CHAPTER III

TRADITIONAL CULTURAL EXPRESSIONS:
NORMATIVE AND POLICY PERSPECTIVES

I. Introduction

Traditional cultural expressions (TCEs) are valuable cultural assets of those communities who usually maintain, practice and develop them. Traditional music, designs, rituals, performances, oral narratives, symbols and signs communicate a community’s beliefs and values, embody skills and know-how, reflect a community’s history and define its cultural identity. They can also be economic assets – they are creations and innovations that can, if so wished, be traded or licensed for income-generation and economic development. They may also serve as an inspiration to other creators and innovators who can adapt the traditional expressions and derive new creations and innovations. This dual nature of these elements of a community’s cultural heritage - cultural and economic – raises a number of policy issues related to the protection, promotion and preservation of these elements of cultural heritage.

Much like the misappropriation of traditional knowledge, as seen in the previous chapter, expressions of folklore have also been removed from their traditional context, commercialized without adequate attribution and sensitivity towards the communities they belong to. This some would argue is inevitable considering the fact that cultures and traditions are naturally impacted by the forces of globalization. However oftentimes the rapid development of technology and availability of the new ways of using both literary and artistic works and expressions of folklore in audiovisual productions, phonograms,

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1 The term traditional cultural expressions and expressions of folklore are used interchangeably in the course of this study. Though folklore is commonly believed to be the oral literature that has been handed down from generation to generation through oral tradition, scholars have also stressed the wider scope of folklore to include a non-exhaustive list of folk religion, folk medicine, folk architecture, folk cookery, recreation, play, rituals, folk arts and crafts (Pasayat 1998: 13; Dorson 1972). Folklore has also been described as “the mirror of the people” and found useful for various purposes including inter alia social protest, amusement, means to codify belief and enforce morality (Islam 1998: 308).
their mass reproduction, broadcasting, cable distribution, and so on, have multiplied abuses. Folklore is commercialized without due respect for the cultural and economic interests of the communities in which it originates. Furthermore, in order to better adapt it to the needs of the market, it is often distorted or mutilated. At the same time, no share of the returns from its exploitation is conceded to the communities who have developed and maintained it.

Studies today show that cultural heritage is not only often a source of creativity and innovation but also that the adequate and appropriate protection of expressions and manifestations of traditional cultures can contribute to a traditional creator’s prosperity or a community’s economic development (Finger and Schuler 2004). These types of knowledge assets have largely been overlooked in the IP community, until recently. The UNESCO in its Study on International Flows of Cultural Goods (2000) noted that tradition-based innovations and creations, which are important parts of a community’s heritage and cultural patrimony, can also act as inputs into other markets, such as entertainment, art, tourism, architecture, and fashion. Yet, even as the rapid globalization of intellectual property rights (IPRs) minimum standards has led to an ever increasing appropriation of the “intellectual commons,” the traditional knowledge of indigenous, local and traditional communities continues to be disregarded by the international community. The potential for exploitation of TK and associated expressions of folklore is believed to be exacerbated by the “unfair” and “discriminatory” treatment of TK and TCEs within existing IPR law (Dutfield 2000: 279).

Since IPRs are derived from Western, especially Continental, "authors' rights" principles, the international copyright regime that governs relations between developed and developing nations inevitably exhibits the same biases. Moreover the exclusive vision of authorship contained therein has been internalized in many developing countries as part of their postcolonial legal legacy. As a consequence, while the traditional, folkloric, and collaborative productions of these countries circulate internationally, becoming subject to appropriation by the culture industries of the developed world, they go for the most part unprotected by both national laws in their countries of origin and the international copyright system. This absence of protection implies, in the first instance, that the creators or cultural custodians of many works and traditions realize no financial
benefit from their exploitation, no matter how profitable or widespread. Perhaps more to
the point, it means that those creators and custodians have no say—and certainly no veto-
over the ways and means by which such exploitation occurs (Woodmansee and Jaszi 1994).

Misappropriation of expressions of folklore has been witnessed across continents
and in varied forms. In some cases, sacred paintings have been copied by those
unauthorized to do the same and reproduced on material that decontextualized the
original symbol. Commercialization of traditional motifs under false claims of originality
is considered to be another problem. Some of the numerous cases of exploitation of TCEs
include (WIPO, Consolidated Analysis, WIPO/GRTKF/IC/5/3, Annex: 30-34):

i. Paintings made by Australian Indigenous persons have been reproduced by
non-indigenous persons on carpets [M*, Payunka Marika & Ors. vs. Indofurn,
(1994) 30 IPR 209], printed clothing fabrics [Bulun Bulun vs. R & T Textiles
Pty Ltd, (1998)157 ALR 193], T-shirts, dresses and other garments, and
greeting cards and have been subsequently distributed and offered for sale

ii. Demand for World music that incorporates elements of indigenous music style
into contemporary music has also led to issues of copyright protection and
misappropriation of cultural works. Although sometimes legitimate and
negotiated agreements are made between the musical groups, much of this
kind of music is recorded from live performances of Indigenous and
traditional music, often without the knowledge of the performers. Perhaps the
most publicized example would be the vastly successful “Deep Forest” CD
produced in 1992, which fused digital samples of music from the Ghana, the
Solomon Islands and African ‘pygmy’ communities with ‘techno-house’
dance rhythms (Sandler 2001: 58-63; Mills 1996).

iii. Misappropriation of TCEs also includes unauthorized use, disclosure and
reproduction of sacred/secret material such as the sacred Coroma textiles of
Bolivia (Lobo 1991:40), as well as sacred songs which can be only performed
in a particular place and for a specified purpose (Sandler 2001:41-44).
iv. Cultural concerns and legal questions have also been raised over the commercial use of originally indigenous words by non-indigenous entities, for commercial purposes, such as ‘ayurveda,’ ‘cherokee,’ ‘pontiac,’ ‘tomahawk,’ ‘rooibos,’ (Silver 2002) ‘siddhi,’ ‘vastu,’ (Times News Network 2002) and ‘yoga.’

Thus it can be seen that the ways in which different forms of TCEs are exploited around the world are varied. These examples clearly show what communities and other stakeholders need (WIPO Draft Gap TCEs Analysis, WIPO/GRTKF/IC/13/4(b) rev., 2008: para. 27):

i. Protection of TCEs against unauthorized use, especially commercial use;
ii. Prevention of insulting, derogatory and/or culturally and spiritually offensive uses of TCEs;
iii. Prevention of the appropriation of the reputation or distinctive character of TCEs by use of misleading or false indications;
iv. Prevention of the failure to acknowledge source when TCEs are used;
v. Defensive protection of TCEs against the grant of IPRs over TCEs or adaptations thereof; and,
vi. Unauthorized disclosure of confidential or secret TCEs.

II. TCEs: Search for a Definition

There is no internationally settled or accepted definition of a “traditional cultural expression” or “expression of folklore” (both terms will be used interchangeably and abbreviated to “TCEs”). There are, however, many definitions in national and regional laws and in international instruments (WIPO/GRTKF/IC/3/9, 2002; WIPO/GRTKF/IC/9/INF/4, 2006). The draft provisions being discussed by the WIPO Intergovernmental Committee (the “TCE Draft Provisions”) also contain a draft description of TCEs (WIPO/GRTKF/IC/12/4(c), 2007, draft article 1). Defining the subject matter of protection has long been one of the most fundamental challenges...
associated with the protection of TCEs. How TCEs are defined can determine the extent to which and how they may be protected by IP.

For purposes of this analysis, two points need to be stressed. First, TCEs may comprise truly old and pre-existing materials which were once developed by "authors unknown" through to the most recent and contemporary expressions of traditional cultures, with an infinite number of incremental and evolutionary adaptations, imitations, revitalizations, revivals and recreations in between. A distinction may, therefore, be made between pre-existing TCEs (perhaps "TCEs stricto sensu") and contemporary interpretations and adaptations of them. Second, while traditional creativity is a dynamic interplay between collective and individual creativity, the defining characteristic of "traditional" creations is that they identify a living tradition and a community that still bears and practices it. Even where an individual has developed a tradition-based creation within his or her customary context, the creation is not "owned" by the individual but falls within a shared sense of communal responsibility, identity and custodianship. This is what marks such a creation as "traditional". TCEs might well have had an author at some stage, but that author is now unknown or simply not possible to locate.

The search for an international mechanism to protect "folklore" from acts of misappropriation is not of a recent origin. Some of the earliest attempts to protect folklore can be traced to certain national copyright laws in the 1960s (WIPO FFM Report 2001). These included copyright laws in Tunisia in 1967, Bolivia in 1968, and Chile and Morocco in 1970. At the WIPO Stockholm Conference of 1967, India proposed to include folklore as one category of protected works in article 2.1 of the Berne Convention. However, Member States could not agree on this approach. Finally, article 15(4) was included, allowing countries to task a national authority with representing authors of anonymous works (Ricketson 1987: 314). However, the adoption of a binding international instrument within the UNESCO or the WIPO failed, in contrast to efforts related to tangible cultural heritage that resulted in few international conventions within UNESCO. Yet, work on the subject within the two organizations continued. In 1976, at a meeting organized jointly by WIPO and UNESCO, a panel of experts drafted the so-called "Tunis Model Law on Copyright for Developing Countries" (UNESCO/WIPO 1976) which affords protection to folklore by extending traditional copyright regimes.
through perpetual protection, exemption from the fixation requirement, and introduction of moral rights to prevent destruction and desecration. The rights are vested in a competent authority (Berryman 1994: 313; Githaiga 1998, § 68).

In 1982, WIPO and UNESCO jointly adopted "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions" ("WIPO Model Provisions"; WIPO 1982). Even after UNESCO’s adoption of the 1989 "Recommendation on the Safeguarding of Folklore" (UNESCO 1989), at present several governments have again asked WIPO to sponsor a treaty to protect expressions of folklore. Accordingly, at its 26th session, in 2000, the WIPO General Assembly established a special body- the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, to facilitate activities among member states on intellectual property (IP) issues related to inter alia folklore.

Efforts to identify the definitional contours of expressions of folklore at the WIPO Intergovernmental Committee has revealed the interest of certain developed countries like the EC for "clear definition of the object of protection" as "a prerequisite to engaging further in discussions in this area" (WIPO/GRTKF/IC/12/4(b), 2008, Annex, page 20). The UNESCO Recommendation defines folklore or "traditional and popular culture" as the:

"totality of tradition-based creations of a cultural community, expressed by a group or individuals and recognized as reflecting the expectations of a community in so far as they reflect its cultural and social identity" (UNESCO 1989, § A).

It encompasses a broad range of objects, such as folk tales, songs, instrumental music, dances, plays, artistic forms, rituals, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets, costumes, musical instruments, and architectural forms. In general, the UNESCO definition for expressions of folklore (Section 2, UNESCO Model Provisions)

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2 The International Publishers Association (IPA) also expressed the need for a clear and concise definition of the protected subject-matter is required, so as to enable the publication of works with economic and legal certainty.
has been found unsatisfactory by developing countries, owing to its disregard for a more holistic treatment of traditional knowledge and failure to acknowledge adequately the contributions of indigenous and related communities (Kutty, WIPO/GRTKF/STUDY/1, 2002: 10).

Countries with a high indigenous population like New Zealand have asserted that attempts to define TK and TCEs that should be subject to protection must be guided by certain commonly understood facts such as: indigenous knowledge is a subset of TK; TCEs are the manifestation of TK; TK and TCEs are embedded in cultural systems of intergenerational transmission and preservation, which each community has developed and maintained in its local cultural and physical environment and that TCEs cannot be dissociated from the TK itself or from the cultural and physical environment from which they emerged (WIPO/GRTKF/IC/12/4(a), 2007, Annex: 28-9).

Developing countries have demanded a more comprehensive understanding of TCEs while considering its definitional aspects, stating that, "[t]he subject matter should be all that consists in the elements belonging to the traditional cultural heritage, developed and maintained by a community or a people within a country or by individuals, and that reflect the traditional cultural expressions of said community or people" (WIPO/GRTKF/IC/11/4(a), 2007, Annex: 9). Developing countries have also emphasized the overlap in the subject-matter of protection in TK and TCEs. They have also pointed to the possible links between the concept of tangible and intangible cultural heritage with the definition of TCEs.

Currently, in the search for a definition for TCEs or expressions of folklore, WIPO has recently listed some common elements that appear in definitions of TCEs/EoF in the national laws of Member States (WIPO/GRTKF/IC/6/3, 2003, para. 50). These are:

(i) Inter and intra-generational transfer, either orally or by imitation;

(ii) Reflects a community’s cultural and social identity;

(iii) Consists of characteristic elements of a community’s heritage;
(iv) Is made by 'authors unknown' and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so; and

(v) Is constantly evolving, developing and being recreated within the community.

TCEs therefore include a wide range of tangible, intangible and mixed forms of creative expression. The description of traditional cultural expressions in the WIPO Draft Provisions on Protection of TCEs contains a non exhaustive list of more than thirty five expressions clustered into four categories. These include both tangible and intangible expressions. The draft TCE provisions leave the specific choice of terms to denote the protected subject matter to be determined within national and regional frameworks. Some of the expressions identified in the draft TCEs provisions (draft article 1, WIPO/GRTKF/IC/12/4(c), 2007) are:

i. Verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;

ii. Musical expressions, such as songs and instrumental music;

iii. Expressions by action, such as dances, plays, ceremonies, rituals and other performances, whether or not reduced to a material form; and,

iv. Tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

(aa) the products of creative intellectual activity, including individual and communal creativity;

(bb) characteristic of a community’s cultural and social identity and cultural heritage; and

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.
Previous WIPO documents (WIPO/GRTKF/IC/5/3, 2003; WIPO/GRTFK/IC/6/3, 2003) that have identified and discussed actual examples of the appropriation and misappropriation of TCEs have referred to the exploitation of traditional music and songs, visual art (notably painting), traditional musical instruments, designs and "styles" embodied in handicrafts and other creative arts, performances of TCEs, sacred and secret TCEs, recordings and documentation of TCEs, and indigenous words, names and symbols. These examples demonstrate that the exploitation of TCEs may refer to protection of (i) the creative and distinctive expressions themselves; and/or (ii) the reputation or distinctive character associated with them; or (iii) their method of manufacture (in the case of handicrafts, musical instruments and textiles, for example). Concrete examples falling within the first two categories mentioned, are as follows:

i. literary and artistic productions, such as music and visual art;
ii. performances of TCEs;
iii. designs embodied in handicrafts and other creative arts;
iv. secret TCEs;
v. indigenous and traditional names, words and symbols.

The third category relating to the method of manufacture of TCEs such as crafts, musical instruments and textiles refers more to what is treated as "traditional knowledge" (WIPO, TCE Gap Analysis, WIPO/GRTKF/IC/13/4(b), 2008, para. 14) stricto sensu (TK) in the WIPO Intergovernmental Committee's work.

Having examined the definitional aspects of TCEs we can now look into some policy considerations that need to be borne in mind while protecting TCEs in IP law.

III. Protection of TCEs: Some Policy Considerations

Intellectual property rules are essentially individualistic and express a set of values that place a high premium on the concepts of authorship and innovation, viewed as Eurocentric and alien to the value-systems of many indigenous and local societies (Bellagio Declaration 1993). IPRs are also based on the economic imperative to
encourage creativity and innovation through the protection of economic rights and these may sometimes be contrary to the system of “property” existing in indigenous circles.

According to the Four Directions Council:

“indigenous peoples possess their own locally-specific jurisprudence with respect to the classification of different types of knowledge, proper procedures for acquiring and sharing knowledge, and responsibilities which attach to possessing knowledge” (Dutfield 2000:4).

Furthermore, the reification of culture, possible through the use of IPRs in TCEs, has not been easily accepted, particularly by anthropologists like Marilyn Strathern. Strathern notes that basic cultural understandings sit uneasily within a framework of intellectual property law. Strathern (1999: 169) sums up the Catch-22 situation in which developing countries find themselves. “In the case of cultural property, one of the tests of a group’s claims may be the transmissibility of cultural knowledge over the generations: it is authentic because it can be shown to have been handed on. Intellectual property is claimable precisely because it is not. So dispersal has to be controlled.” Anthropologists also point that cultures lack clear spatial and temporal boundaries and that human beings are members of a society but not “members of” a culture—which is a flexible set of understandings, dispositions, and behavioral scripts, that shape a repertoire or "tool kit" of habits, skills, and styles from which people construct "strategies of action" (Swidler 1986). However, it can be argued that the growing concern with “cultural issues” and the designation of issues as “cultural” in nature, is integrally linked with globalization and the growing hegemony of informational capital. It would be wrong to assume that these concerns are only related to indigenous peoples, rural peoples, or isolated communities (Coombe 2005:16). As Cottier and Panizzon (2004) point out, new intellectual property rights would be insufficient unless they are tied to public policy strategies, and the desire to support cultural traditions and maintaining cultural diversity is certainly emerging as an important issue of international public policy (Drahos 2004).

Thus the possible protection of TCEs raises a number of complex cultural, economic, social and trade-related questions. Some of the relevant considerations highlighted by WIPO for the purpose of identifying a protection regime for TCEs include:
i. the level at which a gap could be or may need to be addressed (the international, regional, national and/or local levels);

ii. the choice of measures to use for addressing the gaps (legislative action, the development of practical tools, capacity-building);

iii. the degree to which the protection of TCE subject matter is under discussion in other international forums and to which extent TCEs are already the object of protection under legal instruments in other policy areas;

iv. policy implications;

v. economic, cultural and social objectives; specific technical and legal questions; and

vi. operational questions related to rights management and compliance.

It has also been suggested in the course of debates in the WIPO Committee that participants may also wish to assess the addressing of gaps in relation to the specific technical and legal questions that have been previously identified as necessary to consider if wishing to establish new forms of protection for TCEs. Some of the recurring issues that have arisen in attempts to protect TCEs include (Collation of Comments on List of Issues, WIPO/GRTKF/IC/11/4(a), 2007):

i. form of protection intended and nature of rights to be granted;

ii. beneficiaries of protection;

iii. exceptions and limitations, if any, that should attach to these rights;

iv. term of protection and requirement of formalities;

v. nature of administration, enforcement procedures and means of dispute resolution; and

vi. treatment of foreign right holders.

III.1. Public Domain and Free Expression

In relation to IP policy, the protection of TCEs could be assessed in relation to the effects such protection would have on the promotion and protection of creativity and innovation as contributions to sustainable economic development, including local and rural community development. Calls for the indefinite protection of TCEs or for the
protection of “style”, for example, are usefully assessed in relation to the core policy
tenets of the relevant IP systems. Furthermore, 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” and
the implications for the “public domain” of protecting TCEs (WIPO
WIPO/GRTKF/IC/5/3, 2003, paras. 22 to 33).

A key policy challenge is coordinating any new protection for TCEs with existing
IP systems. A cardinal principle that runs through international policy in the protection of
TCEs, particularly in IPR law is to distinguish between pre-existing underlying cultural
heritage and traditional culture and contemporary literary and artistic productions created
by current generations of society and based upon or derived from pre-existing cultural
heritage and traditional culture. This distinction affects the scope of IPRs, particularly
copyrights which are generally understood as a “creation of the mind,” a notion that
slowly evolved with the rise of the romantic author, over the course of the eighteenth
century. Under the ethos of Romanticism, literature began to be seen as the product of an
individuals’s private thoughts rather than the transference of ideas that were already in
the public domain (Woodmansee 1984: 434). The public domain refers to elements of IP
that are ineligible for private ownership and the contents of which are available for use by
any member of the public (Litman cited in Bragdon 2002). Nevertheless, consensus on
what constitutes the “public domain” has remained elusive. While some commentators
have stated that there may well be many public domains (Lange 2003: 483), others
believe that the public domain is that “which is not intellectual property” (Samuels 1993).
Indeed, scholars like Dutfield (2000: 285) assert that traditional knowledge is in the
private domain of native peoples and traditional communities and the problem in the
misappropriation and piracy of TK in general is a problem with IPRs failing to respect
these “other private domains”.

Proposals for the protection of cultural forms in the public domain have a
tendency to annoy many developed country scholars who associate progressive positions
on most copyright and trademark issues with the principle of fair use and the First
Amendment (Brown 1998: 198). It is argued that the public domain character of cultural
heritage is invaluable and that it serves several of the objectives associated with the
safeguarding and preservation of cultural heritage, a denial of which would affect its renewal and survival (Uchtenhagen 1993; EC and Canada comments, WIPO/GRTKF/IC/4/3, 2002). It is said that through overprotection of cultural expressions, the public domain would diminish, leaving fewer works to build on. Though the importance of the right to free speech and expression cannot be overemphasized it must be borne in mind, as scholars like Coombe (2005: 6) assert that from an international perspective, freedom of expression is only one of a number of important human rights and that individual rights must be balanced with collective social and cultural rights.

At the other end of the debate are the TCE holders and practitioners who question whether the public domain status of cultural heritage offers the greatest opportunities for creation and development. The policy question raised here is whether historical materials in the public domain should not be afforded protection because they are not recent enough. It is argued by these groups that almost everything created has cultural and historic antecedents, and systems should be established that yield benefits to cultural communities from all creation and innovations that draw upon tradition (WIPO Consolidated Analysis, WIPO/GRTKF/IC/5/3, 2003: para. 26).

Various approaches could be taken on these issues. At the one end of the spectrum, one could argue for there being no property rights whatsoever in folklore, so that it is can be freely used by all. Indigenous and traditional persons, as well as non-indigenous and non-traditional persons, would be able to exploit folklore for their own benefit and would, where possible, be able to acquire and exercise copyright in respect of any “new” works based on or inspired. At the other end of the spectrum, there would be exclusive property rights in folklore. Any copyright-type uses of folklore would require prior authorization. Such an approach may also provide that copyright or any other IP rights in creations made from using the folklore would vest in the ‘owners’ of the folklore, not in the creator.

However, there are other options between these two extremes that could perhaps achieve the kind of balance needed. It would seem that a balanced system (WIPO Preliminary Systematic Analysis, WIPO/GRTKF/IC/4/3, 2002: 28) for the protection of
“public domain folklore”, i.e., expressions of folklore not protected by copyright or other IPRs, could:

(i) enable and facilitate access to and the use of expressions of folklore as a basis for further creativity and innovation, whether by members of the relevant cultural community or not;

(ii) in such cases, respect any resulting IP rights of the creators and innovators;

(iii) ensure however that such uses of folklore, particularly commercial uses, are coupled with obligations by the user to acknowledge the source of the folklore, share equitably in any benefits derived from the use of the folklore and not to make derogatory or fallacious uses of the folklore under any circumstances; and,

(iv) notwithstanding the above, protect sacred and secret expressions against all forms of use and commercial exploitation.

In the kind of approach towards a balanced system referred to above, the status of “non-traditional” creations that are in the public domain raises some complex policy questions. However, as discussed in the WIPO FFM Report (2001: 221), it is not clear how traditional creations will be allowed to enjoy a privileged legal status vis a vis other public domain “non traditional” knowledge. Separate IP rules for traditional and non-traditional creations may be difficult to sustain, but this is a policy matter for decision by States (WIPO/GRTKF/IC/4/3, 2002: 30). It should also be noted that, since international treaties dealing with IP may include a national treatment obligation, any specialized regime for the protection of traditional cultural expressions would have to extend beyond local indigenous populations to all foreign nationals with which the country in question has treaty relations. Since national treatment is not necessarily always present, international protection may be determined on the principle of reciprocity.

III.2. Protection of Derivative Works in TCEs

Some of the legal and cultural policy issues relevant to TCEs may depend on whether or not to grant a right of adaptation in respect of TCEs, and on the exceptions and limitations that might be appropriate, as discussed before. An adaptation right applies
to the making of derivative works based on EoF/TCEs: these works may separately qualify for copyright protection as original works. An adaptation right would allow the community or other rights holder to prevent or authorize such a derivative work, or alternatively to receive an equitable remuneration for its use, when the work is derived from their EoF/TCE. If there is no such adaptation right, the community cannot control this use of its cultural materials and traditions. This is the approach of the Model Provisions, 1982, which also provide a wide exception in respect of 'the borrowing of expressions of folklore for creating an original work of an author or authors' (Section 4(1) (iii), Model Provisions 1982). This exception was specifically crafted to allow free development of individual creativity inspired by cultural expressions. The Model Provisions were not intended to hinder in any way the creation and subsequent IP protection of original works based on cultural expressions.

On the other hand, while denying copyright to authors of such derivative works who are not community members might discourage creativity and establish inequities between authors from within communities and those not, an option could be to oblige, through legislation, external authors to acknowledge the community whose traditions were used as a source of inspiration, to share benefits from exploitation of the copyright, and/or to respect some form of moral rights in the underlying traditions used. This is the approach adopted in the Pacific Model of 2002 and in the Draft Provisions on TCEs before the WIPO Committee.

III.3. Beneficiaries of Protection

Scholars have pointed out that the changing nature of international markets based on the revaluation of the potential value of indigenous cultural and intellectual property from developing countries raises significant questions of both ownership and benefits for many people and states (Ostergard et al. 2006: 318). Many stakeholders have emphasized that TCEs/EoF are generally regarded as collectively originated and held, so that any rights and interests in this material should vest in communities rather than individuals. Some of the existing national sui generis laws for the protection of TCEs/EoF provide rights directly to concerned peoples and communities, while others vest rights in a governmental authority. In the latter instance, sometimes, proceeds from the grant of
rights to use the TCEs/EoF are applied towards national heritage, social welfare and culture related programs. The African Group has stated that principles for the protection of TCEs/EoF should recognize the role of the State in the preservation and protection of traditional knowledge and expressions of folklore’ (WIPO/GRTKF/IC/6/12, 2004; Morocco, WIPO/GRTKF/IC/7/15 Prov., 2005: para. 85). However, certain scholars, especially in the context of Africa, have questioned the appropriateness of the State stepping in for communities, indigenous and otherwise (Ostergard et al. 2006: 319).

Draft article 2 of the WIPO Draft Objectives and Principles suggests that measures for the protection of traditional cultural expressions/expressions of folklore should be for the benefit of “the indigenous peoples and traditional and other cultural communities.” The draft further qualifies the beneficiaries and subjects them to twin conditions; namely, those in whom lies “the custody, care and safeguarding of the TCEs/EoF are entrusted in accordance with their customary law and practices; and” who “maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage.”

The issue concerning beneficiaries to protection of TCEs/EoF has been divisive in the deliberations at WIPO. While most developing countries have shown a preference for benefits or rights being awarded to communities, positions regarding the nature of these communities have been diverse. For instance, some participants have identified various possible beneficiaries and owners, including the State and individuals. These include countries like the African Group of countries, Canada, Kyrgyzstan, South Africa, Ghana, Guatemala, Tunisia and Russia. There are few countries that have favoured the community as the sole beneficiary in the protection of TCEs (Thailand comments, WIPO/GRTKF/IC/12/4(b), Annex, at 52). Colombia, is emphatic about protection of TCEs benefiting only communities and not individuals, thus keeping with the nature of TK in general and TCEs in particular [WIPO/GRTKF/IC/12/4(b), Annex, at 53]. Others like the Australian Arts Law Centre have chosen to support “indigenous” or “ancestral people”, with a categorical dissent over the appropriateness of the State holding or exercising rights on behalf of indigenous communities owing to “the histories of States misappropriating benefits owing to indigenous peoples” [WIPO/GRTKF/IC/12/4(b), Annex, at 53]. Still others, like Nigeria have shown support for “the community or the
population of the region” as beneficiaries of protection, with the local government as the owner of these rights [WIPO/GRTKF/IC/12/4(b), 2008, Annex, at 54].

Thus, it can be seen that the nature of the beneficiaries to the protection of TCEs is a highly contested issue within the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore. It must be also pointed out that certain scholars also believe that attempts to identify “communities” are ridden with both theoretical and practical obstacles. Communities are notoriously difficult to define, as the abstract identification is likely to bear little resemblance to the practical social reality at a given space and time (Rose 1999: 194). Adding to the politics of defining a community, which is dynamic and fluid, rather than stable and bounded, is the possibility of divisions within the community. This further complicates issues relating to identification and representation as has been demonstrated in some practical real life case such as the failure to account for all members of the Kani Tribe in benefit-sharing arrangement (Anuradha et al., 2001: 38) struck by the Tropical and Botanical Garden Research Institute in Kerala, India; the case relating to the construction of the Hindmarsh Island Bridge in Australia and the broader concern over indigenous rights (Chapman vs. Luminis Property Limited, FCA 1106 (2001), Von Doussa, J.) The fact that indigenous communities are taken to all fall into the small class, without room for differentiation is believed to be unrealistic. As Helliwell and Hindess (1999: 2) have observed:

“...concepts denoting unity that are both ideational and systematic serve the dual role of inscribing ideational sameness within a population, and difference between one population and another...[however] a stress on homogeneity is at the expense of recognition of the disorder that can also be observed with a society or culture, and of the ideational diversity pertaining between its members”.

Coupled with this possibility of vacuum or alternatively contested representation is the questionable role of the state in guarding interests of indigenous and traditional cultural groups. 3 According to some participant in the WIPO debates, the term “cultural

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communities” is intended to be broad enough to include also the nationals of an entire country, a “nation”, in cases where TCEs/EoF are regarded as “national folklore” and belonging to all of the people of a particular country (Statements, Egypt and Morocco, WIPO/GRTKF/IC/7/15 Prov., 2005: paras. 69 and 85).

IV. IPRs as Protection Tools

IP systems are diverse in nature and in terms of the policy goals they seek to achieve.² Copyright, for example, is the right of an author to control the reproduction of his or her intellectual creations. Copyright does not, however, provide perfect control as it is subject to various exceptions and limitations designed to balance the needs to protect creativity and disseminate information. The protection of trademarks and geographical indications, on the other hand, is aimed at the protection of the goodwill and reputation of tradespersons and their products (Downes 2000: 271) and to prevent the unauthorized use of such signs which is likely to mislead consumers. IP protection may comprise property rights. Where property rights do exist, such as economic rights under copyright, they enable the rights holder either positively to exercise the rights himself, to authorize others to do so (i.e., the right can be licensed), and/or to prevent others from doing so. IP protection does not necessarily comprise the grant of property rights – for example, moral rights under copyright provide control over how a work is used, rather than whether or not it may be used, in some cases even after the expiry of the economic rights. Compulsory (non-voluntary) licenses in copyright similarly allow regulation of how a work is used and for the payment of an “equitable remuneration” or a “reasonable royalty” (see, for example, Articles 11bis (2) and 13.1 of the Berne Convention, 1971).

A consideration of IP protection for TCEs is distinguishable from the “safeguarding” or “preservation” of cultural heritage, which refer generally to the identification, documentation, transmission, revitalization and promotion of tangible or intangible cultural heritage in order to ensure its maintenance or viability. While

² The TRIPS Agreement in Article 1.2 does not define “intellectual property” but refers to “all categories of intellectual property” that are subject to Sections 1 through 7 of Part II of the TRIPS. These “categories” include: copyright and related rights, trademarks, geographical indications, industrial designs, patents, layout designs of integrated circuits and protection of undisclosed information.
instruments and programs for the preservation and promotion of TCEs as such are valuable and complement the protection of TCEs, the preservation and promotion of TCEs as such are not the focus of the WIPO IGC’s work. That being the case, it must be emphasized that non-IP laws and programs dealing with the safeguarding and promotion of living heritage can play a useful role in complementing laws dealing with IP protection.

IV.1. Global IP Regime

It has been stressed that provisions for the protection of TCEs/EoF adopted at the international level would also have to accommodate legislative and jurisprudential diversity within current national and regional approaches (WIPO/GRTKF/IC/ 7/3, 2004: 6; Kuruk 1999). This is a relatively common approach in the IP field and some of the examples of IP conventions which establish certain general principles and which give scope for wide variation within the laws of the signatories, include the 1961 Rome Convention for the Protection of Performers, Producers of Phonograms, and Broadcasting Organizations (Article 7 & 15); 1971 Convention for the Protection of Producers of Phonograms against Unauthorized Duplication of their Phonograms (Article 3); the 1974 Convention relating to the Distribution of Programme-Carrying Signals transmitted by Satellite, (Article 2); the 1989 Washington Treaty on Intellectual Property in Respect of Integrated Circuits (Article 4); and 1994 TRIPS Agreement (Article 1.1). Thus, even where international obligations create minimum substantive standards for national laws, it is accepted that the choice of legal mechanisms is a matter of national discretion (Samuelson 1999).

Some of the main international IP conventions and treaties that are relevant to the protection of TCEs are:

a) The International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the “Rome Convention”);


d) The Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of their Phonograms, 1971 (the “Phonograms Convention”);

e) The TRIPS Agreement, 1994;

f) The WIPO Copyright Treaty, 1996 (the “WCT, 1996”); and,

g) The WIPO Performances and Phonograms Treaty, 1996 (the “WPPT, 1996”).

IV.2. Copyright Protection for TCEs

IV.2.1. Literary and Artistic Productions

Literary and artistic productions are typically protected by copyright law. The following obligations, provisions and possibilities exist in international copyright law\(^5\) to protect literary and artistic TCEs:

“Original” TCEs

Traditional literary and artistic productions which are sufficiently “original” and of which the author or authors are known, may be protected as copyright works. Originality is a *sine qua non* of copyright protection [Feist Publications, Inc. *vs. Rural Telephone Service Co.*, (1991), 499 U.S. 340] and many traditional and artistic productions may not be considered original. “Originality” is not defined in the relevant international treaties, nor is it generally defined in national laws. It is a matter left for determination by the courts in relation to particular cases. It may be said in general, however, that a work is

\(^5\) At the international level, the Berne Convention, 1971, the TRIPS Agreement, 1994 and the WCT, 1996 contain principles for copyright protection. Since TRIPS incorporates Articles 1-21 of the Berne Convention, it provides copyright protection for the enumerated categories of “literary and artistic works” set forth in the Berne Convention (Article 9, TRIPS). Such protection includes a term of protection of most works of no less than the life of the author plus fifty years (Article 7, Berne Convention) and the right to prohibit the unauthorized reproduction (article 9, Berne Convention), translation (Articles 8 \& 12, Berne Convention), public distribution (Article 11 *bis* of Berne Convention), public display (Article 11 *ter*, Berne Convention) or public performance (ibid.) of protected works.
“original” if there is some degree of intellectual effort involved and it has not been copied from someone else’s work (Palethorpe and Verhulst 2004: 28; Ricketson 1987: 228-234). Though artistic and literary works of indigenous peoples are known to undergo a “slow process of creative development” (Farley 1997: 21) from pre-existing works, its function more as “historical and sacred text,” (ibid.) such works may not be totally out of the purview of copyright protection. The threshold for originality is not very high. Common law jurisdictions support relatively low level of creativity in order to meet the originality requirement. Case law from various jurisdictions, such as Australia [M* and Ors. vs. Indofurn, (1994), 130 A.L.R. 659; Bulun Bulun, 41 I.P.R. 513 (1998)], China (Decision of Beijing Higher People’s Court, Case No. 246, 17 December 2003 in Draft TCE Provisions, WIPO/GRTKF/IC/13/4(b) rev., 2008, Annex: para. 44) and elsewhere (Lucas-Schloetter 2004: 301-304; Srinivas 2007) has confirmed that contemporary expressions of traditional cultures, being adaptations and interpretations inspired by or based upon pre-existing traditional literary and artistic productions, may be protected as copyright works. The protection discussed here is available for a contemporary literary and artistic production that incorporates new elements and in respect of which there is generally a living and identifiable author(s) (WIPO/GRTKF/IC/5/3, 2003 and WIPO/GRTKF/IC/6/3, 2003).

Unpublished or Anonymous TCEs

Works that have not yet been “published” and which are of “unknown authors” who are assumed to be nationals of a country of the Berne Union are protected as copyright works, under Article 15.4 of the Berne Convention, 1971. This Article was introduced into the Berne Convention in 1967 specifically to provide protection to TCEs.

6 For e.g. French case law has had several occasions to pronounce on the protection of creations based on expressions of folklore. In the 1950s, the French judges refused protection on the basis of copyright of a song inspired by French or Canadian folklore on the grounds that the case in question was a slavish copy of a folklore melody without proof of original composition or orchestration-Tribunal de Grande Instance, Seine, 28 March 1957, Revue Internationale du Droit d'Auteur (RIDA) (1957), vol. 16:138; the famous French case relating to the performance of the flamenco folklore in Manitas de Plata, Cour de Cassation, Civil, July 1970, RIDA 1971, vol. 68:210. See also U.S. cases Whithol vs. Wells, 231 F.2d 550, 554 (7th Cir.); Italian Co. Inc. vs. Rossi, N.C., 27 F.2d 1014 (1928) (concerning a song by a Sicilian sailor inspired by Sicilian songs).
National legislation should designate a "competent authority" to represent the author in such cases, and other countries may be notified as to the authority through a written declaration made to the Director General of WIPO. Only one State has so far made such a Declaration, namely India, although some other countries have enacted protection based on Article 15.4. Under Article 7.3 of the Berne Convention, once the work is "lawfully made available to the public," the period of protection will expire after 50 years.

IV.2.2. Database Protection

Collections, compilations and databases of TCEs, whether pre-existing or contemporary, are protected as copyright works as such. The TRIPS Agreement and the WCT are clear that compilations of non-copyright materials can be protected as compilations and databases. In addition, in some jurisdictions, there is special *sui generis* protection for databases, such as in the EU (EC Directive 96/9/EC, article 7; Cardinale 2007).

IV.2.3. Copyright Protection of TCEs: Some Challenges

Even though copyright law seems to afford protection to some of the more contemporary expressions of folklore, there are some serious theoretical hurdles in the way of its use for the protection of TCEs (Ficsor 1998: 216). Some of them may be summarized as follows:

*Originality*

The WIPO has noted that copyright law makes no distinction based on the identity of the author, irrespective of his/her background, whether within or outside the indigenous, traditional or cultural community. In principle what seems like good law, however in practice robs such communities of economic benefits, if any, that accrue from works that have evolved from their cultural and traditional life. In such cases, it has been suggested for the laying down of obligations on "non-indigenous" copyright holders to acknowledge the community and/or share benefits from exploitation of the copyright and/or respect some form of moral rights in the underlying tradition used (WIPO Consolidated Analysis, WIPO/GRTKF/IC/5/3, 2003: para 108).
The issue gets far more complex with unoriginal imitations or mere recreations of pre-existing folklore, which are unlikely to meet the ‘originality’ requirement. An example to demonstrate this problem would be a case in Indonesia involving a decorated wooden mask of Indonesian dancers, of folk creation, manufactured and marketed in a foreign market for commercial gain. It was upon rivalry between two firms involved in such marketing that the case was brought before the court. The court did not recognize the copyright of either firm in the mask upon the ground that it was an artistic creation that belonged to the Indonesian people (Kutty 2003).

An examination of the 1982 Model Provisions; the 2000 Panama law on the subject and the Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 developed by the Pacific Island countries, clearly shows that legal protection for TCEs could be conceived without a strict reference to originality. In this instance, probably to fill in the lacuna that exists presently in copyright law for the purpose of TCEs in the public domain, a sui generis response may prove more efficacious.

Identified Authorship

Authorship is an integral operative of copyright laws. A problem with existing copyright protection lies in the fact that while copyright is based on the identification of the person originating the work, “folklore is distinguished by the fact that tradition is the attribute of a community.” The identifiable author requirement should not however be considered insurmountable in the case of protection of TCEs. Possibilities proffered for attribution of group copyrights include joint authorship, works made for hire and transference of rights.

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7 See Panama’s Special Intellectual Property Regime on Collective Rights of Indigenous Peoples for the Protection and Defense of Their Cultural Identity as their Traditional Knowledge, established by Law No. 20, of June 26, 2000 and regulated by Executive Decree No.12, of March 20, 2001.


9 Joint authorship allows multiple authors of a work to be co-owners of the copyright in that work, provided that; i) the joint authors collaborate in the work’s preparation; ii) the authors intend, at the time the work is
Beyond copyright law, *sui generis* systems recognize the possibility of collective or community rights. The authorization for use of rights vested under these systems are either to be obtained from a competent authority set up by the State or from the concerned community (1982 Model Provisions, Section 10; Tunis Model Law on Copyright, 1976, Section 6; The South Pacific Model Law, 2002, Section 4). Although these possibilities in *sui generis* mechanisms obviate the need to identify an "author," their effectiveness would be dependent on practical considerations such as: organizational capital of communities, their knowledge of and access to the law, the resources they have to manage and enforce their rights, and so on (WIPO, Consolidated Analysis, WIPO/GRTKF/IC/5/3, 2003: para.117).

**Individualistic notions of Ownership**

Copyright confers exclusive, private property rights in individuals. In contrast, the 'ownership' of Aboriginal heritage, is generally governed by a complex system of obligations and artists operate within this system and according to strict traditional rules. The form of control over this heritage by the cultural community is frequently viewed as akin to custodianship, and the cultural expression in question is not a commodity or property but rather representative of the values and interrelations affecting the community. Indigenous authors are considered to have been given the rights to create artworks and use pre-existing designs of a clan or community, subject to complex rules, regulations and responsibilities, similar to usage and management rights, which are essentially communal in nature. At this point it is relevant to recall what the Special

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preparing, that their contributions be merged into "inseparable or interdependent parts of a unitary whole;" and iii) each person's contribution is itself copyrightable. See 17 U.S.C. 201(a) (2000); see also 17 U.S.C. 101 (2000).

10 Work for hire is a work prepared by an employee within the scope of his or her employment. See generally 17 U.S.C. Ch. 2 (2000).

11 Transfer of rights occurs when an individual artist transfers his or her rights to the community as a corporate entity. See generally 17 U.S.C. Ch. 2 (2000); see also U.S. Copyright Office, Circular 9, available at www.copyright.gov/circ/cires/circ09.pdf

12 See also Milpurrurrru vs. Indofurn Ltd., (1994) 130 A. L. R. 659, 663. This case concerned the use of dreaming and creation designs by an Australian carpet company for making carpets in Vietnam. These designs were taken from bark paintings depicting spiritually significant legends of peoples from the Central Arnhem Land, otherwise strictly controlled by Aboriginal law. The court acknowledged that though the plaintiffs, eight Aboriginal artists, could not show actual monetary loss, it awarded damages based upon a
Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities concluded:

"Indigenous peoples do not view their heritage as property at all—that is something which has an owner and is used for the purpose of extracting economic benefits—but in terms of community and individual responsibility... For indigenous peoples, heritage is a bundle of relationships rather than a bundle of economic rights" (Daes 1997: 3).

This tension between private rights of ownership under copyright and communal ownership held by artists and their community was directly addressed in Bulun Bulun vs. R. and T Textiles [41 I.P.R. 513 (1998)]. In this case, Bulun Bulun, an artist belonging to the Ganalbingu clan of Australia, filed a suit alleging infringement of copyright in his work “Magpie Geese and Water Lilies at the Waterhole,” designs of which had appeared on printed clothing fabric. The clan members also joined in the representation, claiming to be beneficiaries of the creation of the artwork by the artist, who they claimed was a trustee on their behalf. The court negated the contention regarding trusteeship, owing to a failure to show its establishment in the instant case. Nevertheless, the court made an interesting addition to Australian jurisprudence in terms of protection of TCEs by placing reliance on the application of fiduciary principles and observed in its obiter dictum, that while the artist was entitled to pursue the exploitation of the artwork for his own benefit, he was still required by reason of fiduciary duty to not take any steps which might harm communal interests of the clans in the artworks (Golvan 1999).

At the level of sui generis systems, the sometimes clear divergence between individual rights and obligations running under customary law, has led to direct references to customary law on matters of protection. 13

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13 See the laws of Panama in 2000, supra n. 7; and the Indigenous People’s Rights Act (Republic Act No. 8371) of October 1997 of the Philippines.
Right of Assignment

Under copyright law, a copyright holder has the right to licence or assign his or her rights to a third party, but under customary rules and regulations, this same right may not be a reality for indigenous copyright holders.\(^{14}\)

Fixation

In some jurisdictions like in the U.K. and U.S., copyright protection requires fixation of material in some form of media and is generally therefore inappropriate for intangible or oral expressions of folklore and traditional cultures, such as tales, dances or songs. Even certain “fixed” expressions like face painting and body painting may not qualify for copyright owing to the same reason. In general, international law affords copyright protection for both oral and written works. Article 2.1 of the Berne Convention \textit{inter alia} protects “lectures, addresses, sermons and other works of the same nature.” The use of the words “of the same nature” may be construed as restricting the range of oral works to those specifically identified. The Convention, however clarifies in Article 2.2 that national laws need not provide that fixation in some material form is a pre-requisite for protection. In fact Spain, France, Germany and other civil law countries in Latin America and elsewhere do not require material fixation to advance copyright protection.\(^{15}\) Thus, it may be argued that an over-emphasis on the fixation requirements may prove to be counterproductive by potentially allowing works of folklore to be taken away from indigenous cultures by persons who seize the initiative of fixing them in a material form.

Determinate term of Protection

Copyright is usually for a limited period of term- subsisting during the lifetime of the

\(^{14}\) The Australian case of \textit{Yumbulul vs. Reserve Bank of Australia}, (1991) 21 I.P.R. 481 is relevant in this regard. This case arose after the Reserve Bank of Australia was licensed by an agent acting for a Mr. Terry Yumbulul to reproduce his design “Morning Star Pole” on a commemorative ten dollar bank note. It is the traditional understanding that the Morning Star Pole is imbued with the power to take the spirits of the dead to the Morning Star, which will return to their ancestral home. Yumbulul came under considerable criticism for allowing the bank to reproduce the design. The case was interesting in so far as the court recognized that the Pole was an original artistic work in which copyright subsisted, although Yumbulul had obtained his authority to create this design only through initiation and revelatory ceremonies in his clan, the Galpu.

\(^{15}\) See also 1982 Model Provisions (none specified); 1976 Tunis Model Law, Section 5bis; Laws of Panama and the South Pacific Model Law, Section 8, all of which do not allow non-fixation to jeopardize protection of work of folklore.
author, and thereafter for another 50\textsuperscript{16} or 70 years, as the case may be, depending upon the jurisdiction.\textsuperscript{17} Such a pre-condition in copyright law fails to address the need of indigenous and traditional communities to protect TCEs in perpetuity. This issue is compounded by the fact that term of protection is linked to the time when the first publication was made, a fact unknown in the case of pre-existing cultural expressions. It must however be noted that indefinite protection is not alien to copyright law. Subject to certain conditions, trademarks and geographical indications enjoy an indefinite period of protection. The 1982 Model Provisions does not provide for any time limit, as also the Panama law and the Model Law of the Pacific Island countries.

Exceptions in Copyright Protection

The “public domain” element of the IP system is criticized and/or disputed by some indigenous communities as a concept not recognized by them. Furthermore, certain specific exceptions and limitations common in copyright law are criticized as inappropriate to TCEs, such as exceptions which allow a sculpture or work of artistic craftsmanship permanently displayed in a public place to be reproduced in photographs, drawings and in other ways without permission (McDonald 1998: 44). Similarly, national copyright laws often allow public archives, libraries and the like to make reproductions of works and keep them available for the public. Indigenous communities have expressed concerns about these kinds of exceptions and limitations.

Furthermore the fair use exception in copyright law allows for parody or pastiche where such re-interpretation is viewed as fair dealing under copyright rules. Thus, a sacred symbol could be used as the ‘inspiration’ for a new work of art without the need

\textsuperscript{16} The Berne Convention stipulates 50 years as the minimum period for protection, and countries are free to protect copyright for longer periods.

\textsuperscript{17} The 50 year term in the Berne Convention is only a minimum term and Member States could in their national laws provide for a longer term (Article 7.6). A country could therefore, in theory, provide for a hundred year or even a thousand year term for works under Article 15.4. However, in international situations, the “comparison of terms” provision in Article 7.7 of the Convention would apply. This means that (i) the duration of protection is governed by the term in the country where protection is claimed, and (ii) however, if the term in that country is longer than the term in the country of origin of the protected work, then the shorter of the terms would apply. In practice, this means that a term longer than the minimum will only apply when both countries have provided for that longer term – if not, the shorter of the terms will apply. Article 20 of the Convention allows parties to enter into special agreements amongst themselves.
for authorization. This is obviously desirable in encouraging and fostering creativity in a general sense, but is sometimes inimical to the needs of many communities whose traditional cultural heritage is employed in this way and, indeed, to the heritage itself (Blake 2002: 15).

**Protection of "Style"**

One of the claims most frequently heard is that the "style" of an indigenous production has been imitated or misappropriated. Copyright and design laws permit 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. Copyright does not preclude others from using the ideas, systems, facts, concepts or information revealed in the author's work (Article 9.2, TRIPS). The rule of idea-expression dichotomy in copyright laid in *Baker vs. Selden*, [(1879)101 U.S. 99], continues to be held to a large extent in other jurisdictions (*R.G. Anand vs. Deluxe Films*, AIR 1978 S.C. 1613). Therefore, even if copyright were to vest in a new tradition-based cultural expression, copyright protection would not per se prevent the traditional "style" of the protected work from being appropriated. Elements of style may of course be protected to the extent that a style incorporates original expression. Further, the law of unfair competition and the common-law tort of passing off might be helpful. These may relate to protection of a style per se, as an object of protection, or to protection against a misleading connotation or representation that is based on the use of a style or distinctive imagery or symbols. It is in fact often the reputation associated with a TCE, as embodied or represented by its distinctive "style", that is the object of misappropriation.

**Defensive Protection**

The question here is whether and how there should be regulation of derivative works created by authors not connected with the traditions and cultural materials they adapted or were inspired by. This discussion can also be applied to traditional designs. As discussed previously, works derived from materials in the public domain can be copyright protected, because a new interpretation, arrangement, adaptation or collection of public domain materials, or even their "re-packaging" in the form of digital enhancement, colorization and the like, can result in a new distinct expression which is sufficiently "original." The originality requirement could be met even by an author who
is not a member of the indigenous and traditional community in which the tradition originated. In this context, indigenous and traditional communities may seek a form of defensive protection to deny or at least restrict the ability of authors not from the relevant community from enjoying copyright in creations derived from the cultural traditions of that community.

Ownership of Recordings and Documentation of TCEs

Insofar as recordings and documentation of TCEs are concerned, including traditional performances, a disadvantage is that the protection described above vests in the producer who need not and is often not a member of the community concerned. The producer will often be an ethnomusicologist, folklorist or other collector. Indigenous peoples and local communities sometimes argue that their IP-related rights and interests, including those under customary and indigenous laws, are not always adequately taken into account when their TCEs are first recorded and documented by folklorists and other fieldworkers or when they are subsequently displayed and made available to the public by museums, archives and other collections.

The activities of folklorists, collectors, fieldworkers, museums and archives are however, extremely important for the preservation, conservation, maintenance and transmission to future generations of intangible and tangible forms of cultural heritage. Cultural institutions also play a valuable educational role. Cultural heritage programs at the international, regional and national levels frequently establish registers, lists and inventories of intangible and tangible cultural heritage as useful tools for identification, promotion and safeguarding. For example, Brazil has established a Registry of Intangible Heritage and the newly adopted International Convention on the Safeguarding of the Intangible Cultural Heritage of UNESCO envisages the establishment of national and international inventories and lists. However, it is not clear to what extent documentation and the establishment of registries, lists and inventories, could play a role in relation to the IP protection of the TCEs. TCEs or EoF are often intangible and orally maintained. This is one of the reasons why the fixation requirement for copyright protection is criticized, and why most sui generis systems do not require fixation. EoF/TCEs are also ‘living,’ constantly being adapted and recreated. Requiring some form of prior
documentation and/or registration may contradict the oral, intangible and ‘living’ nature of many TCEs (TCE Legal Policy and Options, WIPO/GRTKF/IC/6/3, 2004: 43).

This possible impact of publication and documentation efforts demonstrates in a practical way the tensions that can arise between “preservation” and “protection”, as discussed earlier, because the very process of preservation can trigger concerns about lack of protection and can run the risk of unintentionally making TCEs in the “public domain” vulnerable to unwanted exploitation. In fact, scholars like Gopalakrishnan (2002:725) believe that documentation of TK has made the position of developing countries even more vulnerable by taking the “knowledge base that remained within the confines of the community” and “slowly making available for plunder without their knowledge and consent.”

**Shared TCEs**

A significant and recurring problem with regard to the protection of TCEs is locating ownership of TCEs that are shared by more than one community either in the same national territory or in different territories. States have suggested *inter alia* the use in such cases of national and/or international folklore registers and databases, alternative dispute resolution (ADR), systems of registration and notification, collective management and the establishment of dispute-resolution organizations, or maybe combinations of these.\(^{18}\) Certain commentators, such as Kuruk (1999), have suggested that regional systems, institutions and dispute resolution be established and used to deal with these questions, and a Sub-Regional seminar on TCEs/EoF held in Rabat, Morocco in May 2003 recommended *inter alia* that Arab countries who share popular and traditional cultural patrimony should create joint commissions to study and put in place equitable strategies for protection of TCEs/EoF. Existing regional organizations and mechanisms, such as ARIPO and OAPI in Africa, who, together with Zambia, have raised this issue in the WIPO Committee (WIPO/GRTKF/IC/5/15, paras. 48, 50 and 51)

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\(^{18}\) See for example the responses to the WIPO Questionnaire of 2001 of Canada, Colombia, Egypt, Gambia, Indonesia, Jamaica, Kyrgyzstan, Malaysia, Mexico, Romania and the Russian Federation, WIPO/GRTKF/IC/3/10, 2002.
may be important stakeholders in resolving the 'regional folklore' question. This question is tied to broader issue of creating institutional mechanisms, and is also linked closely to the questions of ‘formalities’ and ‘regional and international protection’ (WIPO/GRTKF/IC/7/3, 2004, Annex II: para.48).

Thus it can be seen that concerns over copyright protection are not only a case of “square pegs in round holes” not presenting adequate positive rights, but are also associated with doubts regarding the efficacy of copyright law to provide defensive protection. The fact that copyright law generally allows photographs, drawings, without permission, of copyrighted works such as sculptures in public domain; or for that matter access to TCEs through public archives and libraries raises issues relating to cultural and indigenous rights (Brown 1998: 193-95). Furthermore, since copyright protection does not generally extend to “style” or method of manufacture, method of manufacture and “style” of traditional products are vulnerable to imitation. Copyright thus permits the imitation of non-original elements or underlying ideas or concepts of works, to assure free flow of creativity and development of other works.19 Furthermore, it has also been pointed out that remedies available under current copyright law may not be appropriate to deter infringing use of 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 infringement.

IV.3. Related Rights and TCEs

Recordings of TCEs such as music are protected under “related rights” law. The protection granted to sound recordings of traditional music (and other TCEs such as legends and proverbs) derives from the Rome Convention, 1961, the TRIPS Agreement, 1994 and the WPPT, 1996 addressing “related rights”. The protection vesting in a sound recording provides an indirect protection for the TCEs, and also promotes the

19 The U.S. has in its comments before the WIPO shown that under U.S. law, elements of style may be protected to the extent that a style incorporates original expression. See WIPO Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, “Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore, 4th Sess., December 9 to 17, 2002, WIPO/GRTKF/IC/4/3, 2002.
preservation and promotion of the TCEs. TCEs which were once only transmitted by oral tradition, and therefore unprotected under those national laws that require fixation as a copyright requirement, may be indirectly protected through their fixation in a sound recording. The owners of rights in sound recordings are in effect the producers of the sound recordings, and they enjoy the exclusive rights of reproduction, distribution, rental and making available. They may also enjoy, under Article 12 of the Rome Convention and Article 15 of the WPPT, 1996, an optional right of remuneration in the case of sound recordings published for commercial purposes for broadcasting or communication to the public. This equitable remuneration would be shared with the performers whose performances are recorded. Under Article 15 of the WPPT, performers and producers of phonograms shall enjoy the right to a single equitable remuneration for the direct or indirect use of phonograms published for commercial purposes for broadcasting or for any communication to the public. In this regard, Contracting Parties may establish in their national legislation that the single equitable remuneration shall be claimed from the user by the performer or by the producer of a phonogram or by both. Contracting Parties may enact national legislation that, in the absence of an agreement between the performer and the producer of a phonogram, sets the terms according to which performers and producers of phonograms shall share the single equitable remuneration (Article 15(2), WPPT).

According to an Agreed Statement concerning Article 15 of the WPPT, 1996, producers of sound recordings of TCEs not published for commercial gain may also, under national implementing laws, be granted such a right. This Agreed Statement was adopted specifically to take into account that TCEs are often exploited on a large scale by broadcasting and other forms of communication to the public on the basis of non-commercial recordings, such as ethnographic recordings (WIPO/GRTKF/IC/13/4(b), 2008: para.43).

The ambiguity in the extent of protection of the rights of performers of TCEs under the Rome Convention, 1961, was removed by the WPPT, 1996, which now clearly protects the rights of performers of "expressions of folklore" [Article 2 (a), WPPT]. The WIPO Performances and Phonograms Treaty, adopted on December 20, 1996, is the first international text that contains binding obligations on folklore. Member states have to
protect performers of “expressions of folklore” without providing a definition of the term. As of 2008, sixty seven countries are Contracting Parties to WPPT compared to 87 to the Rome Convention. Apart from several Eastern European states, the United States and Japan are the only industrial countries that have ratified the WPPT (Wuger 2004:197). The protection provided by the WPPT, 1996 encompasses moral rights (Article 5), various exclusive economic rights in their unfixed performances (Article 6) and the optional right of equitable remuneration in cases where the performance is recorded in a sound recording that is published for commercial purposes, as referred to above. The Agreed Statement concerning Article 15 of the WPPT, 1996 also applies to performers.

Performers’ rights are limited in time to at least 50 years from the time that the performance was fixed in a sound recording. If the performance is not fixed (such as a live performance), term is not relevant because protection can only be in respect of simultaneous acts (Articles 5 and 6, WPPT, 1996). It might be said that performances of TCEs are extensively protected under international related rights laws or at least on par with other performances; the actual extent of this protection at the national level depends on the extent to which and how countries have ratified and implemented the WPPT, 1996 (WIPO, Survey on Implementation of Provisions of the WCT and the WPPT, 2003; Lucas-Schloetter 2004: 304-305).

Some of the shortcomings in the protection of performers’ rights include the following (WIPO Draft TCE Gap Analysis, 12th Sess., 2008: 21):

a) the protection is for the benefit of the performer of the TCE, and not the relevant community, especially in cases where the performer is not a member of that community. Where the performer is from the same community then it is more likely that that the community will benefit directly from this protection;

b) only aural performances, or the aural aspect of an audiovisual performance, are protected under the WPPT, 1996. This applies to all performances, not merely performances of TCEs. The possible extension of the WPPT to audiovisual performances has been under discussion by WIPO’s Member States since the WPPT was adopted in 1996;
c) performers' rights are limited in the audiovisual sector (again, generally, not merely with respect to TCEs). Under Article 19 of the Rome Convention, 1961, once a performer has consented to the inclusion of his performance in a visual or audiovisual fixation, the rights in Article 7 of the Convention "shall have no further application". This means that aside from the fixation right, performers' rights are limited in the audiovisual sector; and

d) performers' rights are time limited to, at least, 50 years in cases where the performance is fixed in a sound recording. Term is not relevant to unfixed performances. The question of term of protection may, therefore, not be considered a "gap" as such.

IV.4. TCEs and Design Protection

Protection of expressions of folklore is also possible to some extent through design protection. Design laws applies to two or three-dimensional with artistic qualities and intended for industrial purposes. Nothing excludes expressions of folklore from such protection a priori (Palethorpe and Verhulst 2000, 3.6.2.1), but it clearly does not cover all of them. Two criteria are important for design protection: the first, novelty and the second, originality. These requirements are similar to copyright protection and therefore some folkloric designs that have shown incremental development in a community setting may fail to comply with the necessary requirements for design protection. Traditional designs that are more contemporary adaptations of earlier traditional designs would qualify for protection as industrial designs and could be registered as such as is seen in the examples cited from China and Kazakhstan (WIPO/GRTKF/IC/5/3, 2003). Typically, design protection extends anywhere from 10-25 years depending upon the number of times renewal has been applied for. This requirement for formal renewal of design protection and the fees thereof can act as a practical hindrance in the way of indigenous and traditional communities (Janke 2003: 72). Study of design protection of Australian aboriginal expressions of folklore has also revealed limits in design protection, owing to a failure to distinguish against third party applications, sole emphasis on commercially manufactured products and failure to protect the process of making carvings, sculptures, baskets and indigenous instruments (Ibid., at 79).
Brief interactions with experts specializing in textiles designing in India revealed that even "traditional" designs such as Kalamkari, believed to be an "art that has evolved through trial and error over the last 3000 years (National Folklore Support Centre 2000), had a strong Dutch influence in the nineteenth century, owing to an increase in demand from Europe (Kumar, personal interview, 2008; Jain, personal interview, 2008). This style of Kalamkari was mainly done on bed covers, curtains and also garments, as it was a popular demand from the West. In the nineteenth century, block prints reached its peak and even today it is largely produced for Indians and foreigners. Some of the old traditional block prints were largely used with Persian motifs like trees, creepers, flowers and leaf designs. Thus, persons working with textiles and folklore designs assert that it is fairly difficult to assess the point at which original contributions were made by Indian artists and the extent to which benefits are to be shared and with whom.

IV.5. Secret TCEs and Protection of Confidential Information

The best form of protection for secret TCEs is not to disclose them, but case law demonstrates that under common law in at least some jurisdictions information conveyed in confidence is protected against further disclosure. In the Australian case, Foster vs. Mountford [(1976), 29 FLR 233], an anthropologist was withheld by interlocutory injunction from continuing to distribute for sale a book which depicted and contained information about sacred sites, objects and other TCEs, which were of deep religious and cultural significance to an indigenous community in Australia. The community had disclosed this information to the anthropologist in good faith and in confidence. This form of protection under common law finds resonance in the specific protection provided in international IP treaties laws against unfair competition (Article 10bis of the Paris Convention, 1967 and Article 39 of the TRIPS Agreement), which includes protection against the disclosure of confidential information. A "breach of confidence", such as the one in the Foster vs. Mountford case, is included as a form of a practice "contrary to honest commercial practices" (Note 10 to the TRIPS Agreement).

Violation of trade secrets and free riding on the achievements of others may also be characterized as unfair competition. The recourse to this particular law is obvious in some of the recent cases of interventions made by the Australian Competition and
Consumer Commission (ACCC) on behalf of Aboriginal artists. In April 2003, the ACCC instituted proceedings against a highly successful Australian souvenir manufacturer, Australian Icon Products Limited, for its representation of some of its hand-painted Aboriginal-style souvenirs as “authentic,” “certified authentic” and/or “Australian Aboriginal art.” ACCC alleged that since a majority of the above-said products were made by persons who were not of Aboriginal origin or descent, a representation to the contrary was misleading. The ACCC in bringing this proceeding sought to bring to light the plight of Aboriginal artists who lose income owing to the unscrupulous and false representation by producers and retailers of souvenirs. The court made a default judgment against Australian Icon. The ACCC instituted similar proceedings against another souvenir producer, Australian Aboriginal Art Property Ltd. (AAA), for violation of the Trade Practices Act, 1974. The case was settled pre-trial in the Federal Court, Brisbane (ACCC, News Release). Relative flexibility of unfair competition law together with its independence from formalities such as registration may be considered useful in case of protection of TCEs.

Protection of confidential information requires neither formalities nor a contractual relationship between the community and the party receiving the information. In order to prove misappropriation of a trade secret, an indigenous group must prove that:

i) the work constitutes a trade secret; and

ii) that it was acquired through improper means.

In order for a work to constitute a trade secret, it must be a secret and have commercial value.\(^{20}\) In the case of TCEs, such an application could possibly be made regarding those traditional and cultural expressions which are sacred and disclosed only to a select group in the community, reasonable measures having been taken to protect the information from the general public. Here of course it may not be always easy for the community to demonstrate economic value as also to show improper acquisition. Not all

\(^{20}\) Article 39 of TRIPS, in sub-clauses 2(a), (b) and (c) describes the content of "undisclosed information." Information is "secret" when it is not generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question.
secret TCEs constitute commercially valuable information. The disclosure of TCEs, as the Mountford case referred to above shows, often rather cause cultural and spiritual rather than economic harm. This might therefore be considered a gap in the protection provided to confidential information. Furthermore, it is not certain that all secret TCEs would be regarded as “confidential” for this purpose. Many TCEs have been disclosed within the community, which might include many people living in vast areas and in more than one environment, such as rural and urban environments. In other words, it may sometimes not be clear in which circles the secret TCEs could be revealed without losing their confidential status.

IV.6. Protection of Indigenous and Traditional Names, Words and Symbols

In the case of protection of indigenous and traditional names and symbols there are two aspects of protection that require to be addressed here, namely:

a) **Defensive Protection:** Indigenous communities are concerned with non-indigenous companies and persons using their words, names, designs, symbols and other distinctive signs in the course of trade, and registering them as trademarks, geographical indications, and/or domain names; and,

b) **Positive Protection:** the positive protection by communities of indigenous names, words and symbols as trade marks and geographical indications.

In international trade mark law the possibility to refuse registration, or declare invalid the registration, of marks that are “contrary to morality or public order and, in particular, of such a nature as to deceive the public” (Article 6 quinquies of the Paris Convention). Although this protection seems generally adequate, a “gap” may exist in that the concepts of “contrary to morality” and “contrary to public order” are broad concepts requiring value judgments to be made by trade mark office staff, many of whom may not have any particular experience with indigenous communities and TCEs. Similarly, protection against “deceptive” use requires a value judgment to be made and it is often the perceptions of the general public that are taken into account. For these reasons, some countries and regional organizations have enacted special measures to protect against the use of TCEs as trademarks. For instance:
(i) Article 136(g) of Decision 486 of the Commission of the Andean Community provides that “signs, whose use in trade may unduly affect a third party right, may not be registered, in particular when they consist of the name of indigenous, Afro-American or local communities, denominations, words, letters, characters or signs used to distinguish their products, services, or the way in which they are processed, or constitute the expression of their culture or practice, except where the application is filed by the community itself or with its express consent;”

(ii) The United States Patent and Trademark Office (the USPTO) has established a comprehensive database for purposes of containing the official insignia of all State and federally recognized Native American tribes in pursuance of the recommendations in its Report on the Official Insignia of Native American Tribes (1999: 47). The USPTO may refuse to register a proposed mark which falsely suggests a connection with an indigenous tribe or beliefs held by that tribe; and

(iii) The New Zealand Trade Marks Act requires the registration of a trademark (or part of a trademark) to be refused if its use or registration is considered likely to offend a significant section of the community, including the indigenous people of that country, the Maori.

The general law of unfair competition, including protection against “passing off”, is also applicable and useful in this context. In respect of positive protection, international principles and procedures are available to communities who wish to register trademarks which are “distinctive”. Trademark protection is potentially indefinite. Several indigenous communities have registered collective or certification trade marks.

IV.7. Trademark Protection of TCEs

Laws protecting distinctive signs, in particular trademarks, also offer opportunities for the protection of indigenous and traditional marks that are intended to be used in the course of trade as with any other signs. Trademarks are signs used to distinguish goods and services of one business from that of another in the marketplace.
and may consist of *inter alia*, words, drawings, devices and shapes of products. The potential for permanent duration of trademark protection and the use of collective and certification marks may prove advantageous. Some states have been able to establish mechanisms to prevent the registration by third parties of indigenous and traditional marks and symbols as trademarks, thus strengthening "defensive" protection. The use of traditional names, indigenous names, tribe names or any other words or pictorial elements as certification or collective marks is also considered a viable proposition to consider in IP law for TK holders (Annas 1997).

The registration of a trade mark provides the following advantages to registered owners (Janke 2003: 28):

i. The right to the exclusive use of the mark and to enforce that right through an action of infringement.

ii. To show infringement of an unregistered mark, the trademark owner would need to prove reputation as is necessary in an action of passing off. A registered trade mark owner can rely on the registration of the mark to prove *prima facie* entitlement.

iii. Rights conferred by registration would extend nationally. In actions of passing off, the owner of a common law trade mark would have to show their reputation is substantial in order to extend beyond the geographic boundaries of actual use.

iv. A registered trade mark is recognized as having commercial value as an asset.

v. The registered owner can prevent importation of goods bearing the marks which are the same or substantially identical to the registered mark.

vi. Improper use of a registered trade mark is a criminal offence.

Some of the cases where indigenous people have used trademarks to protect their TCEs include, the use of the *Toi Iho Maori Made Mark* by the New Zealand Maori Arts Board-denoting authenticity and quality of goods produced by persons of Maori descent; the appellation of origin, as Arte Seri, of creations of the Seri people, distinguishing their craft products from those produced in mass by the *mestizo* workers and the protection of
ancient rock painting images by the Snuneymuxw First Nation of Canada in 1999 using the Trademarks Act, thus preventing its reproduction on items for commercial sale, such as T-shirts, jewelry and postcards.

Trademark protection may prove useful in supporting the trade interests of indigenous groups, especially where adequate trademark registration would help assure the consumer of authentic indigenous products. There are however several bottlenecks in the use of trademarks as a means to protect TCEs. Some of these include: the requirement of application and renewal fees and general lack of awareness of the law and its possibilities amongst members of the relevant indigenous and traditional community, especially as regards opposition and invalidation proceedings (Janke 2003: 41). In most cases, the trade marks system does not currently adequately take Indigenous cultural rights into account. For example, there is no requirement that prior informed consent be obtained before registration of an Indigenous word or symbol is proposed.

Studies of attempts at trademark registration to protect artistic and indigenous knowledge in Australia have shown a large number of applications for trademarks not completing the process of registration. The use of purely descriptive terms and the failure to adequately respond to clarifications from trademark-related government institutions have prevented a ready resort to trademark protection for indigenous knowledge (Janke 2003: 41). Furthermore, it must also be emphasized that the effectiveness of such authenticity labels in the market is dependent on their visibility to and recognition by target groups, namely the consumers. Comparisons between trademarks by indigenous groups in New Zealand and Australia also point towards the role of a vibrant indigenous movement, self-education and the consumer’s willingness to act ethically in adding success to the use of trademark protection for TCEs (Shand 2002: 80).

IV.8. Geographical Indications and TCEs

Article 22.1 of the TRIPS Agreement describes geographical indication (GI), as an indication which defines a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin. GIs serve similar functions to trade marks by guiding consumer choice. However they differ from trade marks in that a
trade mark identifies the enterprise which offers certain products or services, whereas a geographical indication identifies a geographical area in which one or several enterprises are located which produce the type of product for which the GI is used. Thus there is no "owner" of a GI but each enterprise which is located in the area to which the geographical indication refers has the right, if certain quality requirements are satisfied, to use the indication for the products originating in the area. Famous examples of GIs include "Champagne," "Sheffield," "Tequila," and "Darjeeling."

Given that indigenous peoples' cultural expression reflects their belonging to land and territories, GIs may allow some scope for indigenous people to use their clan names, and language words for regions to protect certain forms of TCEs. GIs have the potential to (Palethorpe and Verhulst 2000: 3.5):

(a) provide redress for the appropriation of folkloric indicia by enabling traditional communities of a particular region to restrict which traders may use folkloric geographical indications; and

(b) promote the authentication of genuine folkloric products by permitting the use of particular names to indicate that a product originates from a region of a particular traditional community.

In the WIPO FFM Report concerning Eastern and Southern Africa, GIs are mentioned as a possible means of protection, albeit with some amount of skepticism. It has been pointed out that GIs would not be a workable tool to protect TK within more than one country unless the concerned countries entered into a regional agreement or understanding (WIPO FFM Report: 92). Over 80 GIs of Indian origin have already been registered with the Indian GI Registry. These include GIs like Darjeeling (tea), 'Pochampalli' Ikat (textiles), 'Chanderi' (saree), 'Kancheepuram silk' (textiles), 'Kashmir Pashmina' (shaws), 'Kondapalli' (toy), 'Mysore'(agarbathi). There are many more Indian GIs in the pipeline for registration under the GI Act. This is believed by some to be a positive step on the part of the right holders of potential GIs of the country (Sunder 2007: 114). However, certain experts working with traditional folk artists have expressed concern over the nature of GIs: "It is too severe to say you can't produce because you don't belong there" (Jain 2008; Sundar 2007: 115). Similarly, Coombe
(2005: 46) argues that there may be a possibility that GIs if unduly used may result in limiting competition and exacerbate existing inequalities within groups.

IV.9. TCEs and Moral Rights

It has been argued that indigenous peoples need to have the ability to supervise the commercial by-products of their culture so as not to suffer a gradual loss of their cultural heritage (Bell 1985). In the absence of such legal protection, folklore traditions run the risk of becoming fixed in society’s memory devoid of their cultural context, thus in turn inhibiting the creative evolution of that folklore (Jabbour 1983). In this regard, moral rights or droit moral are relevant to give the legal ability to ensure that the integrity of a work when it is used, performed or displayed is maintained. The ambit for moral rights may include the right to be identified as “author,” or alternatively include protection against mis-identification of a work (Holderness 1998). Other dimensions to moral rights include the right of integrity or protection against the dilution of the work and the right of divulgation, i.e. the right which “reserves to the author the fundamental decision whether at all and when and how to release his work from the private sphere and to expose it to the public” (Dietz 1993: 58). Article 6bis of the Berne Convention recognises moral rights as giving authors the “right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.” Moral rights therefore, protect creators’ rights of (a) attribution; and (b) integrity over their work; and in some territories the right of (c) publication including retraction.

The TRIPS Agreement [Article 9(1)] expressly excludes Article 6bis of the Berne Convention pertaining to moral rights. The TRIPS provision against moral rights is believed to have come about upon insistence by the US (Doyle 1995). However, moral rights jurisprudence is fairly appreciated in Continental Europe. For instance, European Community law recognizes an author’s personal and property rights in a given work, extended into the international community through the Berne Convention. In France, the droit moral exists in conjunction with property rights. In Germany, an author’s personal rights exist in exclusion to all others. In comparison, US copyright law does not recognize moral rights or provide a cause of action for their violation, since the law seeks

In India, prior to 1994, the Copyright Act provided for the perpetual protection of the right to integrity similar to the perpetual protection currently granted to the right of attribution. Further, the right of integrity was not tied to the reputation of the author. Presently, under Section 57 (1) of the Indian Copyright Act, independent of the author’s copyright, the right of attribution is recognized as also the right to restrain or claim damages in respect of any distortion, mutilation, modification or other act in relation to the “work which is done before the expiration of the term of copyright if such distortion, mutilation, modification or other act would be prejudicial to” the author’s “honour or reputation”. Section 57 of the Indian Copyright is a special provision for the protection of special rights of the author. The objective is to put the intellectual property on a higher footing than the normal objects of copyright. The language of section 57 is of the widest amplitude and it not restricted to “literary” expressions alone. Moral rights in Indian copyright law also extend to visual and audio manifestations (Mannu Bhandari vs. Kala Vikas Pictures Private Limited, AIR, 1987 Del. 13). However, as an essentially non-economic right, moral rights have not enjoyed the benefit of enforcement as much as other intellectual property mechanisms. Like copyright, moral rights are founded on romantic notions of individual authorship. The case for TCEs, more often than not, involves collective claims and custodianship and thus tends to complicate a ready resort to this principle. Here the need for a designated authority or clear representation of the community is quintessential. Furthermore, the fact that moral rights subsist only with the author/creator of “works” and for a definite period thereafter his/her lifetime, makes the invocation of moral rights unattractive in the case of TCEs. Attempts to address the possibilities of communal moral rights in Australia have been renewed recently, though...

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21 For instance, despite the 13-year legal battle in the Amar Nath Sehgal case in India, the High Court upheld Section 57 of the Indian Copyright Act to affirm the integrity of a mural created by a celebrated sculptor in India. The Delhi court ordered the return of the remains of the mural to the sculptor, and also ordered damages of Rs.500,000 on the Government of India which was the defendant [2005 (30) PTC 253].
some claim that encouraging results will be hard to come by owing to a combination of a lack of political will and serious conceptual and practical hurdles (Anderson 2004).

IV.10. Protection by Domain Publique Payant

Another economic right that can be exercised in the protection of TCEs is called domaine public payant and it refers to royalty that is payable for commercial use of works in the public domain (Dietz 1990; 1999 Bangui Agreement, Annex VII, Title I, Section 59). The Tunis Model law also lays down the institution of paying the public domain by subjecting “the exploitation of the work in the public domain or their adaptations, including works of national folklore” to the payment of a fee (Article 17, Tunis Model). The establishment of a public domain payant system need not be considered as contrary to the working of a copyright (Lucas-Schloetter 2004: 341). The system of a paying public domain is intended to take over the exclusive right upon expiry of the protected period (Ibid.). The money collected can then be used to further public rather than private interests by distributing it to artists or organizations associated with the arts. Such a measure would allow the incorporation of indigenous tribes and peoples as beneficiaries. The domaine public payant method is constructive in supporting development of folklore in conjunction with regulations and schemes reflecting aboriginal rights, customary entitlements and traditions. Concerns over the fair use of TCEs can be dealt with by making this method non-applicable to usage for educational purposes.

An important example on the use of domain public payant can be found in the India. The unique model for Jeevani, a herbal medicine developed by scientists from the Tropical Botanical Garden Research Institute (TBGRI) in Thiruvananthapuram, in partnership with the Kani tribals in interior Thiruvananthapuram, is reputed to be the

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22 While on a jungle expedition with a few Kani tribes in 1987, TBGRI scientists learnt of the restorative and immuno-enhancing effects of the plant from which Jeevani was eventually extracted. A few years later they returned to collect samples of the plant, locally known as “arophyapacha”, and began laboratory experiments on its potential benefits. In November 1995, an agreement was struck between the TBGRI and the Kani tribe to share a licence fee and cash benefits arising out of the commercialization of the local knowledge of the people. However, as to how far the beneficiaries in the tribe were represented, see Anuradha et al, 2001.
first world model of benefit-sharing that implements Article 8(j) of the UN Convention of Biological Diversity. The TBGRI shared the licence fee and royalty obtained for Jeevani with the tribal community on a 1:1 basis. It received Rs 10 lakh as licence fee and 2 per cent royalty on ex-factory sales from the Coimbatore Arya Vaidya Pharmacy (CAVP). The Kerala Kani Samudaya Welfare Trust, specially formed for the purpose, received half the licence fee (Rs 5 lakh) and received a share of the royalty. The trust funds were used for welfare activities for the Kanis (Kurian, Business Line, 2004).

IV.11. Droit de suite (Resale Right)

Indigenous folk art is known to fetch high prices, especially at the resale level. It is argued that in cases wherein there is such “windfall gain” (Dietz 1990:19-20), an economic right to resale royalty giving the creator of the work the right to share in the increased value of the work would help allay the inherent inequality. Resale rights (le droit de suite) are provided for optionally in the Berne Convention (Article 14ter) and are recognized in some, but not all, jurisdictions.

In Indian law, through an amendment in 1994, resale share right in original copies has been provided for in Section 53 A of the Indian Copyright Act. According to this provision, where there is a case of a resale for a price exceeding Rs. 10,000/-, to the original copy of a painting, sculpture or drawing, or of the original manuscript of a literary or dramatic work or musical work, the author of such work under certain conditions has the right to share in the resale price of such original copy or manuscript, as fixed by Copyright Board.

There is however a lack of consensus as to the nature of the use of the principle of droit de suite- whether voluntary or legislative. Janke (2006: 27), while examining options for the protection of indigenous arts and expressions suggests that where implementation of a legislated resale royalty scheme for artists is being considered, the European Union examples, particularly the recent United Kingdom Regulations (2005) could serve as a model to include the following features:

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23 TBGRI’s struck a seven-year licensing contract with CAVP for manufacturing and selling the drug.
i. an involuntary scheme;

ii. a non-transferable right;

iii. a minimum sale price setting a threshold for payment of the resale royalty;

iv. either a flat rate or sliding scale of payments depending on the sale price;

v. administration *via* a central collecting agency which is already administering services to artists; and,

vi. provisions for reporting and review of the operation of the scheme.

Some opponents to the legislative enactment of a resale royalty scheme claim that only a limited number of artists will benefit from the same and therefore, such a scheme should be shunned. Janke however stresses that "the resale royalty is not intended to provide returns in any uniform manner of distribution, like welfare payments... It is intended to provide a share in the market success of sold works" (Janke 2006: 23).

V. WIPO Draft TCE Provisions and Beneficiaries of Protection

Presently, the WIPO Draft TCE Provisions (WIPO/GRTKF/IC/12/4(c), 2007), envisage protection of TCEs/EoF that would benefit "indigenous peoples and traditional and other cultural communities" who have custody, care and safeguarding of TCEs/EoF in accordance with their customary law and practices; and who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage (draft Article 2). The term "communities" is broad enough to include also the nationals of an entire country, a "nation", in cases where TCEs/EoF are regarded under national law and custom as "national treasures" and belonging to all the people of a particular country (see draft Article 2). This complements and accords with the practice in other policy areas.\(^{24}\)

Therefore, a national law could, for example, state that all nationals are the beneficiaries of protection. Furthermore, according to the WIPO Draft TCE provisions, the benefits of the protection envisaged would accrue to communities and not individuals. This feature is

\(^{24}\) See Glossary on Intangible Cultural Heritage, Netherlands National Commission for UNESCO, 2002: ("... a nation can be a cultural community").
believed to distinguish the potential WIPO suis generis system from conventional IP law which remains available to the individual should he or she wish to take advantage of it (WIPO/GRTKF/1C/12/4(c), 2007, Annex: 18). However, since communities are made up of individuals, and thus communal control and regulation of TCEs/EoF ultimately benefits the individuals who make up the relevant community. Thus, in practice, it is individuals who will benefit, in accordance with customary law and practices.

V.1. Acts of Misappropriation

The attempt to arrive at a consensus on what constitutes "misappropriation" of TCEs/EoF has required the WIPO Committee to gather information and opinion on the protection of TCE/EoF within existing conventional IP law, additional specific forms of behaviour relating to the use of TCE/EoF that should be considered unacceptable or illegal and whether all forms of TCE/EoF must be treated equal protection.

Demand for the legal protection of pre-existing TCEs which are presently in the public domain have arisen in two general ways: TCEs that might once have been eligible for copyright protection, but the time-period for its effect has long lapsed (raising the question of retrospective protection); and TCEs which inherently lack the qualities required for copyright protection (e.g. lack of sufficient originality and well-defined authorship). Such material is, in legal terms, in the public domain, although the communities concerned often challenge the public domain status of such material (especially when it has been recorded or written down without their informed consent). Close at heels concerning this legal predicament is the question of why there must be a distinction over the protection of "traditional" cultural expressions/EoF but not the works of say Shakespeare, Greek, Egyptian, Roman and Babylonian historical events and stories which have long been used as the subjects of operas, books and plays, and more recent works that have fallen into the public domain? (WIPO Consolidated Legal Analysis 2003, paras 41, 42.c). Over time and with deliberations at the WIPO, the protection of TCE/EoF, according to the Committee, involves looking into options for TCE/EoF that do not obtain protection within existing IP law (Second Draft Objectives and Principles, WIPO/GRTKF/1C/12/4(c), 2007, art. 3, Commentary).
In this regard, countries like Australia believe that the unauthorized appropriation of recently created TCE/EoF, which has been fixed, can easily obtain copyright protection, both nationally and internationally. Other developed countries like Canada, Japan and the US have expressed doubts over the need for additional protection of TCE/EoF. These objections have been mainly on the grounds that “unnecessarily rigid regulation against expression could harm freedom of speech or development of culture” (Japan, WIPO Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex, at 86) as also for a lack of a “fact-based foundation” of what actually constitutes unacceptable/illega acts concerning the use of TCEs (Japan and US, WIPO Factual Extraction, Annex: 86, 87). At the WIPO Committee, the response of participants to the question concerning the form(s) of behavior that should be considered unacceptable/illegal, have been varied. Some have chosen the course of moral rights protection, requiring acknowledgment of source where TCEs are published or used (International Publishers Association, WIPO Factual Extraction, Annex: 89); or protection against derogatory use (Japan, WIPO Factual Extraction, Annex: 89).

However, some of the objecting countries have acknowledged that discussions in the Committee (US, WIPO Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex: 87) have already distilled a broad range of behaviors regarded as unacceptable or illegal, including: a) unauthorized reproduction, adaptation and subsequent commercialization of TCEs/EoF, with no sharing of economic benefits; use of TCEs/EoF in ways that are insulting, degrading and/or culturally and spiritually offensive; unauthorized access to and disclosure and use of sacred/secret materials; appropriation of traditional languages; unauthorized fixation of live performances of TCEs/EoF and subsequent acts in relation to those fixations; appropriation of the reputation or distinctive character of TCEs/EoF in ways that evoke an authentic traditional product, by use of misleading or false indications as to authenticity or origin, or adoption of their methods of manufacture and ‘style’; and failure to acknowledge the traditional source of a tradition-based creation or innovation; and, granting of erroneous industrial property rights over TCEs/EoF.

Developing countries, seem to have a core understanding that unacceptable behaviour/illega acts concerning use of TCE/EoF consist of elements of unauthorized exploitation and commercialization, without sharing of benefits (Guatemala, WIPO...
Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex: 91); non-acknowledgment of rights of owners or holders of the EoF (Ghana, WIPO Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex: 90); and culturally offensive and derogatory uses. According to India, "... misappropriation of TCEs/EoF should be considered illegal and inappropriate, if acquired by theft, bribery, inducement, fraud, misrepresentation, deceit, or breach of confidence or fiduciary relationship. Acquisition of information, including recording for commercial use such as for broadcasting, telecasting, advertisement, without the PIC of the holders and traditional users of such TCEs/EoF, would amount to misappropriation. This would also include unauthorized disclosure of secret or spiritual TCEs. Commercialization of TCEs/EoF without just and appropriate compensation should also be considered an illegal and unacceptable act." India believes that equitable compensation should be paid to the communities concerned and finds the possibility of accomplishing the same only with a legally binding international instrument. (India, WIPO Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex: 93).

The African Group (WIPO/GRTKF/IC/11/15 Prov., 2007) has presented acts apart from "misappropriation" that may be considered unacceptable or illegal with regard to protectable TCE/EoF. These include:

(i) unfair and abusive use;
(ii) acts that could constitute denigration and disrespect;
(iii) distortion;
(iv) acts contrary to existing national, regional and international legislations;
(v) suppression of the rights of knowledge holders in any form;
(vi) withholding of results of research based on GR derived from TCEs;
(vii) violation of rules regarding the confidentiality and sacredness which govern practices and observance of TCEs; and
(viii) disclosure of protected information without the authorization of knowledge holders.

Developing countries have also supported the requirement of PIC as a central principle and mechanism in an international system for the protection of TCEs/EoF. It is believed that an effective way of evaluating whether an act would constitute
misappropriation was by evaluating the existence of PIC (Brazil, WIPO Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex: 95).

V.2. WIPO’s Proposed Layered Protection of TCEs

The needs and expectations of traditional, local and indigenous communities as also the growing understanding of “unacceptable and illegal” acts with regard to TCEs have helped merge objectives of protection with forms of protection. Presently, WIPO’s most recent draft instrument on the protection of TCEs/EoF suggests three “layers” of protection, intended to provide supple protection that is tailored to different forms of cultural expression and the various objectives associated with their protection, reflecting a combination of exclusive and equitable remuneration rights and a mix of legal and practical measures (draft article 3, Commentary, WIPO/GRTKF/IC/12/4 (c), Annex, at 21). The protection provided for in the draft provisions is meant to complement and not replace the protection already available under conventional IP systems, as well as laws and programs for the preservation and promotion of cultural heritage (draft Article 10).

The first form of TCEs that is identified within the draft instrument for protection at WIPO are, “traditional cultural expressions/expressions of folklore of particular cultural or spiritual value or significance to a community, and which have been registered or notified as referred to in Article 7” (Article 3 (a), WIPO/GRTKF/IC/12/4 (c), Annex: 19) of the instrument. For TCEs/EoF of particular cultural or spiritual value to a community, a right of “free, prior and informed consent” (PIC), akin to an exclusive right in IP terms, is suggested, in terms of which the kinds of acts usually covered by IP laws, especially copyright, related rights, trademarks and designs, would be subject to the PIC of the relevant community. Some developing countries, in this regard, support the special protection of TCEs/EoF with cultural and spiritual value and view its protection more in defensive form, “since in principle economic interests do not exist” (Colombia, WIPO Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex: 97).

Other TCEs/EoF (which are not registered or notified, but which still have the required linkage with the community concerned) would be protected through regulation of how they may be used by third parties. These TCEs/EoF could be used, as a source of creative inspiration for example, without the need for prior consent or authorization, in
furtherance of creativity and artistic freedom, an objective stated often by the EC and its Members. As to how these TCEs/EoF are used could be regulated, WIPO suggests drawing mainly upon moral rights and unfair competition principles, with civil and criminal remedies proposed, as well as the payment of an equitable remuneration or equitable benefit-sharing, to be determined by a competent authority (WIPO/GRTKF/IC/12/4(c), 2007, Annex: 22). This approach is similar perhaps to a compulsory license or equitable remuneration approach, found in national sui generis laws concerning TCEs/EoF (OAPI, Bangui Agreement), as well as in conventional copyright law concerning musical works already fixed in sound recordings (Berne Convention, 1971, Article 13).

WIPO also recommends adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret TCEs (WIPO/GRTKF/IC/12/4(c), 2007, draft article 3(c)). Thus, WIPO recognizes case law [Foster vs. Mountford, (1976), 29 FLR 233] in this regard as also assertions of indigenous peoples for the right to “protect and control dissemination” of [their] knowledge (The Mataatua Declaration, 1993, Article 2.1). Furthermore, within WIPO’s proposed provisions for the protection of TCEs, protection would continue for as long as TCEs/EoF continue to meet the criteria for protection, including the required linkages with an eligible community (Article 6). Where notification or registration is required, protection would continue as long as the notification or registration subsists. This trademark-like protection term for TCEs has been proposed by WIPO to balance the demands by indigenous peoples and traditional communities for indefinite and even retroactive protection for at least some TCEs, with the need to allow works to enter into the “public domain” and thus feed creativity (WIPO Draft TCEs, Commentary, WIPO/GRTKF/IC/12/4(c), 2007, Annex: 30).

V.3. Notification, Registration and Scope for Higher Protection

The utility of registration, database collections and other forms of defensive protection has been discussed extensively with apparent divisions amongst developing countries concerning the same. The WIPO Draft TCE Provisions (2008), in draft Article
3 proposes registration and notification with "a competent office or organization by the relevant community or by the Agency referred to in Article 4 acting at the request of and on behalf of the community". The concern over the potential of registration and notification, especially with regard to the oral TCEs/EoF, proving counter-productive (Ethiopia, WIPO Factual Extraction, WIPO/GRTKF/IC/12/4(b), 2008, Annex: 96) is addressed by the Draft TCE Provisions in Article 7(b) (i). Accordingly, it is suggested that to the extent that such registration or notification may involve the recording or other fixation of the TCEs concerned, any IPRs in such recording or fixation should vest in or be assigned to the relevant community.

V.4. Exceptions and Limitations to WIPO’s Proposed Protection

Many stakeholders have stressed that any IP-type protection of TCEs should be subject to certain limitations so as not to protect them too rigidly. It has been suggested that overly strict protection may stifle creativity, artistic freedom and cultural exchanges, as well as be impracticable in its implementation, monitoring and enforcement. In addition, the protection of TCEs/EoF should not prevent communities themselves from using, exchanging and transmitting amongst themselves expressions of their cultural heritage in traditional and customary ways and in developing them by continuous recreation and imitation.

WIPO’s suggested provision on exceptions and limitations to the protection of TCEs draws from the Model Provisions, 1982, the Pacific Islands Model Law, 2002 and copyright laws in general. Exceptions or limitations in the WIPO Draft Objectives and Principles apply to illustrations for teaching and learning; non-commercial research or private study; criticism or review; reporting news or current events; use in the course of legal proceedings; making of recordings and other reproductions for archives or inventory for non-commercial cultural heritage safeguarding; and incidental uses. WIPO also affirms that national laws might wish to allow all nationals to use TCEs/EoF and for this purpose, national measures for the protection of TCEs/EoF might also allow unrestricted access and use by all nationals of a country (draft Article 5).
V.5. WIPO’s Proposed Transitional Measures for TCEs in “Public Domain”

Continuing acts in respect of traditional cultural expressions/expressions of folklore that had commenced prior to the coming into force (assuming they did) of WIPO Draft TCE Provisions and which would not be permitted or which would be otherwise regulated by these provisions, are proposed to be brought into conformity with the provisions within a reasonable period of time after they enter into force, subject to respect for rights previously acquired by third parties (WIPO/GRTKF/IC/12/4(c), 2007, draft Article 9). The question of retroactive protection of TCEs is believed to naturally affect the nature and scope of the “public domain.” WIPO has identified several options in existing laws (WIPO/GRTKF/IC/12/4(c), 2007, Annex: 40):

i. Retroactivity of the law, which means that all previous, ongoing and new utilizations of TCEs would become subject to authorization under the new law or regulation;

ii. Non-retroactivity, which means that only those new utilizations would come under the law or regulation that had not been commenced before their entry into force; and;

iii. An intermediate solution, in terms of which utilizations which become subject to authorization under the law or regulation but were commenced without authorization before the entry into force, should be brought to an end before the expiry of a certain period (if no relevant authorization is obtained by the user in the meantime, as required).

Existing *sui generis* systems and models either do not deal with the question, or provide only for prospective operation. However, the Pacific Regional Model, 2002 follows in general the intermediate solution described above. This intermediate solution is the approach of the WIPO draft provision. It draws particularly from the Pacific Regional Model, 2002 as well as the wording found in Article 18 of the Berne Convention for the Protection of Literary and Artistic Works, 1971.

V.6. WIPO: Addressing the International Dimension

The WIPO Committee has decided to deal with the international dimension
integrally with its work on the protection of TCEs/EoF. Calls for outcomes in the field of TCEs/EoF protection are set against concerns that this work should complement and not prejudice or encroach upon other international instruments or processes, and the requirement in the Committee's mandate that it should not prejudice work in other fora. Thus the WIPO Draft Objectives and Principles on TCEs define a form of protection that can be situated within a holistic international context. In common with other areas of law and policy, the international dimension of protection is expressed in broad principles that would be implemented, interpreted and applied directly through national legal, administrative and policy mechanisms. Supplementary documents (WIPO/GRTKF/IC/10/6, 2006; WIPO/GRTKF/IC/9/6, 2006; WIPO/GRTKF/IC/8/6, 2005; and WIPO/GRTKF/IC/6/6, 2003) set out various considerations concerning the international dimension of the work of the Committee. These more specific issues, already fully discussed in those supplementary documents, include:

(i) the manner in which international principles can be articulated and applied in an international context;

(ii) the relationship with other areas of international law and policy; and

(iii) the means by which rights of holders of TCEs/EoF of one country are to be recognized under the law of another country.

Thus it can be seen that the WIPO Draft Objectives and Principles for the Protection of TCEs concern most directly the protection of TCEs/EoF in a legal sense, that is, protection against the kinds of illicit uses and misappropriations that IP protection usually addresses, while taking into account the particular nature and characteristics of traditional creativity and cultural expression, including its communal quality, and the preference many developed countries have expressed to avoid distinct new property rights. This has been the approach of the Committee, in keeping with the mandate of WIPO, since the inception of its work.25 “Protection” in this sense is, as previously

25 See for example, the WIPO Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore of June 2001 which indicated that this work concerned “specific legal protection of on intellectual property nature...” This approach is consistent with the “protection ... against illicit exploitation and other prejudicial actions” that was the objective of earlier norm-setting activities
discussed, distinguishable from the “safeguarding” or “preservation” of cultural heritage and expressions,\textsuperscript{26} but complements them within the broader policy and legal environment. Indeed, a holistic approach to protection of TCEs/EoF within this broader international context entails recognizing and complementing legal instruments and policy approaches in cognate policy areas, such as the UNESCO International Convention on the Safeguarding of Intangible Cultural Heritage, 2003 and the UNESCO Convention for the Protection and Promotion of the Diversity of Cultural Expressions, 2005, and work in other forums such the United Nations Permanent Forum on Indigenous Issues and the Working Group on Indigenous Populations of the Human Rights Council. The substantive provisions in the Annex are expressly intended to complement and work together with laws and measures for the preservation and safeguarding of cultural heritage, and practical suggestions in this regard are made throughout the provisions and the commentary. A suggested General Guiding Principle in the WIPO Draft Objectives and Principles is the “principle of respect for and consistency with international and regional agreements and instruments”.

VI. Summary

Even as rapid globalization of intellectual property rights (IPRs) minimum standards has led to an ever increasing appropriation of the “intellectual commons,” the traditional knowledge of indigenous, local and traditional communities continues to be disregarded. The potential for exploitation of TK and associated expressions of folklore is alleged to be exacerbated by the “unfair” and “discriminatory” treatment of TK and TCEs within existing IPR law. However an analysis of existing international IP law shows that IP law can, in limited circumstances, prove useful in addressing some of the concerns regarding the protection of TCEs. Contemporary expressions of TCEs, with the necessary “creative” element can obtain copyright protection. Some of the oft stated limitations in

\textsuperscript{26} See previous documents, such as WIPO/GRTKF/IC/2/7, 2001; WIPO/GRTKF/IC/3/10, 2002; WIPO/GRTKF/IC/4/3, 2002; WIPO/GRTKF/IC/5/3, 2003; WIPO/GRTKF/IC/6/3, 2003 and WIPO/GRTKF/IC/7/3, 2004.
copyright law, such as issues regarding originality, identified authorship, fixation and duration of protection are overstated. In fact, international law has no strict understanding of these matters and defers to national determination of the exact parameters of protection. Furthermore *sui generis* laws like the Tunis Model Law on Copyright, 1976; 1982 WIPO-UNESCO Model Law Provisions, the 2001 Panama Special Intellectual Property Rights Law and the 2002 South Pacific Model Law, seem to demonstrate the ability to address these concerns. The problem with protection of "style" in TCEs and TCEs shared between communities and regions is far more complicated and requires careful study.

Existing international law, such as the 1996 WPPT, offers protection to the performance expressions of folklore. However protection under the WPPT does not extend to communities and covers only aural performances, or the aural aspect of an audiovisual performance. Furthermore, under Article 19 of the Rome Convention, 1961, once a performer has consented to the inclusion of his performance in a visual or audiovisual fixation, the rights in the Convention "shall have no further application." In such a scenario, the crucial factor determining protection of performances of TCEs could be to prevent all ways of "fixing" performances without permission of the performer or related community, as the case may be. To a limited extent, trademark protection may also prove useful in supporting the trade interests of indigenous groups, especially where adequate trademark registration would help assure consumers of authentic indigenous products. Design protection also seems to be used in some countries to protect folklore designs but this form of protection also has its limitations considering the fact that designs travel easily across borders both within and outside a country and it is difficult to identify where and by whom the element of "novelty" or "originality" was introduced. Recourse to GIs, moral rights, public domain payant and resale rights are also seen to be of limited use in the protection of TCEs.

Considering some of these limitations in existing IP law, WIPO has been examining the possibilities of evolving an international template for a more holistic protection of TCEs. WIPO has chosen to draw a distinction therefore between pre-existing TCEs ("TCEs stricto sensu") and contemporary interpretations and adaptations of them. WIPO has also pointed out that there is no internationally settled or accepted
definition of a “traditional cultural expression” or “expression of folklore”. There are, however, many definitions in national and regional laws and in international instruments, which have been taken into account in the draft Objectives and Principles for the Protection of TCEs being discussed by the WIPO IGC. To a large extent, WIPO seems to be in favour of deferring to national laws for the protection of folklore, as long as they are consistent with existing international law. For the purpose of obtaining international protection of TCEs, the principle of national treatment or reciprocity may be used.

Currently, in the search for an international definition for TCEs or expressions of folklore, WIPO has listed some common elements that appear in definitions of TCEs/EoF in the national laws of Member States. Accordingly, folklore is: handed down from one generation to another, either orally or by imitation; reflects a community’s cultural and social identity; consists of characteristic elements of a community’s heritage; is made by ‘authors unknown’ and/or by communities and/or by individuals communally recognized as having the right, responsibility or permission to do so; and is constantly evolving, developing and being recreated within the community. Developing countries have reiterated their demand for a comprehensive understanding of TCEs while considering its definitional aspects. Developing countries have also emphasized the overlap in the subject-matter of protection in TK and TCEs. They have also pointed towards the possible links between the concept of tangible and intangible cultural heritage with the definition of TCEs. The WIPO Draft Objectives and Principles concerning the protection of TCEs addressed some key concerns in the protection of TCEs; such as, TCEs in the public domain; protection of TCEs while balancing the freedom of expression; acts of misappropriation of TCEs; beneficiaries of protection; protection of derivative works in TCEs; duration of term of protection and the international dimension to the protection of TCEs.

Present deliberations in the WIPO have resulted in conceiving a “layered” protection of TCEs. For TCEs/EoF of particular cultural or spiritual value to a community, a right of “free, prior and informed consent” (PIC), akin to an exclusive right in IP terms, is suggested, in terms of which the kinds of acts usually covered by IP laws, especially copyright, related rights, trademarks and designs, would be subject to the PIC of the relevant community. These TCEs will need to be registered or notified to obtain
protection. It must bear repetition here that developing countries support the requirement of PIC as a central principle and mechanism in an international system for the protection of TCEs/EoF. WIPO also recommends adequate and effective legal and practical measures to ensure that communities have the means to prevent the unauthorized disclosure, subsequent use of and acquisition and exercise of IP rights over secret TCEs.

Thus, it can be seen that increasingly the WIPO has acknowledged that existing IP law cannot provide holistic and adequate protection to TCEs and those who maintain, hold and create them. The movement away from definitional challenges to a more substantive debate on the protection of TCEs at the WIPO should be considered an encouraging development for developing countries. The multi-faceted nature of TCEs and related concerns of various stakeholders requires to be addressed in terms beyond IP law. Indeed, certain indigenous groups and scholars have stressed that a “one-size-fits all” solution in IP law for the protection of TCEs may actually be detrimental. Even if new intellectual property rights in TCEs were to come by, they would be insufficient unless they are tied to broader public policy strategies. In this regard, the desire to support cultural traditions and maintaining cultural diversity is certainly emerging as an important issue of international public policy. Therefore, the next chapter will seek to examine some of the non-IP solutions available in international law for the protection of TCEs.