arguments discussed so far deal

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8 See Document submitted the Group of Countries of Latin America and the Caribbean (WIPO/GRTKF/IC/1/5); Document submitted by the European Community and its Member States (WIPO/GRTKF/IC/3/11); Responses to the folklore questionnaire (WIPO/GRTKF/IC/2/7) and/or the TK survey of Australia, Bhutan, Hungary, Indonesia, New Zealand, Norway, Panama, Peru, the Philippines, Republic of Korea, Samoa, Singapore, the Solomon Islands, Viet Nam and others (WIPO/GRTKF/IC/2/5).
more with the inability of copyright to provide positive protection, there are claims that current copyright law has shortcomings that limit the capacity of indigenous and traditional persons to prevent the use of their literary and artistic productions by others (WIPO, Consolidated Analysis, 2003: para. 131). While the copyright system treats EoF as part of the public domain, non-indigenous and non-traditional persons (as well as indigenous and traditional persons) are able to acquire copyright over “new” folkloric expressions or folkloric expressions incorporated in derivative works, such as adaptations and arrangements of music. Furthermore, even in respect of those contemporary, tradition-based TCEs that are subject to copyright protection, the exceptions typically allowed under copyright are believed by some to undermine customary rights under customary laws and protocols – for example, national copyright laws typically provide that a sculpture or work of artistic craftsmanship which is permanently displayed in a public place may be reproduced in photographs, drawings and in other ways without permission. It has been pointed out that the effect of public display upon certain works may not be well-known among indigenous and traditional artists. Similarly, national copyright laws often allow public archives and libraries and the like to make reproductions of literary and artistic works and keep them available for the public. However, doing so in respect of copyrighted traditional cultural expressions may raise parallel cultural and indigenous rights issues.

Since copyright protection also generally does not extend to “style” or method of manufacture, the method of manufacture and “style” of traditional products are vulnerable to imitation (Daes 1993: para. 31). In so far as “style” and method of manufacture go, copyright protection does not extend to utilitarian aspects, concepts, formulaic or other non-original elements, colors, subject matter and techniques used to create a work. This is a fundamental and long-standing principle reflected in copyright laws worldwide. There are limits to that which can be protected by copyright, as Article 9.2 of the TRIPS Agreement makes clear: “Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such.” Copyright therefore permits the imitation of the non-original elements or underlying ideas and concepts of works, which is a widespread practice as creativity is nourished and inspired by other works. The US has pointed out that under US law
elements of style may be protected to the extent that a style incorporates original expression (WIPO, Consolidated Analysis, WIPO/GRTKF/IC/5/3, 2003: para. 133).

It has also been pointed out that the remedies available under current IP law may not be appropriate to deter infringing use of the works of an indigenous artist-copyright holder, or may not provide for damages equivalent to the degree of cultural and non-economic damage caused by the infringing use (WIPO, Consolidated Analysis, 2003: para. 131).

III. “Filling the Gaps” and Possible Modifications

Some countries in the Asian and Pacific region have gone on record to state that “the existing IPR regime is inadequate to address all the issues involved in the protection of traditional knowledge and folklore” (WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific, WIPO-UNESCO/FOLK/ASIA/99/1, (Hanoi), 21 to 23 April 1999: 2). Instead, some countries have proposed modifications to existing intellectual property standards to provide protection for TCEs (WIPO National Experiences, 2002: para. 142). For example, it has been stated that once the usefulness of existing intellectual property standards has been investigated, consideration could be given to modifications to close any “gaps” or limitations found in existing standards. Some of the concrete suggestions noted by WIPO include:

(i) Handicrafts Protection

The need for a suitable mechanism and agreed norms for the protection of handicrafts have led to specific suggestions in the WIPO. In this respect, the

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9 The WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific was organized in Hanoi from April 21 to 23, 1999 with the cooperation of the Government of Vietnam. Representatives from 15 countries, namely Bangladesh, Brunei Darussalam, China, Fiji, India, Indonesia, Japan, Mongolia, Nepal, Pakistan, Philippines, Singapore, Sri Lanka, Thailand, and Vietnam were present at the consultation meeting. In addition facilitators from six countries as well as four nongovernmental organizations from the Region were present at the Consultation.

10 Doc. WIPO/GRTKF/IC/1/5, 2001; WIPO/GRTKF/IC/1/13, 2001, paras. 20, 21, 28, 40, 50, 71.


possibilities offered by copyright, industrial designs, trademarks, trade names and geographical indications have been mentioned. The WIPO Intergovernmental Committee has also studied ways of streamlining the industrial design protection systems embodied in national and regional laws, inclining them towards procedures involving deposit or registration without any novelty examination or anticipation search. In this regard, a relevant provision is Article 25.2 of the TRIPS Agreement, concerning the simplification of procedures for textile designs. It has been proposed that the same kind of solution could be promoted for any kind of design originating in indigenous communities.

ii) Incorporation of customary law

Some have presented the recognition of informal regimes and customary law as “a third approach” to addressing the intellectual property needs of TK holders (Australian Copyright Council 1998:11). It has been suggested that, for example, traditional forms of ownership be recognized and used within the context of the formal intellectual property system to determine who is the “author” of a cultural expression, or at least who is an owner and entitled to exercise control over it. This perhaps ties in with a suggestion made in a response to the Questionnaire that consideration be given to “appropriate modifications of existing regimes to be more culturally sensitive;” (Response of Australia to the Questionnaire; Maui Solomon, Comments on WIPO Revised Objectives, WIPO/GRTKF/IC/115(b), 2007, Appendix, para.4.4).

iii) Protection of Community Interests

A further issue concerns the collectivity of creation, ownership and custodianship which prevails in certain communities and traditional knowledge systems. While collectivity of creation and ownership may not be characteristic of traditional knowledge systems in all cases, (Mould-Iddrussu 1997: 18) Member States have still identified the need to develop legal solutions which address the need of communities for recognition of their collective rights to their collective knowledge. A concrete suggestion in this regard, in relation to handicrafts, is made by the International Trade Centre (ITC) and UNESCO.¹³

¹³ ITC/UNESCO, Doc. no. CLT 96/WS/5, 1996. A tripartite structure is proposed, in which existing guild
In addition to the above specific proposals for modifications to existing intellectual property standards, several States in their responses to the Questionnaire, at sessions of the WIPO Intergovernmental Committee and elsewhere have called for the development of new _sui generis_ rights to protect expressions of culture (and traditional knowledge more generally). Most recently and in particular, at the second session of the WIPO Intergovernmental Committee, the Secretariat of WIPO was requested to prepare a document on “Elements of Sui Generis Protection for Traditional Knowledge.”

**IV. Sui Generis Options: Some Examples**

Apart from a growing acceptance of _sui generis_ solutions to the protection of TK and TCEs in international fora, in recent times, some experts have observed that in legal scholarship, the initial enthusiasm about the prospects for modifying IP laws to protect intangible heritage and expressions of folklore seem to be cooling off (Brown 2005: 46). In broad summary, there are two general approaches among States to the legal protection of TCEs. Some believe that TCEs are adequately protected by existing IP systems, and that no additional measures or systems of protection are necessary or appropriate. Others believe that the establishment of new, specific measures and/or statutory systems is necessary either to complement existing IP rights or act as a substitute for them because...
they are regarded as inadequate and/or inappropriate. The latter are referred to in this Chapter as "sui generis" measures and systems.

According to the WIPO, "[t]hese lines of enquiry should be undertaken in parallel, without privileging one over the other, as several States have pointed out. The two main approaches are not necessarily mutually exclusive. A dual-track approach could be formulated as follows: it is understood that TCEs have already some of their main aspects covered by existing IP mechanisms, but other measures may be necessary to complement the existing legal system and to deal with perceived gaps in protection" (WIPO Consolidated Analysis, 2003: para. 96). Eventually, the protection afforded to TCEs could be found in a multi-faceted menu of options, using both IP and some sui generis options. In some cases, adapted, extended or modified usage of the IP system has acted as a bridge between these two approaches. The present Chapter will therefore study some of the existing sui generis models and laws that have tried to address the inadequacies in the protection of TCEs. The present analysis of sui generis options for the protection of expressions of folklore will draw upon in part from WIPO's Comparative Summary of Sui Generis Laws for the Protection of Traditional Cultural Expressions (WIPO/GRTKF/IC/5/INF/3, 2003).

IV.1. The UNESCO Model

In 1973, at the request of the Government of Bolivia vide a memorandum to examine the opportunity of drafting an international instrument on the protection of folklore, UNESCO began to explore the legal issues implicated in the protection of EoF/TCEs on an international scale. Subsequently, UNESCO and WIPO agreed to collaborate and they convened a Committee of Governmental Experts on the Intellectual Property Aspects of the Protection of Expressions of Folklore. The Committee adopted the Model Provisions in 1982.

The Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions (Model Provisions 1982) protect expressions of folklore (section 2) from unauthorised use with gainful

intent and utilisation outside the relevant community's traditional or customary context (Section 3) and also prohibit misrepresentation of the source of expressions of folklore (Section 5). However, exceptions are provided under section 4 of the 1982 Model Provisions whereby there is no infringement of the provisions if the expressions of folklore are (i) utilised for purposes of education; (ii) utilised by way of illustration in the original work of an author, provided that the extent of such utilisation is compatible with fair practice and (iii) borrowing of expressions of folklore for creating an original work of an author or authors. It is to be noted that exception (iii) allows creation and subsequent protection of original works based on expressions of folklore. Thus the 1982 Model Provisions also follow the same copyright-form of protection to derivatives in TCEs, as seen in the Tunis Model Law.

Furthermore, under the 1982 Model Provisions, the right holder of expressions of folklore is either a competent authority or the community concerned, according to the choice of each country. As such, authorisation for commercial use of expressions of folklore shall be obtained from the competent authority established by the State or community concerned [Section 10(1)]. This means that there is no requirement for an identifiable author or authors. Where the competent authority or community concerned grants authorisation, it may fix the amount of fees and collect fees, which shall be used for the purpose of promoting or safeguarding national culture or folklore (section 10(2)).

The Model Provisions also grant perpetual protection since there is no time limit for protection and there is no requirement for material fixation. This seems to suggest that the protection is for a community whose existence may not be limited in time rather than for individual authors. The Model Provisions do not create any binding international obligations but merely serve as a model upon which countries can legislate their national laws on protection of EoF/TCEs. The Nigerian Copyright Act of 1988 is among some of the national legislations and regional instruments that were enacted based on or incorporating the provisions of the Model Provisions (Blakeney 2000: 257).

IV.1.1. The UNESCO Model: a Critique

Although some countries that have chosen to provide specific protection for expressions of folklore have referred to some degree or another to the 1982 Model Law
Provisions (WIPO National Experiences, WIPO/GRTKF/IC/3/10, 2002: para.136; Kuruk 1999), others have advanced various reasons for its inappropriateness. Some countries have considered the Model Law Provisions as outdated and in applicable to their domestic situation (New Zealand, WIPO/GRTKF/IC/3/10, 2002, para. 137; Kutty 2002).

The need for updating and improving the Model Law Provisions has been expressed by States and WIPO has taken cognizance of these requests.19 In general, the comments and suggestions for modification relate to almost all aspects of the Model Provisions, particularly: the use of the term “expressions of folklore” and the scope of the term as used in the Model Provisions (many States wished for the term to also encompass technical and scientific knowledge systems, such as traditional medicine); the limitation of the Model Provisions to the “artistic heritage” of a community (a few countries wished for the Provisions to apply to the “cultural heritage” of a nation); the relationship between the type of sui generis system envisaged by the Model Provisions and conventional intellectual property systems; and, the need for the Model Provisions to be updated to take into account technological developments and new forms of commercial exploitation that have arisen since the early 1980’s (WIPO/GRTKF/IC/3/10, 2002, para. 138).

A further aspect of the Model Provisions that some States commented on is the principle referred to in Section 3, namely, that utilizations of expressions of folklore require authorization when they are “made both with gainful intent and outside their traditional or customary context.” (Australia, Panama and Sierra Leone-WIPO/GRTKF/IC/3/10) According to the Commentary to the Model Provisions, this means that a utilization—even with gainful intent—within the traditional or customary context should not be subject to authorization. On the other hand, a utilization, even by

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19 See Statements of States at the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/1/13, WIPO/GRTKF/IC/2/16), and Responses to Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore (for example, Burundi; Chad; Côte d'Ivoire; Colombia; Ecuador; Iran (Islamic Republic of); Jamaica; Kyrgyzstan; Malaysia; Mexico; Namibia; New Zealand; Pakistan; Panama; Philippines; Poland; Romania; Sri Lanka; Togo; Tunisia; Venezuela; Viet Nam and, the African Group). See also WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for countries of Asia and the Pacific, Hanoi, April 21 to 23, 1999 (WIPO-UNESCO/FOLK/ASIA/99/1); WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Pretoria, March 23 to 25, 1999 (WIPO-UNESCO/FOLK/AFR/99/1); See also WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), (WIPO, 2001): 77, 93.
members of the community where the expression has been developed and maintained, requires authorization if it is made outside such a context and with gainful intent. As pointed out by some, the distinction between "traditional context" and "customary context" is perhaps not clear.

According to the Commentary to the Model Provisions, an expression of folklore is used in its "traditional context" if it remains in its proper artistic framework based on continuous usage of the community. For instance, to use a ritual dance in its "traditional context" means to perform it in the actual framework of the respective rite. On the other hand, the term "customary context" refers rather to the utilization of expressions of folklore in accordance with the practices of everyday life of the community, such as selling copies of tangible expressions of folklore by local craftsmen. A customary context may develop and change more rapidly than a traditional one, according to the Commentary.

The fact that the Model Law Provisions allows for the creation of works "based" on expressions of folklore in Section 4 (1) (iii) and Section 13 is also believed to be of some concern. Section 13 of the Model Provisions, 1982 provides as follows: "The protection granted under this [law] shall in no way be interpreted in a manner which could hinder the normal use and development of expressions of folklore." Though the exception for derivative works within the Model Law Provisions was intended to prevent any hindrance to the creation of original works inspired from cultural expressions, these very acts of "borrowing from" expressions of folklore are cause for complaint among some countries. It has been observed that it is mostly appropriation (or "borrowing") of cultural expressions between traditions and cultures, rather than within them, that causes the most offence (Sandler 2001: 6).

IV.2. Tunis Model Law

One of the earliest attempts at a sui generis law for the protection of folklore can be found in the Tunis Model Law on Copyright for Developing Countries (hereinafter referred to as "Tunis Model Law"). A product of the joint effort of WIPO and UNESCO in 1976, the Tunis Model Law was drawn up to serve as a reference for developing countries to employ when drafting their copyright legislation. The Tunis Model Law
established a special protective regime for national folklore. The Tunis Model Law defines "folklore" as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage" (Section 18). There is no requirement for material fixation [section1(5) bis] or originality.

Furthermore, in the Tunis Model Law, works of national folklore are protected "without limitation in time" [Section 6(2)]. Besides that, works of national folklore enjoy economic rights (Section 4) as well as moral rights (Section 5(1)) and these rights are to be exercised by a competent authority (Section 6). Notably under the Tunis Model Law, works of national folklore are accorded a sui generis type of protection as they are not protected by copyright whereas works derived from national folklore are treated as copyright works.\(^{20}\)

The Tunis Model Law was intended to be used as a guideline by developing countries in drafting national copyright legislation (Farley 1997: 43). The Tunis Model Law appears to have met the expectations of its proponents since it seems to have influenced a number of African countries including Burundi, Cameroon, Ghana, Guinea, the Ivory Coast, Mali and Congo (Kuruk 1999). Take for instance, in Mali, folklore is considered part of the country’s heritage. Under the Mali law, with the exception of public entities, all persons seeking to use folklore for profit must obtain prior authorization from the Minister of Arts and Culture who may impose a fee for such use. In addition, the law prohibits the total or partial assignment of copyrights or exclusive licenses in “works derived from folklore”, without the approval of the Minister. In this sense, the Mali law deviates from the Tunis Model Law by disallowing copyright over derivative works. Significantly, the law also places in the public domain and charges a user fee for all “works whose authors are unknown, including the songs, legends, dances, and other manifestations of the common cultural heritage.”

However, although the Tunis Model Law seeks to resolve the inadequacies of copyright by widening its conventional ambit so as to accommodate the special

\(^{20}\) Doc. WIPO/GRTKF/IC/7/4, 27 August 2004, para. 107(b).
characteristics of expressions of folklore, the Tunis Model Law is not widely adopted due to the over-broad nature of the availability and scope of protection.

IV.3. Sui Generis Protection: Some Case Studies

As pointed earlier, few states have gone ahead with providing *sui generis* copyright protection to expressions of folklore. Certain other countries have in contrast chosen to carve out entirely new *sui generis* legislations for the purpose of protecting the rights of indigenous/traditional communities and their associated traditional knowledge and expressions. Crucial among these *sui generis* laws, are: the Philippines Indigenous Rights Act, 1997; the Bangui Agreement on the Creation of an African Intellectual Property Organization (OAPI), as revised in 1999 (hereinafter referred to as "Bangui Agreement"); the US Indian Arts and Crafts Act 1999; the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama 2002 (hereinafter referred to as "the Panama law") and the related Executive Decree of 2001; the South Pacific Model Law for National Laws (2002). The present Chapter seeks to do a brief analysis of some of these existing *sui generis* laws so as to reveal possible strategies of protection beyond traditional IPRs.

*IV.3.1. The Philippines*

The Philippines in 1997 exercised the choice to legislate on *sui generis* protection of TCEs owing to certain special features in its socio-political, cultural and economic life. Music is an integral part of the basic traditional life of the indigenous communities (Kutty 2002). The Philippines also exhibits unique textile designs of the minority cultural communities such as the *abaca* clothes decorated with resist-dye techniques; use of tapestry techniques and applique embroidery decoration is also seen among others. The onset of technological advancement in communication has however resulted in the commercial misappropriation of traditional medicinal knowledge and

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21 The Philippines has one of the most diverse ecosystems in the world and a wealth of TK and folkloric expressions. In its varied forms of habitat, about 25,000 species of animals, birds and insects sustain themselves. The indigenous people of the Philippines roughly form ten per cent of its population of approximately 60 million people. There are 110 tribes in the groups of islands that constitute the Republic of the Philippines.
widespread copying of textiles designs by both Western and local industrialists. Apart from these technological threats, the Philippines has also been subjected to colonization by Western powers over a long period of time. In recent years the desire to distinctly move away from forced assimilation is apparent in the attempts to re-ignite pride in the cultural roots of the nations, especially with regard to its indigenous population (Kutty 2002: 25). In the Philippines, the 1987 Philippine Constitution mandates the recognition, respect and protection of the rights of the indigenous cultural communities and indigenous peoples (referred to as “ICCs/IPs”). This mandate was realized with the passage of the Indigenous Peoples Rights Act (Republic Act No. 8371) in October 1997.

The Indigenous Peoples Right Act shows the desire of the Republic of Philippines in mitigating the effects of colonization experienced by indigenous peoples and communities and to this end shows its commitment to protecting “ancestral domains” [Section 2(b); Section 3(a); 3(h)] and make efforts to recognize and protect the rights of ICCs/IPs within the framework of national unity. The Act makes references to terms such as sustainable traditional resource rights [section 3(o)] and the importance of free and prior informed consent of indigenous peoples and communities in all cultural and development activities and also envisages the role of a Memorandum of Agreement (MOA) between proponent, host ICC/IP community and the National Commission on Indigenous People (NCIP).

The Philippines’ Law provides protection for “community intellectual rights” (Section 32), with ICC/IPs having “the right to practice and revitalize their own cultural traditions and customs. The State’s role in this regard is given to preserve, protect and

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22 The right of the indigenous peoples to their indigenous knowledge systems and practices and to develop their own science and technologies is provided by Section 34 of the Philippine Republic Act 8371 which states: “ICCs/IP are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights. They shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, including derivatives of these resources, traditional medicines and health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, knowledge of the properties of flora and fauna, oral traditions, literature, designs and visual and performing arts.”

23 For the purposes of the Act, “free and prior informed consent” is defined as “the consensus of all members of the ICCs/IPs to be determined in accordance with their customary laws and practices” [Section 3(g)]. This consent is to be obtained, “free from any external manipulation, interference, coercion,” and “after fully disclosing the intent and scope of activity, in a language and process understandable to the community.”
develop these “community intellectual rights”, as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without free and prior informed consent or in violation of their laws, traditions and customs. Philippines response to the WIPO’s questionnaire regarding national experiences in the protection of folklore (WIPO/GRTKF/IC/3/10, at 38) further elaborates on the meaning of “community intellectual rights” to include:

(a) The past, present and future manifestations of their cultures, such as but not limited to, archaeological and historical sites, artifacts, designs, ceremonies, technologies, visual and performing arts and literature as well as religious and spiritual properties;

(b) Science and technology including, but not limited to, human and other genetic resources, seeds, medicine, health practices, vital medicinal plants, animals and minerals, indigenous knowledge systems and practices, resource management systems, agricultural technologies, knowledge of the properties of flora and fauna, oral traditions, designs, scientific discoveries; and

(c) Language, script, histories, oral traditions and teaching and learning systems [NCIP Administrative Order No. 01-98, Rule I, Section 4(j)];

(d) Filipino historical and cultural heritage resources [Rep. Act No. 7356, Sections 7 and 12(b)].

(e) Traditional culture and its various creative (sic) [Ibid. Section 12(d) Philippine, WIPO Questionnaire on National Experiences, 1999: 6].

IV.3.2. Panama

Panama has an extensive legal framework for the protection of its traditional crafts.24 The Constitution of the Republic of Panama, in Article 77, specifies that the State will promote and safeguard Panamanian cultural heritage. Panama Law, Act 20 of

24 In Panama, the livelihood of about 250,000 people depends on the production of around 100,000 artisanal products. Traditional handicrafts of Panama are produced by two distinct ethnic groups: indigenous, pre-Hispanic communities; and the mestizos who evolved as a result of the fusion of Spanish, indigenous, and people of African racial descent.
June 26, 2000, establishes a “special intellectual property system for the collective rights of Indigenous peoples, for the protection and defense of their cultural identity and of their traditional knowledge”. The Panama Law is said to be the culmination of the efforts by the Kuna people of Panama to stop cheap copies of molas—the traditional dress of the Panamanians—being bought by tourists (Fowler 2004: 124). The purpose of this law is to “protect the collective rights of intellectual property and traditional knowledge of the indigenous communities upon their creations”, in addition to the “cultural elements of their history, music, art and traditional artistic expressions,” “capable of commercial use, through a special register system.” (Article 1, Law No. 20, Panama; Article 1 of the Panama Ministry of Trade and Industries, Executive Decree No. 12, March 20, 2001). Another key objective is also to protect the authenticity of crafts and other traditional artistic expressions (Article 6, Panama Law).

The Panamanian Law is broad in its formulation of what constitutes traditional knowledge and its manifestations and also includes within its fold “customs, believing, spirituality, religiosity” and “folkloric expressions of the indigenous communities.” The Law explicitly states that these are part of the cultural assets of the indigenous communities and consequently “cannot be object of any form of exclusive right by not authorized third parties under the intellectual property system such as copyrights, industrial models, trademarks, indications of regional origin and others” (Article 2, Panama Law). Under the Executive Decree, pre-existing intellectual property rights relating to art, music, literature, biological, medical and ecological knowledge and other subject matter and manifestations that have no author or owner and no date of origin and

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25 The first known legislation to cover crafts in Panama was the Act 21 of January 30, 1967, which restricts imports of certain articles that are used as substitutes for, imitate, or compete with native artisanal products.

26 The tourist industry in the Kuna Yala, or Kuna lands, is tremendous because of cruise ship traffic. The sale of poor quality, mass produced, non traditional molas were offensive to the strict adherence of cultural mores practiced in the region (Snow, 2001).

27 The principle embodied in this law is considered unique. When formulating this law, Panama was advised by the World Intellectual Property Organization (WIPO) that there was “no model Law nor International Treaty that includes recommendations on the best way to protect traditional knowledge”. The decision was therefore made to create this law from scratch without basing it on any model (Espino, 2004: 182).
constitute the heritage of an entire indigenous people, is protected as “collective indigenous rights” [Article 2(v)].

Under Panamanian law, the relevant indigenous communities represented by their general congresses or traditional authorities are the holders of rights. Panama also recognizes the possibility of more than one community registering collectively as the holders of rights (Executive Decree, Article 5). The Decree also clarifies that the traditional knowledge of indigenous peoples consists of creations shared by the members of several communities and that benefits must accrue to all of them collectively. The rights conferred by law, accordingly seeks to protect the collective rights to authorize or prevent: (i) use and commercialization28 (Panama Law, Article 15); and (ii) industrial reproduction (Panama Law, Article 20). The Law also recognizes the collective right to apply for intellectual property over protected subject matter (Panama Law, Article 2) and also allows prevention or authorization of third parties from acquiring exclusive IP over protected subject matter (Panama Law, Article 2). The Law provides the collective right to consent the certification of cultural expressions as works of indigenous traditional art or handicraft and handmade by natives (Panama Law, Article 10; Executive Decree, Article 15).

It must be noted that the Panama Copyright Act, 1984 does not provide copyright protection for “objective expressions of folklore” (Article 9). The Panamanian Law allows exemptions for folkloric dance groups (Panama Law, Article 16) and certain small non-indigenous artisans.29 However, these small, non-indigenous artisans will not be able to claim the collective rights of indigenous as recognized by the Panamanian law (Ibid.). Interestingly, in comparison to the UNESCO Model Law provisions, the Panamanian law does not provide for exceptions relating to education, “fair practice,” “borrowing for producing original work,” or for incidental uses in broadcasting or for reporting purposes,

28 The right of use and commercialization of tradition-based arts, crafts and other expressions is subject to the regulation of each indigenous community, thus recognizing the role of customary law, and needs to also obtain the approval of and be registered at the General Office for the Registry of the Industrial Property of the Ministry of Commerce and Industry (DIGERPI) or in the National Copyright Office of the Ministry of Education, as the case may be.

29 Even though the law does not define “small non-indigenous artisans”, it identifies the crafts of specific indigenous communities residing in particular districts of Panama, which may be manufactured, reproduced and marketed by these artisans.
thus preferring to keep the balance of rights skewed in favour of the right-holders and owners of collective indigenous rights.

An important point to be noted is that in Panama, the registration of the collective rights in an object or in traditional knowledge shall not affect the traditional exchange of the object or knowledge in question between indigenous peoples (Executive Decree, article 11). Furthermore, significantly, access to the register of collective rights is to be made public, with the exception of experiments and cognitive processes conducted by indigenous peoples and their traditional production techniques or methods used (Ibid., Article 12). Thus Panama employs the use of the register not only as a defensive strategy but also exercises necessary caution against complete disclosure of TK to the detriment of the interests of indigenous communities.

The Panamanian Law for the protection of expressions of indigenous knowledge also provides for sanctions against importation of foreign goods originating from countries that are non-original products, recorded, embroidered, weaved or any other articles, that are imitated, in whole or in part. Apart from protecting collective indigenous intellectual property and traditional knowledge from non-original imitations and acts of smuggling, the Panamanian law also hopes to address the problem of trade in such goods outside its borders by invoking the principle of reciprocity (Panama Law No. 20, Article 25).

IV.3.3. The United States

While the previous group of countries have enacted general and comprehensive legislation, one country, the United States of America, has established specific measures or provisions to “protect and preserve cultural heritage and to prevent commercial interests from falsely associating their goods or services with indigenous peoples.”30 Within the US, the Omnibus Trade and Competitiveness Act (OTCA) of 1988 and the Indian Arts and Crafts Act (IACA) of 1999 are considered crucial for the protection of certain expressions of folklore. The OTCA requires that Indian-style imported products

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30 In the US, it has been the experience of Native American tribes that many commercial enterprises, both in the United States and in other countries, essentially attempt to counterfeit Native American arts and crafts and/or falsely indicate some association between the non-Indian product and a Native American tribe.
be indelibly marked with the country of origin. This provides the buyer clear evidence of where a product is made so as to facilitate informed decision making in reference to authenticity (Fowler, 2004: 119).

The Native American Graves Protection and Repatriation Act, or NAGPRA, is seen by some as the integral step taken in 1990 by the US Congress to "formally recogniz[e] the Native American culture as unique," and particularly in need of special protection by the laws of the United States government (Milchan 2003-2004: 168). The statute applies to cultural items of Native American peoples, which it defines as "human remains", "associated funerary objects," "unassociated funerary objects," "sacred objects," and "cultural patrimony."

The United States has also established a mechanism for protecting "national" folk culture through a 1976 Act of Congress: The American Folklife Preservation Act. The Act created an American Folklife Center (Moran 1998: 106) within the Library of Congress. Reading through information on the American Folklife Centre reveals that much of the ethnographic material available in its collection is dependant upon the permission of "peoples whose lives, ideas and creativity are documented" therein. On a query regarding the process of identification of these "peoples," Judith Gray, reference specialist at the American Folklife Centre, at the Library of Congress said:

"We look for individual names. Different collectors have gathered information in different ways over the decades, so the amount of information we have about individuals varies considerably. And in some cases, songs may not belong to the singers: in many Native American cases, for example, songs belong to a specific "drum" or to a clan, etc., so you need to seek permission via the tribe. In a very few cases, the collector or a donor institution also maintains rights over reproduction of recordings, so we first send researchers to them for permissions, and then in many cases to the communities of origin of the songs." Here again published folklife material before 1923 is considered to be in the public domain.

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31 The term "American folklife" means the traditional expressive culture shared within the various groups in the United States: familial, ethnic, occupational, religious, regional; expressive culture includes a wide range of creative and symbolic forms such as custom, belief, technical skill, language, literature, art, architecture, music, play, dance, drama, ritual, pagent, handicraft; these expressions are mainly learned orally, by imitation, or in performance, and are generally maintained without benefit of formal instruction or institutional direction."

32 http://www.loc.gov/folklife/

“Recordings given ... in previous decades without any identification of performers' names (e.g., "sung by prisoners" or "sung by 4 girls") becomes, in effect, public domain, since we have no idea where to tell people to seek permissions”.

The US Indian Arts and Crafts Act (IACA), in comparison to other US legislations pertaining to cultural property and native indigenous claims, is a federal “truth-in-marketing” law that prevents the marketing of products as “Indian made” when the products are not made by Indians34 as they are defined by the Act. Section 104 (a) of IACA, P.L. 101-644, prohibits the offering or displaying for sale or selling of any good, in a manner that falsely suggests it is Indian produced, an Indian product, or the product of a particular Indian or Indian tribe or Indian arts and crafts organization, resident within the U.S. Armed with severe penalties, the courts can impose fines of up to US$250,000 and up to five years in prison for fraud. The Act also provides for civil action; namely a person may obtain an injunction or equitable relief and recover damages [Section 6 (a)(1) and (2)].

The Indian Arts and Crafts Enforcement Act of 2000 (as amended in September 2003) expands civil provisions to allow organizations and individuals to sue. It also expands the liability to include “indirect” marketers. It includes regulations clarifying the definition of “Indian products.” The Act requires that the labour component of the product, must be entirely Indian for the art or craft object to be considered Indian (WIPO Background Paper No. 1, Consolidated Analysis, May 2, 2003: 77). Section 309.2(3) of the Indian Arts and Crafts Enforcement Act gives example of non-qualifying products to include. The requirement of complete involvement of Indians in design, process and manufacture of “Indian products” seems to significantly narrow the scope for non-Indians to exploit the knowledge base of the Native American community.35 It must be however

34 The Indians, referred to in this section essentially refers to indigenous native American tribes, band, nation, Alaska native village, or other organized group or community which is recognized as eligible for special protection by the US.

35 The US legislation in Section 309.4, P.L. 101-497 shows how an individual can be certified as an Indian artisan. In order for an individual to be certified by an Indian tribe as a non-member Indian artisan for the purposes of the law, the individual must be of Indian lineage of one or more members of such tribe; and the certification must be documented in writing by the governing body of an Indian tribe or by a certifying body delegated for the task by the Indian tribe. As provided in Section 107 of the IACA (1990), a tribe may not impose a fee for certifying an Indian artisan. Thus under US law, the right-holders include American
pointed out that the ability to trace lineage to affirm membership in a community is not without its share of challenges. An illustrative example of practical hurdles in US efforts to protect community rights of Alaskan Natives is found in claims regarding the Alaskan Natives Claims Settlement Act, which according to some scholars serves as a warning that incorporation of indigenous societies on the basis of lineage could exacerbate the disintegration of societies (Stephenson, 1994: 184-185).

Under Section 2(a) of the US Trademark Act, 1946, as amended, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. The United States Patent and Trademark Office (USPTO) may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. According to the US response to WIPO's Questionnaire on National experiences, such a provision provides not only protection for folklore aspects of Native American tribes, but also "those of other indigenous peoples worldwide."

IV.3.4. Bangui Agreement

In the African Intellectual Property Organization (OAPI), expressions of folklore are defined as productions of characteristic elements of traditional artistic heritage, developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community [Bangui Agreement, Annex VII, Title I, Article 2(xx)]. Works of folklore are considered part of the national heritage and their exploitation is conditioned on notice to the appropriate state agency (Bangui Agreement, Article 8).

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Indians; Native Alaskans; State recognized Indian tribes (Sec. 309.2(c), 1, 2, 3 for definition of Indian tribe); and an Indian artisan as certified by an Indian tribe as a non-member.

36 The Trademark Law Treaty Implementation Act, 1998 required the USPTO to complete a study on the protection of the official insignia of federally and state-recognized Native American tribes. As a direct result of this study, on August 31, 2001 the USPTO established a Database of Official Insignia of Native American Tribes. The Database of Official Insignia of Native American Tribes may be searched and thus prevent the registration of a mark confusingly similar to an official insignia. "Insignia" refers to "the flag or coat of arms or other emblem or device of any federally or State recognized Native American tribe" and does not include words.
The Bangui Agreement identifies the author as the first holder of the economic and moral rights. Specific provisions within the Agreement also deal with collaborative works, collective works, the works of employees, and other cases. There are no specific provisions dealing with EoFs (Articles 28 to 33). The nature of rights recognized under the Agreement includes economic and moral rights as understood in copyright terms (Articles 8 and 9). In addition, however, EoF and works that have fallen into the public domain are subject to “domaine public payant” (Section 59). The exploitation of EoF and works or productions that have fallen into the public domain or expiry of the terms of protection shall be subject to the user entering into an undertaking to pay to the national collective right administration body a relevant royalty. Royalties collected with respect to the exploitation of expressions of folklore shall be devoted to welfare and cultural purposes. Within the Bangui Agreement, there are no special formal procedures or sanctions in relation to expressions of folklore. Furthermore, the Bangui Agreement does not make references to customary laws and protocols.

Title II of the Agreement also deals with cultural heritage relating folklore, sites and monuments (Article 67). The Agreement also envisages the creation of inventories to determine, classify, place in security and illustrate elements that make up the cultural heritage (Article 72). It is believed by some that the list of national heritage property that OAPI requires each State to create could potentially improve the protection of folklore if the States include on their lists all relevant items of folklore (Kuruk 1999: 812). The possibility of an exhaustive list, for reasons of both logistical impracticability and conceptual obstacles is unlikely (Ibid).

The Bangui Agreement makes provision for national treatment. Therefore, the sixteen countries that are members of the OAPI and have ratified the accord are bound to protect each other’s expressions of folklore according to the national treatment principle [Article 4(2)]. Many of the countries are neighboring. It is not known, however, if there has ever been any practical application of these provisions.

38 These are Benin, Burkina Faso, Cameroon, Central Africa, Congo, Cote d’Ivoire, Equatorial Guinea, Gabon, Guinea, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad and Togo.
IV.3.5. Pacific Regional Framework

The main objective of the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (hereinafter the PRF) is to protect rights of traditional owners in their traditional knowledge and expressions of culture and permit tradition-based creativity and innovation, including commercialization thereof, subject to prior and informed consent and benefit-sharing. This model law also reflects the policy of complementing existing IP laws.

Cultural expressions are the main focus of the PRF. Expressions of culture are described as the many ways in which traditional knowledge appears or is manifested, including inter alia, names, stories, chants, riddles, songs in oral narratives, art and craft, instruments, pottery, jewellery, metalware, weaving, needlework, dances, textiles, ritual performances, cultural practices, designs and architectural forms. For the purpose of protection, the subject-matter must be “traditional”, that is:

(i) created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative, or recreational purposes;

(ii) transmitted from generation to generation;

(iii) regarded as pertaining to a particular traditional group, clan, or community of people; and

(iv) originate and be held collectively (Section 4).

Under the PRF, the holder of rights are traditional owners of TK or expressions of culture, being the group, clan, or community, or individual recognized as part of group, clan or community, in whom the custody or protection of the traditional knowledge or expressions of culture is entrusted in accordance with customary law and practices (Section 4). If a derivative work is created, IP in work vests in creator or as provided for by IP law. However, where cultural expressions and derivative works are used for commercial purposes, user must share benefits with traditional owners, acknowledge source and respect moral rights (Section 12).

The PRF establishes “traditional cultural rights” and “moral rights” in TK or expressions of folklore. Moral rights and traditional cultural rights continue in force for
perpetuity, are inalienable, and cannot be waived or transferred [Section 9 and 13(4)].

Traditional cultural rights are rights to authorize or prevent reproduction; publication; performance and display in public; broadcast; translate, adapt, arrange, transform or modify; fixation through any process such as making a photograph, film or sound recording; making possible online availability; creation of derivative works; the making use for offer, sale, import, or export of both the "original" and derivative work; and the use in non-customary context (whether or not of a commercial nature (Section 7). Thus, it can be seen that the ambit of rights recognized in TK and expressions of culture under the PRF is rather expansive. Nonetheless, the PRF provides important exemptions such as those relating to use of TK and expressions of culture by traditional owners [Section 7 (3)], face-to-face teaching, criticism or review, news reportage, judicial proceedings, and incidental use, although sufficient acknowledgment is needed in these cases [Section 7(4) and (5)].

Under the PRF, various offences are created, punishable on conviction by fine or term of imprisonment, or both. Traditional owners may also institute civil proceedings. Remedies in civil law include: injunctions, damage for loss, public apology, cease or reserve false attribution of ownership, or derogatory treatment, order for account of profits, seizure of objects etc. Nothing within the Act prevents recourse to mediation procedures, alternate dispute resolution and use of customary law for purposes of dispute settlement. As regards regional and international protection of expressions of culture under the South Pacific Model Law, protection is provided on the basis of reciprocity.

**IV3.6. Andean Framework**

In Chapter 2 of Decision 351\(^39\), the subject matter of protection is referred *inter alia* as "works of applied art" [Andean Decision 351, Chapter II, 4(j)].\(^40\) Decision 351 on Copyright and Neighbouring Rights of the Andean Community provides protection *inter


\(^40\)The meaning of "works of applied art" is further elucidated in Chapter I of Andean Decision 351, as "an artistic creation with utilitarian functions or incorporated in a useful article, whether a work of handicraft or one produced on an industrial scale" (Andean Decision 351, Chapter I, section 3).
alia to handicrafts based on the national treatment. In other words, the four States (Bolivia, Colombia, Ecuador, Peru) bound by the Decision are obliged to protect each other’s handicrafts in a manner no less favorable than that accorded to their own nationals. It is not known whether this possibility has been used in practice.

V. Sui Generis Options: An Analysis

A consideration of the sui generis laws in countries such as the Philippines and Panama reveal that the rights of indigenous groups and the desire to mitigate the effects of colonization in the past are at the heart of the interests in protecting TCEs. The Philippines’ Indigenous Rights Act of 1997 does not expressly protect “expressions of folklore” but instead lays emphasis on the “promotion and dissemination of” “traditions, customs and practices” which are believed to ultimately lead to the “protection” of expressions of folklore. The Philippines’ Law provides protection for “community intellectual rights” (Section 32), with ICC/IPs having the right to practice and revitalize their own cultural traditions and customs. The State’s role in this regard is given to preserve, protect and develop these “community intellectual rights”, as well as the right to the restitution of cultural, intellectual, religious, and spiritual property taken without free and prior informed consent or in violation of their laws, traditions and customs. The recognition of collective rights of the indigenous people in folklore is novel considering the fact that in many other States that do have legislative protection for works of folklore, the ownership of the folklore is deemed to vest in the government [Ghanaian Copyright Law 1985, section 5(2)] or considered as the country’s heritage (Mali Literary and Artistic Property Ordinance 1977). The latter form of ownership by the state has been critiqued by some as difficult to reconcile with the needs and expectations of indigenous communities (Fischer and Dickens 2004). Furthermore, the Philippines has chosen to have a broad understanding of “community intellectual rights” that encompasses both tangible and intangible elements and conveys a more holistic understanding of the life ways of the indigenous communities, without the separation of TK from TCE elements.

as has been generally desired for by indigenous and traditional communities. The Philippines’ *sui generis* law also highlights the indigenous concept of ownership as that which “belongs to all generations and therefore cannot be sold, disposed or destroyed.” Under the Philippines’ law, commercialization and creation of property rights beyond the contours of indigenous communities would have to weigh against cultural and human rights as also notions of customary ownership.

In similar vein, Panama also seeks to protect its TK. Owing to its special wealth in cultural expressions, Panama’s *sui generis* legislation is especially focused on the protection of traditional crafts. Panama has had legislations to protect TCEs since 1967 but has progressively moved away from a protective regime based heavily on unfair competition law to one that also accounts for the collective rights of the indigenous people. Concerns regarding authenticity of crafts and adherence to social and cultural mores of the Panamanian society have led to the protection of TCEs that are “pre-existing”, capable of being used commercially, “collective” in nature with no identified author and “traditional” if not old. As in Philippines, the subject-matter of protection includes biological, medical and ecological knowledge among the other familiar expressions of culture. It must be emphasized that the recognition of collective rights of the indigenous people in folklore in the *sui generis* laws of both Philippines and Panama is novel considering the fact that in many other States, especially in Africa, that do have legislative protection for works of folklore, the ownership of the folklore is deemed to vest in the government or considered as the country’s heritage as in Guatemala. This form of ownership by the State has been critiqued by some as difficult to reconcile with the needs and expectations of indigenous communities. The Panama Law also recognizes the collective right to consent to the certification of cultural expressions as works of indigenous traditional art or handicraft and handmade by natives. The right of use and commercialization of tradition-based arts, crafts and other expressions is also subject to the regulation of each indigenous community, thus recognizing the role of customary law.

As regards, exceptions and limitations to the protection of TCEs, Panama law allows exemptions for folkloric dance groups (Panama Law, Article 16) and certain small non-indigenous artisans. Panama also has exercised the right to restrict “borrowing” and incidental uses of its cultural expressions. Use of registers is also envisaged in the
Panama law to protect the collective rights of the indigenous people in their cultural expressions. However, caution is also exercised in stopping short of full disclosure. Panama also uses criminal sanctions against cases of "passing off", civil action in the form of imposition of fines and also takes recourse to customs legislation and industrial property legislation to give fuller protection to its cultural expressions. Unfortunately, despite these laudable *sui generis* solutions formulated in Philippines and Panama, there is little evidence to test their use and effectiveness.

In contrast, a study of existing legislations in the US, show a preponderance of the use of unfair competition law to protect cultural expressions as seen in the 1999 IACA. This is probably owing to the fact that the US has admitted that concerns for authenticity in "Indian-made" products and the related commercial interests are high. Protection of the spiritual and religious dimensions to the cultural life of Native Americans finds expression in the 1990 Native Americans Graves Protection and Repatriation Act. The importance of "preservation" strategies for protecting expressions of folklore is also acknowledged in the creation of the American Folklife Centre that helps provide access to its rich archives, subject to the permission of "peoples whose lives, ideas and creativity are documented". However, probing further, it is revealed that it is not always easy to get individual names of people who could give "permission" in these collective works. The US also employs a combination of civil and criminal law remedies to ensure "truth in marketing" of Indian made products. It must be emphasized that the restrictive definition of what constitutes "Indian-made" helps prevent illicit and inauthentic products from being sold within the country. Furthermore, under US law, a proposed trademark may be refused registration or cancelled (at any time) if the mark consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe. This use of trademarks as a defensive tool to protect against cultural and religious offence may potentially recognize the rights of other indigenous and traditional groups worldwide.

Turning to the Bangui Agreement of the OAPI, a preference for copyright-form of protection for both expressions of folklore and its derivatives is seen. Folklore in the
public domain can be accessed subject to payment of royalties to the national collective rights administration. Such royalty payments are to be devoted to welfare and cultural purposes. The Bangui Agreement also requires the setting up of administrative bodies for offering consultation for the protection, safeguard and promotion of cultural heritage and endorses the use of “lists.” The Bangui Agreement, unlike the Panama and Philippines’ sui generis law offers protection to other countries on the basis of the principle of national treatment and not reciprocity.

VI. Other Sui Generis Options

It has been suggested that efforts at creating new legal instruments for the protection of cultural products require a thorough assessment of existing national legislations of affected countries. The assessment must cover legal provisions for copyright, protection of works of art, performances, rights of authors and interpreters of traditional folk culture and folklore. It should assess whether the enacted laws are actually enforced and should take into account the global information dissemination infrastructure and the concomitant protection of relevant databases. Some have recommended (Ondrusova 2004: 108-109) that for technologies related to traditional handicrafts, art and other creative forms, the focus, with the help of international organizations like UNCTAD, should be on inter alia: developing and regularly updating an identification system for traditional folk culture and folklore; establishment of organizations for public administration of copyright and neighbouring rights which would deal with expressions of traditional folk culture and folklore, or, if necessary, extending the powers of existing organizations to cover this area as well; raising awareness amongst the creators of traditional folk culture (folk artists, performers, artisans, etc.) of their rights in the area of intellectual property; support for museum and archives holding traditional folk culture and folklore collections and databases in their efforts to monitor how the collections and databases are used for present interpretation or for production purposes in their respective countries; encouraging efforts for protection of in situ collections and databases against abuse and devaluation while emphasizing their cultural and educational value to the general public; and encouraging educational institutions, mainly schools, to introduce classes in
traditional folk culture and folklore as a means for developing tolerance and understanding.

VII. Summary

Countries in the Asian and Pacific region have gone on record to state that the existing IPR regime is inadequate to address all the issues involved in the protection of traditional knowledge and folklore. Few countries, like Sri Lanka and some of the African countries that have copyright protection for TCEs, have been unable to reign in unauthorized commercialization everywhere in their countries. Instead, some countries have proposed modifications to existing intellectual property standards to provide protection for TCEs with specific reference to protecting the style, production methods and other specific characteristics of works of art and textile and three-dimensional craft; streamlining of industrial design protection systems embodied in national and regional laws and inclining them towards procedures involving a deposit or registration without any novelty examination or anticipation search; incorporation of customary law perhaps for the purpose of recognizing traditional forms of ownership within the context of the formal intellectual property system; as also, the recognition of collective rights of creation, ownership and custodianship of traditional knowledge and related expressions.

Even as efforts to modify IPRs are ongoing, some countries have chosen to frame *sui generis* laws for the purpose of protecting their TCEs. Few countries have referred to the Tunis Model Law and the 1982 WIPO-UNESCO Model Provisions for the protection of their TCEs. The overbroad emphasis on access, lack of protection for derivative works and a lack of a holistic understanding of what constitute “expressions of folklore” are some of the reasons for developing countries to deviate from these “model” laws and create their own legislation in conformity with their local needs.

In conclusion, it can be said that though the scope for modifications in existing IP law for protecting TCEs appear increasingly slim, yet the options within IP law and elsewhere remain open for use in protecting different categories of TCEs. Due to the wide variety of traditions and cultures, there can be no universal guidelines for protecting various art forms against inappropriate commercialization. However, several principles
and mechanisms for safeguarding these traditions and cultures can be developed. The problem of protecting pre-existing TCEs has been addressed by existing *sui generis* law such as in Panama (2000) and the Pacific Regional Framework (2002). In this regard, WIPO's ongoing efforts at norm-setting may perhaps result in prescriptions for the protection of TCEs. Nonetheless, today, developing countries have a menu of options to select from and possibly put in order things at home. Creating *sui generis* protection for TCEs would be only one step in the process. Furthermore, it must be remembered that creating *sui generis* laws for protecting TCEs should not result in a failure to access other existing laws—both IP and otherwise.

Other recommendations for the protection of TCEs include the need to develop and regularly update an identification system for traditional folk culture and folklore; establishment of organizations for public administration of copyright and neighbouring rights which would deal with TCEs, or, if necessary, extending the powers of existing organizations to cover this area as well; raising awareness amongst the creators of traditional folk culture (folk artists, performers, artisans, etc.) of their rights in the area of intellectual property; support for museum and archives holding traditional folk culture and folklore collections and databases; encouraging efforts for protection of *in situ* collections and databases against abuse and devaluation while emphasizing their cultural and educational value to the general public; and encouraging educational institutions, mainly schools, to introduce classes in traditional folk culture and folklore.
**TABLE I**

National Experiences in Protection of TK through Traditional IP Law
(* represents possibilities identified by these countries for protection of TK in national law)

<table>
<thead>
<tr>
<th>Country</th>
<th>Copyright and Related Rights</th>
<th>Patent Law</th>
<th>Plant Variety Protection</th>
<th>Trademark Law including Certification and Collective Marks</th>
<th>Geographical Indications</th>
<th>Industrial Design</th>
<th>Trade Secret (unfair competition) Law</th>
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** For summary of few country comments on needs and expectations for protection of TCEs see Table II.
TABLE II
Regional Representation of Some Needs and Expectations in the Protection of Traditional Cultural Expressions (TCEs)/Expressions of Folklore (EoF)

<table>
<thead>
<tr>
<th>Countries</th>
<th>Terminological Preferences for EoF</th>
<th>Subject-matter for Protection</th>
<th>Nature and Objectives for IP Protection</th>
<th>Beneficiaries of Protection: Nation, Community/Individual</th>
<th>Exceptions and Limitations</th>
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<tr>
<td>Australia</td>
<td>“Arts and cultural expressions”</td>
<td>For identifying scope of TCEs general characteristics of TCEs as recognized by indigenous communities should be considered.</td>
<td>IP protection of EoF inappropriate since it is seen as part of the national cultural heritage and the public domain. However, traditional IP law is flexible enough to provide protection to EoF.</td>
<td>Communal ownership not recognized under copyright law; fiduciary duty upon “author” to protect aboriginal works possible.</td>
<td>Exceptions in national and international IP law should be retained. Use, even if with “gainful intent” within traditional and customary context should be allowed.</td>
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<td>Canada</td>
<td>Preference for IP terms like “artistic work”, “dramatic work,” “collective work”</td>
<td>Terminological clarity in meaning of “traditional”, “community” and objectives of protection will help identify scope of subject-matter.</td>
<td>IP protection of EoF inappropriate since it is seen as part of the national cultural heritage and the public domain. Need for balance between IP protection and challenges of multiculturalism and cultural diversity.</td>
<td>Community, individual, clan or society may be acknowledged as source of TCEs.</td>
<td>Premature to judge issue of exceptions before subject-matter and nature of protection is worked out. Impact on creators, inventors, users and broader public interest should be considered.</td>
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| Colombia | “indigenous art” | Without restriction on mode or form of expression, subject-matter must include works developed in the traditional or customary context of creative indigenous communities, reflecting distinctive cultural identity and heritage. | IP law does not protect TCEs collectively created and owned. Fundamental issue relates to prior informed consent (PIC) for use and exploitation and benefit-sharing with community. Commercialization of secret/sacred TCEs also to be prevented. Sui generis rights to protect cultural expressions and TK in general required. | Works of unknown authors, “indigenous art” part of cultural heritage. | Protection should not affect use in habitual and traditional context. |

<p>| India | “Folklore” or “traditional knowledge”- encompassing folklore and folk medicine. | Should include traditional agricultural practices; tangible products like handicrafts based on EoF. | Against “commercial exploitation” by members outside the community of existing folk knowledge or new products based on folk knowledge. Systems of legal protection of TK should be complementary and mutually supportive with TCEs. Use of IP law and sui generis mechanisms for protection need not be mutually exclusive. Database protection of TK to avoid misappropriation must be considered. | Customary law treats folklore as property of local communities. In case of folklore that is “widespread”, treated as property of nation. | Exceptions must exist subject to safeguards against misuse and unfair commercial advantage. |</p>
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<th>Country</th>
<th>Scope of subject-matter dependant on meaning of &quot;traditional&quot;.</th>
<th>Establishment of an international treaty system of sui generis protection is the main alternative.</th>
<th>Rights and interests vested in community.</th>
<th>Use in education, science and public health according to national law; use by members of a community in traditional and customary context.</th>
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<tr>
<td>Indonesia</td>
<td>Preference for IP terms like &quot;artistic work&quot;, &quot;dramatic work,&quot; &quot;collective work,&quot;</td>
<td>IPRs mainly for purpose of incentivizing creativity. Economic benefits through IPRs for only one generation unfair since TCEs/EoF passed on through generations. IPRs may unduly restrict &quot;public domain&quot;</td>
<td>No clear idea. Identification of &quot;community&quot; or &quot;group&quot; linked to TCEs is a problem. State acting in proxy for indigenous peoples is also questionable.</td>
<td>Customary law or State could allow use on fulfillment of conditions for PIC, disclosure of origin and benefit-sharing.</td>
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<td>Japan</td>
<td>Use of term &quot;folklore&quot; might be considered offensive or inappropriate or in a number of cultures. EoF must be considered as a subset of the general term TK.</td>
<td>Must also include items like human remains and languages.</td>
<td>Exclusive property rights in TCEs/EoF and IP-type mechanism to be coordinated with non-proprietary and non-IP measures. Key focus while considering new solutions must be on their effect on traditional decision-making structures of indigenous peoples and local communities.</td>
<td>Discussion of issue only possible after assessment of implication on Member States, indigenous peoples and local communities.</td>
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<td>New Zealand</td>
<td>&quot;Expressions of folklore.&quot; Prefer holistic view of TK.</td>
<td>TK comprises both tangible and intangible EoF; inventions that include genetic resources, medicinal plants</td>
<td>Positive legal protection of collective IPRs in TK desirable through sui generis measures.</td>
<td>Local or indigenous community.</td>
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<td>Panama</td>
<td>&quot;Works of unknown authors&quot; Should include traditional medicines and medicinal practices; and indigenous knowledge</td>
<td>Existing IP law not sufficient to protect TCEs/EoF created and sustained by communities.</td>
<td></td>
<td>Use in teaching and education, group dance and display of folklore by indigenous peoples.</td>
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and seeds; knowledge of features of flora and fauna; designs, visual arts and performances. Defensive protection of TK alone not sufficient.

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<tr>
<th>Russian Federation</th>
<th>Commonly uses &quot;work of folk arts&quot;. Exhaustive list to be avoided. Oral folk arts like fairy tales, proverbs and legends; musical works like folk songs and instrumental music; folk dances; games; sculptures; decorative arts. Exclusive rights in TCEs through IPRs not appropriate owing to practical problems in identifying beneficiaries. Objective of honoring the dignity and labour of &quot;authors&quot; of &quot;works of folk art&quot; better served through non-proprietary moral rights. Some expressions can be &quot;cultural property of the peoples of the Russian Federation; others of &quot;national importance&quot; must belong to the nation. Practical problems of identifying beneficiaries in IP law exist. Exceptions to be identified after clarification on aims of protection and unlawful acts.</th>
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<td>South Africa</td>
<td>&quot;Traditional knowledge&quot; must include technical know how and spirituality. Objective of IP protection must include sustainable development, prevention of misappropriation and unauthorized use by persons outside the community. IPR applications on existing indigenous knowledge should be specifically removed from IPR protection. Recognition of customary laws and protocols that govern indigenous knowledge is important. Indigenous, traditional and local community directly linked to indigenous knowledge must be first beneficiary. Proposal for exceptions being worked out.</td>
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In national law, the United States uses term "Indian products"; "official signia of the Native American tribes". Definition of TCEs requires delineation from TK and clear identification of subject-matter.

Subject matter of TCEs may cover both tangible and intangible elements, including stories, songs, dances and baskets.

While considering IP protection, balance required with freedom of expression and flow of information.

Defining "beneficiaries" difficult since individuals and groups readily cross national and geographic boundaries.

Premature to discuss exceptions before obtaining consensus on nature of protection.

*Sources: WIPO Documents: WIPO/GRTKF/IC/3/10, 2002; WIPO/GRTKF/IC/3/17, 2002; WIPO/GRTKF/IC/7/3, 2004; WIPO/GRTKF/IC/11/4(a), 2007; WIPO/GRTKF/IC/12/4(b), 2008; and India’s Response to WIPO Questionnaire on National Experiences on Protection of EoF (WIPO/GRTKF/IC/27/1, 2001)