Traditional Knowledge*

Berkman Center for Internet & Society

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Abstract

One of the most complex recent extensions of copyright law involves traditional knowledge. This module first describes the intricate and rapidly changing set of legal rules pertaining to traditional knowledge, and then explores the fierce continuing debate concerning the appropriate scope of protection for this novel topic.

1 Module 8: Traditional Knowledge

2 Learning objective

One of the most complex recent extensions of copyright law involves traditional knowledge. This module first describes the intricate and rapidly changing set of legal rules pertaining to traditional knowledge, and then explores the fierce continuing debate concerning the appropriate scope of protection for this novel topic.

3 Case Study

Angela is a member of an indigenous community that has a unique tradition of dance. Performances of these dances attract members of other indigenous communities and tourists. Angela calls Nadia when she sees elements of one of the dances in a recently released music video by the American singer, Madonna. Anglea asks whether she has any legal recourse either to stop the use of the dance or to obtain compensation for herself or for her community.

4 Lesson

4.1 What Is Traditional Knowledge?

Though difficult to define, **traditional knowledge (TK)** is generally understood to encompass four types of creative works: **verbal expressions** (stories, epics, legends, folk tales, poetry, riddles, etc.), **musical expressions** (folk songs and instrumental music), **expressions by action** (dances, plays, ceremonies, rituals and other performances) and **tangible** expressions that must be fixed on a permanent material (drawings, designs, paintings (including body-paintings), carvings, sculptures, pottery, mosaics, jewelry, basket work, textiles, carpets, costumes, musical instruments, etc.) More detailed definitions can be found in the World Intellectual Property Organization (WIPO)[1] and United Nations Educational, Scientific and Cultural Organization (UNESCO)[2] Model Provisions. TK is used interchangeably with the term **traditional cultural**

*Version 1.2: Jun 14, 2011 7:48 am +0000
†http://creativecommons.org/licenses/by/3.0/
[1]http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_7/wipo_grtkf_ic_7_3.pdf
[2]http://portal.unesco.org/culture/en/ev.php-URL_ID=34325&URL_DO=DO_TOPIC&URL_SECTION=201.html

expressions (TCEs); both refer to music, art, designs, names, signs and symbols, performances, architectural forms, handicrafts and narratives. TCEs are integral to the cultural and social identities of indigenous and local communities. They embody knowledge and skills, and they transmit core values and beliefs.

4.2 What is the Debate About?

Several combined forces have recently led to commercialization of TCEs on a global scale without due respect being given to the cultural or economic interests of the communities from which they originate. The Internet provides pervasive access to TCEs. The demand of western consumers for what is sometimes (disrespectfully) called "primitive art" has increased. Finally, tourism in developing countries has exposed more potential consumers to manifestations of folklore that can be found there. As a result, indigenous groups are seeking protection for their TCEs and their responses have affected legislation at national, regional and international levels.

4.3 What types of Traditional Knowledge are Most Frequently Used?

Exploitation of TK occurs in different forms. Examples include the unauthorized production of indigenous craft objects in the souvenir market[3] , the unauthorized use of indigenous imagery on clothing[4] , food products[5] , or toys[6] , the unauthorized use of indigenous names or phrases as trademarks[7] , the unauthorized incorporation of traditional dance into commercial performances[8] , and the unauthorized use of traditional music in commercial musical productions[9] .

4.4 What Kind of Legal Liability Governs?

What kinds of legal rules (if any) should govern use of traditional knowledge by people who are not members of communities from which the TK originates? This issue is being addressed on national, regional and international levels. TK might be protected through conventional IP law – for example, through the use of Copyright law, Patent law, Geographical Indicators, or Certification Trademarks. However, many regions and countries have found it difficult to fit TK into traditional IP protection schemes. As a result, some have adopted *sui generis* laws that apply specifically to TK. Examples of these different approaches are discussed below.

5 How Individual Nations deal with Traditional Knowledge

5.1 Countries Whose Traditional IP Laws Do Not Cover Traditional Knowledge

Several nations have copyright laws that expressly exclude folklore from the list of works eligible for copyright protection. These include: **Armenia, Azerbaijan, Belarus, Bulgaria, Estonia, Greece, Hungary, Kazakhstan, Kyrgyzstan, Lebanon, Lithuania, Moldova, Russia, Slovenia, The Ukraine, Uzbekistan** and **Yemen**. These countries tend to classify traditional knowledge as within the "public domain" and thus do not restrict use of or access to TK. For instance, Article 9[10] of the 2002 Copyright Act of **Bosnia and Herzegovina** states that "the use of folk literature and art creations for the purpose of a literary, artistic or scientific arrangement shall be free."

[3]http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/carpetscase-main.pdf
[4]http://www.wipo.int/tk/en//studies/cultural/minding-culture/studies/rockart.pdf
[5]http://cita.chattanooga.org/chml.html
[6]http://news.bbc.co.uk/2/hi/asia-pacific/1627209.stm
[7]http://www.wipo.int/export/sites/www/tk/en/studies/cultural/minding-culture/studies/trademarks.pdf
[8]http://www.villagevoice.com/2004-04-13/news/rap-rage-redvolution/
[9]http://en.wikipedia.org/wiki/Taiwanese_aborigines
[10]http://www.ohr.int/ohr-dept/legal/oth-legist/doc/BH-LAW-ON-COPYRIGHT-AND-RELATED-RIGHTS.doc

5.2 Countries Whose Traditional IP Laws Cover Traditional Knowledge

5.2.1 Protection Despite No Explicit Reference to TCE

The traditional IP statutes in some nations contain no explicit references to folklore, but TCEs may still be protected in those nations under copyright law, other traditional intellectual property doctrines, or through special statutes. For example, most countries in Europe have copyright legislation that may be used to cover traditional knowledge, but do not have any provisions explicitly mentioning TCEs. These include: **Belgium, Cyprus, Denmark,Finland, France, Germany, Iceland, Italy, Latvia, Luxembourg, Norway, Poland, Portugal, San Marino, Spain, Sweden,** and **Switzerland**. Several other "major industrialized countries" lack explicit TCE references as well. These include: **Australia, Canada, Japan,** and the **United States**. Additionally, several countries with recently-enacted copyright legislation have not expressly included TCEs within its scope. Included in this group are several Asian countries (such as **India, Malaysia, Philippines,** and **Thailand**) and several Caribbean and South American countries (such as **Barbados, El Salvador, Saint Vincent and the Grenadines, Trinidad and Tobago,** and **Venezuela**). Silence in these statutes, however, does not mean that traditional knowledge is unprotected. Rather, in these countries TCEs are protected on the basis of traditional IP, customary, regional or international laws or through *sui generis* legislation.

In **Australia**, TCEs are protected through traditional copyright law. For example, in Milpurrurru v. Indofurn Ply Ltd.[11] , aboriginal Australian artists sued to prevent the importation by a Perth-based company of carpets manufactured in Vietnam, upon which were reproduced the designs of several prominent aboriginal artists without their permission. The designs had been copied from a portfolio of artworks produced by the Australian National Gallery. The federal court awarded the aboriginal artists substantial damages for copyright infringement and granted an injunction against any further infringement. The court pointed out that the unauthorized use of the artwork involved the pirating of cultural heritage and that such behavior could have far reaching effects on the Australian cultural environment. It was deemed especially offensive that the images had been used on a medium (carpet) that was designed to be walked upon.

Other nations have begun using trademark law to protect TCEs, even when TCEs are not mentioned in national statutes. For example, in **Canada, New Zealand** and the **United States**, as well as **Australia**, indigenous people have sometimes relied (with varying degrees of success) upon trademark law or its equivalent to protect tribal names and other designs and motifs against unauthorized use by others. Considerable efforts have also been made to protect sacred and culturally significant symbols as well as collective and certification marks under traditional trademark law. For instance, **Australia**provides for design registration, which allows for the registration of features of shape, configuration, pattern or ornamentation applicable to an article. This system protects the visual form for 16 years, provided that it is new and original and is not based on a pre-existing design. Still, because of the originality requirement, this system has not yet been effective for protecting folklore. More effective is the system used in **New Zealand**. There, the recently adopted Trade Marks Act of 2002[12] , prevents the registration of trademarks based on Maori text or imagery where the use or registration of such marks would be offensive to the Maori. The Commissioner of Trade Marks has set up a Maori Advisory Committee to advise on whether the proposed registration or use of a mark is likely to be offensive.

Although the **United States** has not acted to provide general protection for indigenous peoples' traditional knowledge, it has sometimes adopted narrow statutes in response to Native Americans' attempts to regain self-governance and to control the use of their traditional knowledge by non-community members. Efforts of this sort include:

- the Antiquities Act of 1906[13] (16 U.S.C. §§431-33 (2000)), giving the President power to set aside as national monuments certain historic landmarks, structures and other objects of historic interest,
- the Historic Sites, Buildings and Antiquities Act of 1935[14] (16 U.S.C. §§461-67), empowering the

[11]http://www.austlii.edu.au/au/journals/AILR/1996/20.html
[12]http://www.legislation.govt.nz/act/public/2002/0049/latest/DLM164240.html?search=ts_act_Trade+Marks+Act_resel&sr=1
[13]http://www.nps.gov/history/local-law/anti1906.htm
[14]http://www.nps.gov/history/local-law/hsact35.htm

National Park Service to restore, reconstruct, and maintain sites and objects of historic interest,
- the National Historic Preservation Act of 1966[15] (16 U.S.C. §470), providing for the maintenance of a National Register of Historic Places and requiring the Secretary of the Interior to establish a program to help Native American tribes to preserve their properties, taking into account tribal values,
- the Native American Arts and Crafts Act[16] (25 U.S.C. §305 (2000)), intended to assure the authenticity of Native American artifacts, and
- the Native American Graves Protection and Repatriation Act[17] ("NAGPRA")(25 U.S.C. §3001(1)-(13) (2000)), which provided that the ownership or control of Native American cultural items excavated or discovered on federal or tribal lands remained with lineal descendants, Native American tribes, or Hawaiian Organizations.

5.2.2 Protection Using Explicit Reference to TCEs

Many countries now explicitly refer to folklore in their copyright legislation. Such references take various forms.

Some countries have sections, chapters, or special parts of copyright law that are entirely devoted to folklore. Countries within this group include **Algeria, Bolivia, Brazil, Burkina Faso, Burundi, Chile, Congo, Ghana, Kenya, Mongolia, Morocco, Namibia, Nicaragua, Niger, Nigeria, Papua New Guinea, Paraguay, Rwanda, Seychelles, Togo, Tanzania, Tunisia,** and **Zimbabwe**.

In the **Congo**, for example, folklore is considered party of the country's heritage, and Congolese copyright law protects folklore without a time limitation. A "Body of Authors" society is responsible for collecting royalties, representing authors' interests, and overseeing the use of folklore. Permission must be sought from the society before any public performance, reproduction, or adaptation of folklore for commercial purposes. This includes the import or distribution of copies of works of national folklore made abroad. Public agencies are exempted from the obligation to obtain prior authorization to use folklore for non-profit activities, though they still must notify the society before use.

In **Ghana**, the recently adopted Copyright Act of 2005[18] significantly changed the way traditional knowledge is protected. In the Act, copyright protection extends to literary works, artistic works, musical works, sound recordings, broadcasts, cinematographic works, choreographic works, derivative works, and program-carrying broadcast signals. To be eligible for copyright, the work must be original, in writing (or otherwise reduced to material form), and created by a citizen or resident of Ghana. The work must also have been first published in Ghana, or, if first published outside Ghana, published in Ghana within thirty days of its original publication. A work created by an individual is protected for the life of that individual plus fifty years; a work created by a corporation is protected for fifty years from the date on which the work was first made public. In Ghana, an author has exclusive rights to reproduce the work (with the exception of private use, quotations in other works, and use in pedagogy, which are permitted). It is an infringement of the copyright to reproduce, sell or exhibit in public for commercial purposes any work without authorization, or to use the work in a manner that adversely affects the reputation of the author. Both civil and criminal penalties may apply. Article 59 of the Act establishes a National Folklore Board, which governs the administration, preservation, registration and promotion of expressions of folklore. The Board may authorize the use of folklore and may determine a fee to be paid. The Act provides that the copyrights of authors of folklore vest in the government as if the government were the creator of the works. In Ghana (as in the Central African Republic and Congo), funds from fees or other money accruing from the use of folklore are to be used for social welfare benefits.

Namibia grants indigenous communities indefinite exclusive rights to control expressions of folklore and their adaptations, translations, and transformations. These exclusive rights include the right to publicize, make a reproduction, or distribute copies of an expression of folklore; communicate an expression of folklore

[15] http://www.nps.gov/history/local-law/nhpa1966.htm
[16] http://www.doi.gov/iacb/act.html
[17] http://www.nps.gov/nagpra/MANDATES/25USC3001etseq.htm
[18] http://www.wipo.int/clea/en/text_pdf.jsp?lang=EN&id=1789.

to the public by performance, broadcasting, distribution by cable or other means; include an expression of folklore in a cinematographic film or a television broadcast; cause the folklore expression, or a television program or other program including the expression, to be transmitted in a diffusion service (unless such service transmits a lawful broadcast, including the expression, and is operated by the original broadcaster); make adaptations, translations and other transformation of the expression (Article 60[19]). Article 61[20] , however, allows a secondary user to use expressions of folklore for personal or private use, criticism or review, teaching or scientific research, and incidental use. Article 61 also allows the use of the original expression if the use is "compatible with fair practice," such as for creating an illustration or borrowing the expression to create an original work.

Likewise, **Nigerian** Copyright Law[21] protects expressions of folklore "against reproduction, communication to the public by performance, broadcasting, [or] distribution by cable." In addition, it forbids adaptations, translations, and other transformations of such folklore, when made either for commercial purposes or outside their traditional customary context. The right to authorize any of these acts lies with the Nigerian Copyright Council. However, Nigerian folklore may be used without authorization for private, educational, or illustrative purposes. The law requires identification of the source of the folklore by reference to the community or place from which the folklore is derived. Violations of the law subject the user to liability in damages, injunctions, and other remedies the court deems appropriate. Nigeria also protects traditional knowledge through patents and trademarks. To be patentable, an invention must be new, result from inventive activity, and be capable of industrial application. The patent right is vested in the inventor, and the patent is valid for 20 years after the filing date. Additionally, Nigerian legislation protects registered trademarks. Registration is valid for seven years and then can be renewed; registration is limited to marks that are distinctive.

In **Rwanda**, Art. 3 of the Copyright Law (1983)[22] provides generous protection to folklore. Included in its coverage are traditions and literary productions (tales, legends, myths, proverbs, accounts, and poems), artistic works (dances and spectacles of any kind, musical works of any kind, styles and works of decorative art, and architectural styles), religious works (ritual rites, objects, clothing, and places of worships), scientific knowledge (practices and products of medicine and pharmacology, theoretical and practical fields of the natural science and anthropology), and technological knowledge.

The Copyright Law of **Zimbabwe** protects performers' rights to record, broadcast and distribute copies of their performances (Section 68[23]). In addition, it extends protection to a "work of folklore," which it defines as a literary, musical or artistic work, whether or not it is recorded, of which: (a) no person can claim to be the author; and (b) the form or content is embodied in the traditions peculiar to one or more communities in Zimbabwe; and includes: (i) folk tales, folk poetry and traditional riddles; (ii) folk songs and instrumental folk music; (iii) folk dances, plays and artistic forms of ritual; and (iv) productions of folk art, in particular drawings, paintings, sculptures, pottery, woodwork, metalwork, jewelery, baskets and costumes (Section 80[24]).

The copyright laws in several other countries shield traditional knowledge by including folklore in the list of literary and artistic works eligible for regular copyright protection. Countries adopting this approach include **Angola, Benin, Cameroon, Djibouti, Gabon, Guinea, Ivory Coast, Lesotho, Madagascar, Mali, Mozambique, Oman, Republic of Central Africa, Senegal, Togo, Uganda, and Zaire.**

For instance, **Cameroonian** law extends copyright protection to "works derived from folklore."[25] Users must seek permission from the National Copyright Corporation before any commercial exploitation of folklore may occur. Agents authorized by the Corporation regulate the use of folklore in Cameroon, while the Corporation collects royalties fixed by agreement between the parties and brings infringement actions against unlawful users of protected works.

[19] http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/namibia.pdf
[20] http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/namibia.pdf
[21] http://www.nigeria-law.org/CopyrightAct.htm
[22] http://www.amategeko.net/display_rubrique.php?ActDo=ShowArt&Information_ID=874&Parent_ID=3070032&type=public&Langue_ID=
[23] http://www.unesco.org/culture/pdf/anti-piracy/Zimbabwe/zb_copyright_2000_en
[24] http://www.unesco.org/culture/pdf/anti-piracy/Zimbabwe/zb_copyright_2000_en
[25] http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=836

Lesotho's Copyright Order of 1989[26] defines folklore as cultural productions with "characteristic elements of the traditional artistic heritage developed and maintained over generations by a community or by individuals reflecting the traditional artistic expectations of their community." Works inspired by expressions of folklore are protected as original works (Article 4(c)).

In **Mali** all persons (except public entities) seeking to use folklore for profit must obtain prior authorization from the Minister of Arts and Culture who may impose a fee for such use. The law prohibits the assignment or licensing of "works derived from folklore" without the approval of the Minister. The law also places in the public domain and charges a user fee for all "works whose authors are unknown, including the songs, legends, dances, and other manifestations of the common cultural heritage."

Senegal includes folklore in the list of works eligible for copyright protection. Article 1 of the Senegalese Copyright Act provides special protection for folklore, and Article 9 states that any "direct or indirect" fixation of such material for "profit-making purposes" is subject to prior authorization by the Copyright Office of Senegal. All folklore uses require prior authorization from the Office, which charges users a fee whose amount depends on the nature of the use and prior arrangements. Senegal criminalizes the importation of works into Senegal that violate its copyright law.

Uganda's Copyright and Neighbouring Rights Act, 2006[27] grants copyright protection to "work in the field of literature, traditional folklore and knowledge, science and art" (Article 5). It grants performers – persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works or expressions of folklore – the right to control the fixation, transmission and reproduction of their performances (Articles 2 and 22).

A final group of countries protect TCEs by granting rights to the State for its protection. Included in this group are **Egypt, Jordan, Malawi, Saudi Arabia, Sudan,** and **Qatar**.

For instance, in **Sudan**, Article 7[28] of the Copyright Act notes that "National folklore of the Sudanese community is deemed to be the property of the State" and that the "State represented by the Ministry of Culture and Information, shall endeavor to protect works of folklore by all legal ways and means, and shall exercise the rights of an author in cases of mutilation, transformation and commercial exploitation." Similarly, in **Egypt**, Article 142[29] of the Law on the Protection of Intellectual Property Rights No. 82 (3 June 2002) defines "national folklore" as part of the "public domain of the people." The act states, "The competent ministry shall exercise the author's economic and moral rights and shall protect and support such folklore." In **Saudi Arabia**, Article 7[30] of the Copyright Law of 2003 states that "[f]olklore shall be the property of the state, and the Ministry shall exercise the copyright pertaining thereto," and that "[t]he import or distribution of copies of folklore works, copies of their translations or others which are produced outside the Kingdom without a license from the Ministry shall be prohibited." Likewise, in **Qatar**, Article 32 of the Copyright Act of 2002 provides that "[n]ational folklore shall be the public property of the State" and that "the State...shall protect national folklore by all legal means, and shall act as the author of folklore works in facing any deformation, modification or commercial exploitation." In **Jordan**, Article 7(c)(3)[31] of the Copyright Law No. 22 of 1992 excludes from copyright protection "works which reverted to the public domain. For the purpose of this article folklore shall be considered in the public domain with the minister exercising the copyrights of these works against distortion, misrepresentation or damage to cultural interests" unless "the collections of these works were distinguished by a personal effort involving innovation or arrangement."

5.2.3 Countries with Sui Generis Traditional Knowledge Laws

The countries discussed in the previous section include traditional knowledge in their regular copyright laws, but typically treat TK somewhat differently from other types of copyrighted works. The members of the

[26]http://www.copyright-watch.org/sites/default/files/LesothoCopyrightOrder1989.pdf
[27]http://www.i-network.or.ug/index2.php?option=com_docman&task=doc_view&gid=93&Itemid=130
[28]http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=3605#P116_9052
[29]http://www.ecipit.org.eg/Arabic/pdf/IPR%20law%20no%2082%20year%202002%20English.pdf
[30]http://www.boe.gov.sa/English/En%20Word/2%20Media,%20Culture%20and%20Publishing/Copyright%20Law.doc
[31]http://www.agip.com/country_service.aspx?country_key=50&service_key=C&SubService_Order=3&lang=en

final group of countries go one step further. Instead of classifying TK as a (special) type of copyrighted work, these countries have adopted so-called *sui generis* laws that create an entirely different sort of legal protection for TK. (As we will see, the distinction between customized copyright laws and sui generis laws is blurry, but is nevertheless helpful in differentiating the types of approaches to this issue.)

Two early examples of national *sui generis* laws grew out of countries' efforts to protect the traditional knowledge of indigenous groups concerning the medicinal value of plants. **Ecuador's** Law on Intellectual Property of 1998[32] protects the country's biological and genetic heritage and conditions the grant of product or process patents relating to that heritage on the acquisition of rights from the relevant traditional owners. Similarly, in 1997, the **Philippine Congress** passed the Indigenous Peoples Rights Act[33] "to recognize and promote all the rights of Indigenous Cultural Communities/Indigenous Peoples (ICCs/IPs), including their rights to "preserve and develop their cultures, traditions, and institutions" in cultural property. The Act affirms the right of ICCs/IPs to the full ownership and control of their cultural and intellectual rights. Thus, access to biological and genetic resources is permitted only after obtaining the free and informed consent of such communities. In addition, the Act guarantees ICCs/IPs the right to practice and revitalize their cultural traditions, including "to practice and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect and have access to their religious and cultural sites; the right to the use and control of ceremonial objects; and, the right to the repatriation of human remains."

Panama's Act No. 20[34] launched the *sui generis* protection movement specifically for TCEs in June, 2000. The Act subjects "the rights of use and commercialization of the arts, crafts and other cultural expressions based on the tradition of the indigenous community" to the regulation of each indigenous community approved and registered in the DIGERPI or in the National Copyright Office of the Ministry of Education. It defines "indigenous collective rights" as "indigenous intellectual and cultural property rights law relating to art, music, literature...and other subject matter and manifestations that have no known author or owner and no date of origin and constitute the heritage of an entire indigenous people."

Likewise, **Peru's** 2002 sui generis[35] [36] TK Law[37] aims to promote respect for and protect the "collective knowledge of indigenous peoples; to promote the fair and equitable distribution of the benefits derived from the use of that collective knowledge; to promote the use of the knowledge for the benefit of the indigenous peoples and mankind in general; to ensure that the use of the knowledge takes place with the prior informed consent of the indigenous peoples; to promote the strengthening and development of the potential of the indigenous peoples...and to avoid situations where the patents are granted for inventions made or developed on the basis of collective knowledge of the indigenous peoples of Peru without any account being taken of that knowledge as prior art in the examination of the novelty and inventiveness of the said inventions."

In 2003, **Guatemala** designed and implemented a special *sui generis* set of intellectual property rights for indigenous folklore, backed by both civil and criminal penalties. Guatemala's "Cultural Heritage Protection Law" also enables the attorney general to protect any registered indigenous cultural good (including oral or musical traditions) and provides perpetual intellectual property protection for any registered item. The Guatemalan system is reciprocal; it recognizes the registered folklore of any other country that recognizes the Guatemalan registry.

It is likely that many other countries will soon adopt *sui generis* TK laws. One indication of the trend in this direction is that many national members of WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore have called for the establishment of *sui generis* systems in their written submissions to the Committee. Among such countries are **Brazil, Colombia, Ethiopia, Egypt, Indonesia, Iran, Morocco, the Russian Federation, Thailand,** and **Venezuela**.

[32] http://www.wipo.int/clea/en/text_html.jsp?lang=en&id=1205
[33] http://www.grain.org/brl_files/philippines-ipra-1999-en.pdf
[34] http://www.ichrdd.ca/english/commdoc/publications/indigenous/aresioPanamaLawEng.html
[35] http://www.wipo.int/export/sites/www/tk/en/laws/pdf/peru_law_27811.pdf
[36] http://www.wipo.int/export/sites/www/tk/en/laws/pdf/peru_law_27811.pdf
[37] http://www.wipo.int/export/sites/www/tk/en/laws/pdf/peru_law_27811.pdf

6 Regional Codes Governing Traditional Knowledge

Another way in which some countries attempt to protect traditional cultural expressions (TCEs) is by pooling their resources and creating intergovernmental organizations that monitor and seek to control the use of TCEs in foreign territories. Advantages of this approach include harmonizing local laws, centralizing administration, and avoiding duplication of costly efforts across multiple countries. While the objectives of regional laws may be sound, it is debatable whether the regional organizations provide effective forms of enforcement. The major examples of this strategy are described below.

6.1 African Regional Intellectual Property Organization (ARIPO)

The African Regional Intellectual Property Organization (ARIPO) (originally named the African Regional Industrial Property Organization) was formed in 1976 and includes many of the English-speaking African countries: **Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mozambique, Namibia, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia,** and **Zimbabwe**. ARIPO's overall objectives[38] are to harmonize intellectual property regimes, foster cooperation, and provide coordinated administrative training across member states.

ARIPO has adopted two central protocols: the Harare Protocol[39] , pertaining to patents and industrial designs, and the Banjul Protocol[40] , relating to trademarks and service marks. Surprisingly, neither protocol specifically mentions protection of traditional knowledge or TCEs. Some have criticized the protocols as insensitive to the needs of the member states. However, since the adoption of the protocols, ARIPO has continued to work with the World Intellectual Property Organization (WIPO) to protect indigenous knowledge. Furthermore, ARIPO's Administrative Council has initiated a study to assess the feasibility of developing a traditional knowledge database. In 2009, ARIPO's Administrative Council suggested[41] three primary ways to implement the Organization's mandate on the protection of genetic resources, traditional knowledge, and expressions of folklore: (1) develop ARIPO's Traditional Knowledge Digital Library, (2) create regional frameworks on access and benefit sharing related to biological resources, and (3) adopt the Draft Protocol and implementing regulations on the protection of traditional knowledge and the expressions of folklore. Progress on one or more of these paths can be expected in the near future.

6.2 African Intellectual Property Organization (OAPI)

The African Intellectual Property Organization (OAPI) was created by the francophone African countries in 1962. The organization's most important legal instrument is the Bangui Agreement, which was signed in 1977. The following 16 African countries are bound by the Agreement: **Benin, Burkina Faso, Cameroon, Central African Republic, Congo, Cote d'Ivoire, Guinea, Equitorial Guinea, Gabon, Guinea Bissau, Mali, Mauritania, Niger, Senegal, Chad,** and **Togo**. The Bangui Agreement[42] was amended in 1999 so that its formal name is now "the Agreement of 24 February 1999 Revising the Bangui Agreement of 2 March 1977 on the creation of an African Intellectual Property Organization." Although the 1977 version of the Agreement is no longer effective, comparing the 1977 and 1999 versions helps to identify the strengths and weaknesses of OAPI's most important agreement.

6.3 Annex VII in the 1977 Bangui Agreement

The most notable difference between the 1977 and the 1999 Agreements is the removal of direct protection of folklore from the copyright section. Annex VII of the 1977 Agreement obliged member states to declare use of folklore to a national agency and to pay fees for such use. The fees collected were directed, in part, to cultural and social purposes. This section was criticized for its vagueness because most people were not

[38] http://www.aripo.org/index.php?option=com_content&view=article&id=19&Itemid=53
[39] http://www.aripo.org/index.php?option=com_docman&task=doc_view&gid=4&tmpl=component&format=raw&Itemid=11
[40] http://www.aripo.org/index.php?option=com_docman&task=doc_view&gid=5&tmpl=component&format=raw&Itemid=11
[41] http://www.aripo.org/index.php?option=com_docman&task=doc_view&gid=57&tmpl=component&format=raw&Itemid=11
[42] http://www.oapi.wipo.net/doc/en/bangui_agreement.pdf

sure how broadly to interpret the scope of "use of elements borrowed from folklore" (1977 Agreement, Annex VII, Chapter 1, Article 8, para. 5). Additionally, the older version of the Bangui Agreement imposed a fine for any use "of folklore work or a work that has entered the public domain" without prior declaration to the appropriate national agency (1977 Agreement, Annex VII, Chapter 1, Article 38, para. 2). The older system can be described as one in which folklore automatically belongs to the public domain and folklore users simply pay the public domain for the use to be authorized. Alternatively, this older system can be characterized as one in which folklore is owned and regulated by the state because, as declared in the original Agreement, the state has an indefeasible right with respect to folklore and "folklore is by its origin part of national heritage" (1977 Agreement, Annex VII, Chapter 1, Article 8, para. 1). The tension between these two interpretations ultimately created confusion regarding who owned TCEs. Protection of folklore and cultural heritage was then moved from the copyright section of the 1977 Agreement to the section discussing provisions common to copyright and neighboring rights in the 1999 Agreement. As discussed below, this new placement did not eliminate confusion and ambiguity.

6.4 Annex VII in the 1999 Bangui Agreement

The 1999 Bangui Agreement continues earlier attempts to protect folklore and cultural heritage. Under the new system, users of folklore must receive prior authorization. The objectives of the system are to protect (Chapter 2), to safeguard (Chapter 3), and to promote (Chapter 4) cultural heritage. "Cultural heritage" is defined as a composition of "all those material or immaterial human productions that are characteristic of a nation over time and space. Such productions relate to (i) folklore, (ii) sites and monuments; [and] (iii) ensembles" (Article 67, paras. 1-2). The definitions of "folklore" (Article 68) and "monuments" (Article 70) are very detailed. Additionally, the definitions of "sites" and "ensembles" can be found in Articles 69 and 71, respectively.

Prohibited acts are listed in Article 73. They include deformation, export, misappropriation, and unlawful transfer. Article 74 states three main exceptions to these prohibitions: "use for teaching," "use as illustration of the original work of an author on condition that the scope of such use remains compatible with honest practice," and "borrowings for the creation of an original work from one or more authors."

A fee payment scheme similar to the 1977 Agreement still exists in which "the exploitations of expressions of folklore and that of works or productions that have fallen into the public domain . . . shall be subject to the user entering into an undertaking to pay the national collective rights administration body a relevant royalty" (1999 Agreement, Annex VII, Chapter 5, Article 59, para. 1). The fees will be donated, in part, to "welfare and cultural purposes" (1999 Agreement, Annex VII, Chapter 5, Article 59, para. 3).

Some observers contend that the 1999 Agreement completely removed folklore from copyright law and instead provided it with *sui generis* protection whereby folklore is regulated and owned by the government. However, others see that folklore can still be protected as a form of copyright as stated in Article 5 of Annex VII. This ambiguity creates confusion as to who owns folklore under the terms of the Agreement. This confusion is even greater than in the 1977 Agreement because there are no longer specific references to the States having an indefeasible right with respect to folklore and cultural heritage.

6.5 Common Market of the South (MERCOSUR)

MERCOSUR is a regional trade agreement created in 1991 by the Treaty of Asuncion between **Argentina, Brazil, Paraguay,** and **Uruguay**. In 1995, the regional organization adopted an important protocol to protect indigenous heritage: the Protocol for the Harmonization of Intellectual Property Norms in MERCOSUR with respect to Trademarks and Indications of Source or Denominations of Origin. In particular, Article 19 of the Protocol requires Party States to "reciprocally protect their indications of source and dominations of origin." "Denomination of origin" is defined broadly as "the geographical name of a country, city, region or locality within a Party State's territory, which designates products or services whose qualities or characteristics are exclusively or essentially caused by the geographical environment, including natural and human factors." Such a broad definition of geographic origin – which notably includes "human factors" – encompasses traditional cultural expressions. Similarly, the Protocol attempts to protect traditional knowledge

through its definition of "indications of source" by basing the defined term on the location that is "known as a center place for extraction, production or manufacture of a certain product or for the performance of a certain service." In 1996, MERCOSUR affirmed the importance of cultural rights by creating the Protocol on the Cultural Integration of MERCOSUR. Although traditional knowledge is not specifically mentioned, this protocol focuses on the creation of cultural policies that display historical traditions, common values, and cultural diversity of member countries.

6.6 Andean Community

The Andean Community (originally known as the Andean Pact) was created in 1969 with the signing of the Cartagena Agreement. The overall objective of the Community is to enable the member countries to work jointly to "improve their people's standard of living through integration and economic and social cooperation." The current member states are **Bolivia, Columbia, Ecuador,** and **Peru; Mexico** and **Panama** are observer countries. In 2000, the Community enacted Decision 486[43] , the purpose of which was to improve intellectual property protection and provide "more expeditious and transparent procedures for trademark registration and patent issues." Although this Decision focuses on biological resources, it also provides for protection of traditional knowledge in the General Provisions. Article 3 states that member countries must "ensure that the protection granted to intellectual property elements shall be accorded while safeguarding and respecting their biological and genetic heritage, together with the traditional knowledge of their indigenous, African American, or local communities. As a result, the granting of patents on inventions that have been developed on the basis of material obtained from that heritage or that knowledge shall be subordinated to the acquisition of that material in accordance with international, Andean Community, and national law. The Member Countries recognize the right and the authority of indigenous, African American, and local communities in respect of their collective knowledge."

6.7 Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture

The Pacific Regional Framework for the Protection of Traditional Knowledge and Expression of Culture[44] was created in 2002 but has not yet been implemented. It was drafted by the Pacific Islands Forum Secretariat[45] whose member countries are **Australia, Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Nauru, New Zealand, Niue, Palau, Papua New Guinea, Republic of Marshal Islands, Samoa, Solomon Islands, Tonga, Tuvalu,** and **Vanuatu**. Additionally, the following countries have associate membership: **New Caledonia** and **French Polynesia**. Finally, **Tokelau, Wallis and Futuna, the Commonwealth, the Asia Development Bank,** and **Timor L'este** all have observer status.

The Forum has developed a specific action plan[46] that details ways that the member countries plan to protect the Region's traditional knowledge. In particular, the Forum has created a set of Model Laws to protect traditional knowledge and the expressions of culture[47] . The laws are noteworthy because they not only protect TK and TCEs but also employ customary uses as the foundation of the framework.

The Framework's general approach is to create *new* rights in traditional knowledge and expressions of culture, which previously may have been regarded as part of the public domain. People seeking to use TCEs must have prior and informed consent from the traditional owners. The rights the Framework specifies fall into two categories: moral rights and traditional cultural rights. It is crucial to note that neither moral nor traditional cultural rights depend on copyright formalities (e.g., registration requirements). Moral rights include the right of attribution, the right against false attribution, and the right of integrity of indigenous work. As stated in Clause 7(2) of Part I, traditional cultural rights include the right to reproduce, publish,

[43] http://www.comunidadandina.org/ingles/normativa/D486e.htm
[44] http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsofCulture20021.pdf
[45] http://www.forumsec.org/index.cfm
[46] http://www.forumsec.org/resources/uploads/attachments/documents/Traditional%20Knowledge%20Action%20Plan%202009.pdf
[47] http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsofCulture20021.pdf

perform, make available online, and create derivative works, among many others. These are said to be both exclusive and inalienable.

Clause 11 is noteworthy because it states that traditional rights exist in addition to (and do not affect) the rights created by other intellectual property law regimes. Clause 7(4) provides that there is no traditional knowledge protection in the following contexts: face-to-face teaching, criticism or review, reporting news or current events, judicial proceedings, and incidental use.

Clause 7 of Part I of the Framework makes clear who owns the protected TCEs. Traditional owners are defined as: "a group, clan, or community of people, or the individual who is recognized by a group, clan, or community of people as the individual, in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with customary law and the practices of that group, clan, or community."

Finally, Clause 37 details the role of the Cultural Authority in protecting TCEs. Those attempting to seek permission to use elements of protected TCEs have two options: (1) apply directly to the Cultural Authority or (2) communicate directly with the traditional owners. One of the Authority's many roles is to advise the traditional owners. Valid TCE users must prove they have received consent from the traditional owners via an "authorized user agreement."

This Framework is ambitious and may provide for strong TCE protection once adopted; however, its potential impact is unknown as the laws have not yet been implemented.

7 International Legal Instruments

The final set of laws pertaining to traditional knowledge consist of international agreements. These agreements have emerged from various international organizations, including the United Nations Education, Scientific and Cultural Organization (UNESCO), the World Intellectual Property Organization (WIPO), the World Trade Organization (WTO) and the International Labor Organization (ILO). The types and strength of the protections they provide for TCEs vary radically; no consistent pattern or theme is discernible. They are discussed below in reverse chronological order.

7.1 United Nations Declaration on the Rights of Indigenous Peoples (2007)

The UN has been investigating[48] the protection of minorities and indigenous populations since 1969. On 30 January 2007, the Assembly of the Union adopted a decision (Assembly/AU/ Dec. 141 (VIII)), known as the UN Declaration on the rights of indigenous peoples. 143 countries voted in favor of the Declaration. **Australia, Canada, New Zealand** and the **United States** voted against it. **Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa** and **Ukraine** abstained. The Declaration is the most comprehensive statement of the rights of indigenous peoples ever developed, giving prominence to collective rights to a degree unprecedented in international human rights law. The adoption of this instrument is the clearest indication yet that the international community is committing itself to the protection of the individual and collective rights of indigenous peoples. The key provisions follow.

7.1.1 Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture. States shall provide effective mechanisms for prevention of, and redress for:

Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities; Any action which has the aim or effect of dispossessing them of their lands, territories or resources; Any form of forced population transfer which has the aim or effect of violating

[48] http://www.sami.uit.no/girji/n02/en/102daes.html#Anchor-39228

or undermining any of their rights; Any form of forced assimilation or integration; Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

7.1.2 Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

7.1.3 Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

7.1.4 Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

7.1.5 Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

7.1.6 Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

7.1.7 Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

7.1.8 Article 34

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

7.2 WIPO Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge (2006)

In 1998, the World Intellectual Property Organization (WIPO) embarked on a fact-finding mission to 28 countries to identify intellectual property-related regulations of traditional knowledge. Following a review of those materials, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (the IGC) was formed in 2001. Since 2004, it has been working[49] on draft provisions for the enhanced protection of traditional cultural expressions against misappropriation and misuse. Although the provisions are still in draft form, they are meant to serve as points of reference for ongoing policy discussions at the national, regional, and international levels.

The Draft Provisions have the following objectives: to recognize value; to promote respect; to meet the actual needs of communities; to prevent the misappropriation of traditional cultural expressions/expressions of folklore; to empower communities; to support customary practices and community cooperation; to contribute to safeguarding traditional cultures; to encourage community innovation and creativity; to promote intellectual and artistic freedom, research and cultural exchange on equitable terms; to contribute to cultural diversity; to promote community development and legitimate trading activities; to preclude unauthorized IP rights and to enhance certainty, transparency and mutual confidence. The General Guiding Principles and Substantive Principles are available here[50] .

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

The Convention on the Protection and Promotion of the Diversity of Cultural Expressions builds off the earlier Universal Declaration on Cultural Diversity[51] of (2001). **Canada, France, Germany, Greece, Mexico, Monaco, Morocco,** and **Senegal** and Francophone member states of UNESCO strongly supported the Convention. The **United States** opposed it. 104 countries have acceded to or ratified the Convention.

The Convention recognizes "the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion." It seeks to “to reaffirm the sovereign rights of States to maintain, adopt and implement policies and measures that they

[49] http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html
[50] http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet.pdf
[51] http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html

deem appropriate for the protection and promotion of the diversity of cultural expressions on their territory" (Article 1(h)). The Convention also seeks to mitigate the dilution of culture that follows from the movement of cultural goods and services across national borders.

The Convention mentions intellectual property rights once, by recognizing "the importance of intellectual property rights in sustaining those involved in cultural creativity." The Convention is ambiguous, however, on how much protection to grant to TCEs. Article 6 lists the types of measures member states may adopt to protect and promote cultural diversity. Subsection 2(g) allows "measures aimed at nurturing and supporting artists and others involved in the creation of cultural expressions" but subsection 2(e) allows for measure that "promote the free exchange and circulation of . . . cultural expressions and cultural activities, goods and services." Strong support for indigenous groups as creators of TCEs is not required by Article 7, as members states need only "endeavour to recognize the important contribution of artists, others involved in the creative process, cultural communities, and organizations that support their work, and their central role in nurturing the diversity of cultural expressions." Professor Laurence R. Helfer has noted[52] that the Convention disregards the protection for TCEs that could be derived from the use of intellectual property law.

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

In 2001, UNESCO[53] began drafting a definition of intangible cultural heritage and formulating provisions for its protection. In 2003, the resulting Convention was adopted and in 2006 it entered into force. 121[54] countries have ratified the Convention. **Australia, Canada, New Zealand** and the **United States** have not ratified the Convention. **Argentina, Columbia, Denmark, Indonesia, Saudi Arabia, Seychelles** and **the Syrian Arab Republic** all entered declarations or reservations.

Article 1[55] lists the purposes of the Convention as "to safeguard the intangible cultural heritage; to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned; to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof; to provide for international cooperation and assistance." Although the Convention does not directly discuss intellectual property rights, Article 3[56] notes that nothing in the Convention affects "the rights and obligations of States Parties deriving from any international instrument relating to intellectual property rights ... to which they are parties."

Article 11 Role of States Parties

Each State Party shall:

take the necessary measures to ensure the safeguarding of the intangible cultural heritage present in its territory;

among the safeguarding measures referred to in Article 2, paragraph 3, identify and define the various elements of the intangible cultural heritage present in its territory, with the participation of communities, groups and relevant nongovernmental organizations.

7.5 Trade-Related Aspects of Intellectual Property Rights (1994)

As we saw in Module 2, the 1994 TRIPS Agreement[57] created a set of minimum intellectual property standards for all members of the World Trade Organization. Although the Agreement requires developing countries to increase many forms of intellectual property protection, it does not mention folklore or TCEs.

After the passage of TRIPS, the UN Human Rights Commission studied its implications for human rights. In 2000, the Commission, relying on that study, adopted Resolution 2000/7 on Intellectual Property and Human Rights. The Resolution notes that "actual or potential conflicts exist between the implementation

[52]http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891303
[53]http://www.unesco.org/culture/ich/index.php?pg=00007
[54]http://www.unesco.org/culture/ich/index.php?pg=00024
[55]http://www.unesco.org/culture/ich/index.php?pg=00006
[56]http://www.unesco.org/culture/ich/index.php?pg=00022
[57]http://www.wto.org/english/docs_e/legal_e/27-trips_01_e.htm

of the TRIPS Agreement and the realization of economic, social and cultural rights in relation to . . . the reduction of communities' (especially indigenous communities') control over their own . . . natural resources and cultural values." It declares that "the implementation of the TRIPS Agreement does not adequately reflect the fundamental nature and indivisibility of all human rights, including . . . the right to self-determination. There are apparent conflicts between the intellectual property rights regime embodied in the TRIPS Agreement, on the one hand, and international human rights law, on the other." The Sub-Commission urged national governments, intergovernmental organizations, and civil society groups to give human rights primacy over the economic policies and agreements. Since the passage of the 2000/7 Resolution, Human Rights bodies at the UN have investigated the relationship between intellectual property law and human rights, as discussed by Lawrence Helfer in this article[58] .

7.6 ILO Convention 169 on Indigenous and Tribal People (1989)

The International Labor Organization, a special agency under the auspices of the UN, was the first international organization to attempt to define indigenous populations and to declare the rights of such populations. ILO Convention No. 169 replaced ILO Indigenous and Tribal Populations Convention No. 107[59] (1957) that had been ratified by six African States. Although no African states have yet ratified[60] ILO Convention 169, the ILO and the African Commission on Human and Peoples' Rights[61] view this instrument as an inspiration and a reflection of a trend towards the protection of indigenous rights globally and in Africa.

The 169 Convention focuses on indigenous peoples' rights to control their own institution, economic development, customs and belief systems. It applies to "tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations" and to "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions." Article 1[62] . The Convention does not mention intellectual property rights, but seeks to protect indignous culture and recognizes the collective ownership that characterizes many indigenous populations.

Article 4(1)

Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned.

Article 5

the social, cultural, religious and spiritual values and practices of these peoples shall be recognised and protected, and due account shall be taken of the nature of the problems which face them both as groups and as individuals;

the integrity of the values, practices and institutions of these peoples shall be respected;

policies aimed at mitigating the difficulties experienced by these peoples in facing new conditions of life and work shall be adopted, with the participation and co-operation of the peoples affected.

Article 13

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.

[58]http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891303
[59]http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107
[60]http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169
[61]http://www.ilo.org/indigenous/Resources/Publications/lang–en/docName–WCMS_115929/index.htm
[62]http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169

7.7 Berne Convention for the Protection of Literary and Artistic Works (1979)

Although the Berne Convention (discussed at length in Module 2) does not mention traditional knowledge, Article 15(4) can be interpreted to leave to the discretion of each member country how (if at all) to protect TCEs.

Article 15(4)

1. In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.

7.8 International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (ICESCR) establishes a right to the protection of the moral and material interests resulting from any scientific, literary or artistic production. ICESCR has 160 parties[63] , 69 of which are signatories. Read[64] .[65] In conjunction with the 1948 Universal Declaration of Human Rights, and recognizing the binding nature of the treaty upon its signatories, the ICESCR can be interpreted[66] as guaranteeing intellectual property rights as a human right. In 2005, the Committee on Economic, Social and Cultural Rights (CESCR) commented[67] on Article 15 of the ICESCR (reproduced below), expanding it to protect indigenous groups' expressions of cultural heritage. CESCR calls upon signatories to adopt protective measures that "recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties."

Article 15

The States Parties to the present Covenant recognize the right of everyone:

To take part in cultural life;

To enjoy the benefits of scientific progress and its applications;

To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.

The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.

7.9 International Covenant on Civil and Political Rights (1966)

The International Covenant on Civil and Political Rights (ICCPR) recognizes the self determination of minority groups and their right to control their culture. The ICCPR has 165 parties[68] , 72 of which are signatories. Although the ICCPR is silent on most cultural and intellectual property rights issues, considered[69] in conjunction with the 1966 International Covenant on Economic, Social and Cultural Rights and the 1948 Universal Declaration of Human Rights, the ICCPR can be viewed as establishing intellectual property rights as human rights.

Article 1

[63]http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en
[64]https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=48+Am.+U.L.+Rev.+76
[65]https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=48+Am.+U.L.+Rev.+76
[66]http://papers.ssrn.com/sol3/papers.cfm?abstract_id=891303
[67]http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/E.C.12.GC.17.En?OpenDocument
[68]http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en
[69]https://litigation-essentials.lexisnexis.com/webcd/app?action=DocumentDisplay&crawlid=1&doctype=cite&docid=48+Am.+U.L.+Rev.+76

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 27

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

7.10 Universal Declaration of Human Rights (1948)

The Universal Declaration of Human Rights (UDHR) establishes the right to the protection of moral interests and materials deriving from any scientific, literary or artistic production. The UDHR is not a binding document, but it is a foundational document for the United Nations and for the two 1966 Covenants, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.

Although the UDHR does not address intellectual property rights, Article 27[70] of the UDHR recognizes the "moral and material interests" of authors and inventors and the right of the public “to enjoy the arts and to share in scientific advancement and its benefits.” This article expresses the challenge of balancing private intellectual property rights and a vibrant public domain.

Article 17

1. Everyone has the right to own property alone as well as in association with others.
2. No one shall be arbitrarily deprived of his property.

Article 27

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

8 Policy Arguments

As indicated above, the questions of whether and how to protect traditional knowledge are currently being debated and are highly controversial. At the international level and within many individual countries, strong differences of opinion can be found. Set forth below are summaries of the primary arguments made in this debate.

8.1 Why Protect TK?

Arguments from Personhood. For many indigenous groups, TK encompasses cultural elements that are integral to the group's sense of identity. One can argue that objects and expressions that are fundamental to a person's or group's identity merit protection, and at the extreme, could be considered inalienable. Similarly, some advocates for TK protection have proposed a "cultural stewardship" justification for this protection. For example, Kristen Carpenter, Sonya Katyal and Angela Riley advocate allowing indigenous communities to retain control, if not exclusive access and ownership, of TK because of its importance in shaping the identity of the indigenous group and its culture.

Closely related to arguments from personhood are arguments from moral rights, which we discussed in Module 4. It is argued, just as an individual artist should enjoy a right of attribution and integrity with respect to her creations, so should a community enjoy a right of attribution and integrity with respect to its collective creations.

Arguments based on Preservation. Another reason to advocate for protection of TK is that unlike many forms of intellectual property, cultural expressions may require protection in order to preserve their value. For example, religious ceremonies and sacred rituals may be valuable to a culture in part because

[70] http://www.un.org/en/documents/udhr/index.shtml

they are not widespread; their rarity is integral to their place in the culture. In order to maintain the value of these traditions, it may be necessary to restrict their use.

Arguments based on Reparations. A third argument in favor of protection for TK is based upon the idea that many indigenous cultures have been damaged by invasive colonialism practiced by Western countries in the past few centuries. Supporters of this argument believe that protection of TK is a way of providing reparations, symbolic as well as monetary, for the wrongs committed against these indigenous groups.

8.2 How Should TK be protected?

8.2.1 Traditional IP Modes of Protection

8.2.1.1 Copyright

As we have seen, many nations have used copyright law (either alone or in conjunction with *sui generis* laws) to protect TK. However, there are many arguments against using standard copyright to protect TK.

1. *The fixation requirement.* Some copyright systems require that a work be fixed in a material form. This is an obstacle in the protection of TCEs, which are not always manifested in tangible expressions.
2. *Originality.* Copyright law requires that a work be "original" in order to merit protection. Since most TK is "traditional" rather than new, this originality requirement will often be difficult to satisfy.
3. *Authorship.* Much cultural expression develops gradually over time, through the contributions of several members of a community. If no single author or group of authors can be identified, it will be difficult for copyright protection to be obtained.
4. *The term of protection.* The term of protection for copyright in most countries is traditionally limited, and not infinite. Many forms of TK are in fact older than the copyright term. As a result, copyright protection may be unavailable for them.

To avoid these difficulties, it is possible for countries to modify copyright legislation so that it has different requirements for folklore or cultural expression. For example, the Tunis Model Law for Copyright in the Developing Countries[71] , adopted in 1976, advocates extending copyright protection to works of folklore without requiring fixation and with an unlimited term of protection.

8.2.1.2 Trademark Law

Some expressions of folklore might be registered as trademarks. Trademark law protects not only graphic representations, but also words and (in some countries) sounds. An advantage of protection through trademark law is its near indefinite term of protection, and its lack of a novelty requirement; it is sufficient for purposes of protection that the trademark has a "distinctive character." However, at least in some countries, trademark protection, unlike copyright and patent protection, requires that the applicant demonstrate use of the mark in commerce. Many cultural expressions do not have a direct link to commerce and are not used as designations of source to the consuming public. Furthermore, the application of trademark law to TK is complicated, since by registering a mark the community makes public TK that the community may desire to keep secret for religious or other reasons.

8.2.1.3 Collective Trademarks, Certification Marks, and Geographic Indicators

Collective trademarks, certification marks, and geographic indicators form a subset of trademark law that could be particularly useful for the protection of TK. Collective trademarks are trademarks that are used by a group of producers rather than one producer. Collective marks are held by an association rather than an individual; in order to be useful for protecting TK, members of indigenous groups would need to form an association for the purpose of marking their cultural expressions.

[71] http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html

Certification marks indicate that the producer of a good has met certain standards of quality. (A popular example is the Good Housekeeping[72] certification prominent on household products sold in the United States.) Certification marks could be used to specify which TCEs meet the standards of the indigenous community in which they originated. This, like a collective trademark, would require the formation an official oversight organization to act on behalf of the indigenous community in determining which expressions can bear the certification mark.

Geographic indicators, as the name suggests, are marks that can be placed on products that come from a specific geographic area. Geographic indicators are often used for food products, such as wines, but some indigenous groups have experimented with using geographic indicators as a means of protecting cultural expressions by authenticating products that are sold elsewhere. One example of such a program is the Alaskan Silver Hand Program[73] .

8.2.1.4 Sui Generis Laws

As we have seen, where TK does not map onto traditional intellectual property regimes, *sui generis* laws may be adopted. *Sui generis* legislation is a promising route for advocates of TK protection, as it can provide strong protection while avoiding the hurdles that separate TK from traditional IP subject matter.

8.2.1.5 Absolute Ownership

One possibility for TK protection is to give absolute ownership of the cultural expression to the indigenous group from which it originated. However, this is relatively unpopular option, as it would impede the spread of knowledge and risk the loss of cultural expressions and information in the event that the group is disbanded or its members are assimilated into the general population.

8.2.1.6 Negotiation and Mutual Respect

Michael Brown argues that the law should, at most, foster "negotiation and mutual respect" between indigenous cultures and those who seek to employ a culture's traditional expressions. This approach would give indigenous groups much less protection, but would facilitate, he argues, beneficial cultural interchange.

8.2.1.7 International Human Rights

Other scholars, such as Laurence R. Helfer, approach the issue as one of Human Rights. They advocate granting TK protection that is fair and balanced and not overreaching. Their ambition is to balance the needs of indigenous groups and the benefits of a robust public domain.

In this vein, Duncan M. Matthews[74] points out that "a human rights approach takes what is often an implicit balance between the rights of inventors and creators and the interests of the wider society within intellectual property paradigms and it makes it far more explicit and exacting.... [T]he rights of the creator are not absolute but conditional on contributing to the common good and welfare of society.... [B]ecause a human rights approach also establishes a different and often more exacting standard for evaluating the appropriateness of granting intellectual property protection, in order for intellectual property to fulfill the conditions necessary to be recognised as a universal human right, intellectual property regimes and the manner they are implemented first and foremost must be consistent with the realisation of the other human rights, particularly those enumerated in the Covenant."

[72]http://www.goodhousekeeping.com/product-testing/history/welcome-gh-seal
[73]http://www.eed.state.ak.us/aksca/Native.htm
[74]http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1414900

8.2.1.8 System of Domain Public Payant

The doctrine of domain public payant, advocated by the Tunis Model Law[75] and discussed at WIPO's 1999 Round Table on IP and TK (section 3 b of the Round Table minutes)[76] , advocates payment of royalties for works, including TCEs, that are in the public domain because they do not qualify for protection under traditional intellectual property law. This would provide monetary compensation for indigenous communities, but would not be a satisfactory solution for communities whose priority is control over their TCEs rather than remuneration. For more on different versions of domain public payant, see the UNESCO Copyright Bulletin from 1994.

8.3 Why not protect TK?

Some observers think that legal protection for traditional knowledge is highly problematic. Here are some of their arguments:

TK does not map onto IP law easily. As indicated above, traditional cultural expressions are often not put into a fixed form, are not "original," and do not have a defined author – three requirements for copyright protection. Furthermore, as indicated above, most expressions of folklore are not used in commerce as a means of identifying their source, and so would not be eligible for trademark protection. Finally, patent law may not be available to protect TK because by definition, TK has been used and passed down through generations, and this type of prior public use may preclude patent protection, as least if it is publicly recorded. Thus, it appears that certain attributes of TK make it a difficult fit with all three of the major types of intellectual property law. Additionally, protection for TK does not fit well with the principal goals underlying the protection of intellectual property law. There is little evidence that protection of TK is necessary to incentivize the creation of cultural expression, as other factors have successfully motivated the creation of these expressions for millennia. Furthermore, the labor-desert theory does not easily fit with TK protection, as those who created the traditional expression are either unidentifiable because the expression was the product of collaboration, or in some cases, long dead. Current members of the culture do not have as strong a claim for protection from a labor-desert perspective.

Protection of TK would involve perpetuation of illiberal social hierarchies and oppressive customs within indigenous groups. Another argument against providing protection for TK is that doing so may perpetuate inequality and oppression within indigenous groups. When an indigenous group is given the right to control the use of TK, the powerful members of that indigenous group may benefit at the expense of the group's minorities. Paul Kuruk argues that protection of TK may further the oppression of women and subordinated social and economic groups within an indigenous culture.

Protection of TK may deprive the world community of valuable knowledge. Some might argue that principles of liberal democracy dictate that knowledge should be freely shared rather than restricted to certain people or groups. Protection of TK might deprive outsiders of a chance to benefit from the traditions, medicinal or otherwise, of an indigenous culture. When advancing this argument, however, one should keep in mind that principles of liberal democracy, while widely accepted in the Western world, are not necessarily an agreed-upon starting point for this debate.

Increase awareness rather than changing the law. Some organizations have advocated protection of TK through nongovernmental organizations and projects rather than through legislation. For example, the Intergovernmental Committee for the Safeguarding of Intangible Cultural Heritage has compiled a List of Intangible Heritage in Need of Urgent Safeguarding[77] . UNESCO lists projects for safeguarding intangible cultural heritage in African countries here[78] . Finally, groups of academics and activists have created community standards for those, such as anthropologists, whose work impacts indigenous cultures and may involve sensitive issues of disclosure of TK.

[75]http://portal.unesco.org/culture/en/ev.php-URL_ID=31318&URL_DO=DO_TOPIC&URL_SECTION=201.html
[76]http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=1192
[77]http://www.unesco.org/culture/ich/index.php?pg=00011#list
[78]http://www.unesco.org/culture/ich/index.php?pg=00176

9 Back to the case study

Nadia should make Angela aware of the various types of national intellectual property laws that could apply to this situation. For example, in their country traditional dances might be protected under copyright or *sui generis* statutes. However, those laws would only apply within their country, not to the distribution of the Madonna video in other countries. Nadia should also make Angela aware of regional organizations of which their country may be a member. Finally, Nadia could help equip Angela to advocate for protection of her community's traditional cultural expressions by making her aware of the policy recommendations and reports of international organizations, such as WIPO, and the relevant committees that may be proposing draft legislation on traditional knowledge in the near future

10 Additional resources

10.1 In General

Silke Von Lewinski Ed., Indigenous Heritage and Intellectual Property (2d. 2008).

WIPO's Database[79] contains existing codes, guides, policies, protocols and standard agreements relating to the recording, digitization and dissemination of intangible cultural heritage, with an emphasis on intellectual property issues.

Who Owns Native Culture by Michael F. Brown[80] is a good resource for understanding current debates about the legal status of indigenous art, music, folklore, biological knowledge and sacred sites.

Intellectual Property Rights Online[81] is a compendium articles about Traditional Knowledge and Cultural Expressions

The African Copyright & Access to Knowledge Project (ACA2K)[82] probes the relationship between national copyright environments and access to knowledge in African countries.

National Experiences with the Protection of Traditional Cultural Expressions/Expressions of Folklore: Preface[83]

WIPO's resources on Traditional Cultural Expressions (Folklore)[84]

Creative Heritage Project: Strategic Management of IP Rights and Interests[85] lists resources for developing best practices and surveys existing practices, protocols and policies.

Resources on Indigenous Cultures and Cultural Property[86] is a searchable database of codes, guides, policies, protocols and agreements relating to IP and the digitization of ICH. It also includes short case studies presenting informal summaries of best practices, multimedia materials, articles, laws and other resources.

Is a Sui Generis System Necessary?[87] reviews traditional IP laws and outlines potential problems with sui generis systems.

WIPO[88] list of legislative texts on the protection of TK.

WIPO case studies of appropriated traditional cultural expressions[89]

10.2 Examples of Nation Specific Rules Governing Traditional Knowledge

Peter Jaszi, "Traditional Culture: A Step Forward for Protection in Indonesia" (2009)[90]

[79]http://www.wipo.int/tk/en/folklore/creative_heritage/
[80]http://www.williams.edu/AnthSoc/native/index.htm
[81]http://www.iprsonline.org/resources/tk.htm#2006
[82]http://www.aca2k.org/index.php?option=com_content&view=article&id=174&Itemid=60&lang=en
[83]http://www.wipo.int/tk/en/studies/cultural/expressions/preface/index.html
[84]http://www.wipo.int/tk/en/folklore/
[85]http://www.wipo.int/tk/en/folklore/culturalheritage/index.html
[86]http://www.caslon.com.au/ipguide14.htm
[87]http://docs.google.com/viewer?a=v&q=cache:YpXBL2B8YW4J:www.iipi.org/speeches/newyork011404.pdf+what+are+sui+generis+laws+W
vKUx386Lbgxl_JtZO798bxHrrw
[88]http://www.wipo.int/tk/en/laws/tk.html
[89]http://www.wipo.int/tk/en//studies/cultural/minding-culture/studies
[90]http://www.wcl.american.edu/pijip/go/news/professor-peter-jaszi-authors-report-on-protection-of-the-traditional-arts-in-indonesia

Lauryn Grant, "The Protection of Traditional or Indigenous Knowledge," SJ049 ALI-ABA 469 (2004).

Paul Kuruk, "Goading a Reluctant Dinosaur: Mutual Recognition Agreements as a Policy Response to the Misappropriation of Foreign Traditional Knowledge in the United States," 34 Pepp. L. Rev. 629 (2007).

Paul Kuruk , "The Role of Customary Law Under *Sui Generis* Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge," 17 Ind. Int'l & Comp. L. Rev. 67 (2007).

Paul Kuruk, "Protecting Folklore Under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individual and Communal Rights in Africa and the United States," 48 Am. U. L. Rev. 769 (1999).

Stephen R. Munzer, Kal Raustiala, "The Uneasy Case for Intellectual Property Rights in Traditional Knowledge," 27 Cardozo Arts & Ent. L.J. 37 (2009).

Wikipedia site[91] on the United State's Native American Mascot Controversy.

10.3 Examples of Regional Codes Governing Traditional Knowledge

Adebambo Adewopo, "The Global Intellectual Property System and Sub-Sahara Africa: A Prognostic Reflection," 33 U. Tol. L. Rev. 749 (2002).

African Intellectual Property Organization (OAPI)[92]

African Regional Intellectual Property Organization (ARIPO)[93]

Andean Community[94]

Common Market of the South (MERCOSUR)[95]

Pacific Islands Forum Secretariat[96]

10.4 International Legal Instruments

Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property," 40 U.C. Davis Law Review 971 (2007).

A critique of WIPO's Draft Principles from a coalition of indigenous groups[97]

10.5 Policy Arguments

Megan Carpenter, Intellectual Property Law and Indigenous Peoples: "Adapting Copyright Law to the Needs of a Global Community," 7 Yale Hum. Rts. & Dev. L.J. 51 (2004).

Patty Gerstenblith, "Identity and Cultural Property: The Protection of Cultural Property in the United States," 75 B. U. L. REV. 559, 570 (1995).

Lorie Graham and Stephen McJohn, "Indigenous Peoples and Intellectual Property," 19 WASH. U. J.L. & POL'Y 313 (2005).

Kristen A. Carpenter, "Real Property and Peoplehood," 27 Stan. Envtl. L.J. 313, 345-51, 355-57 (2008).

Paul Kuruk, "Promoting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the US," 48 Am. U. L. Rev. 769 (1999).

Anupam Chander & Madhavi Sunder, "The Romance of the Public Domain," 92 California Law Review 1331 (2004).

Kristen A. Carpenter, Sonia Katyal, and Angela Riley, "In Defense of Property," 118 Yale L.J. 1022 (2009).

[91] http://en.wikipedia.org/wiki/Native_American_mascot_controversy
[92] http://www.oapi.wipo.net/en/OAPI/index.htm
[93] http://www.aripo.org/
[94] http://www.comunidadandina.org/endex.htm
[95] http://untreaty.un.org/unts/144078_158780/12/10/5009.pdf
[96] http://www.forumsec.org/index.cfm
[97] http://www.wipo.int/export/sites/www/tk/en/igc/ngo/ciel_gap.pdf

11 Assignment and discussion questions

11.1 Assignment

Answer one of the following questions:

1. Should intellectual property protection of any sort be granted to traditional knowledge?
2. Assuming some sort of intellectual property protection for traditional knowledge is appropriate, which of the many legal systems discussed in this module is the best?

11.2 Discussion Question(s)

Select one of the answers that your colleagues provided to the Assignment questions, and comment on it. Explain why you agree or disagree.

12 Contributors

This module was created by Emily Cox[98] , Adrienne Baker[99] , Ariel Rosthstein[100] , and Miriam Weiler[101] . It was then edited by William Fisher[102] .

[98]http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#cox
[99]http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#Abaker
[100]http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#arothstein
[101]http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#weiler
[102]http://cyber.law.harvard.edu/copyrightforlibrarians/Contributors#fisher