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Stepping Outside the Box: Traditional Knowledge, Folklore, Indigenous Textiles and Cultural Appropriation is there Room for Folklore Protection Under Intellectual Property Law?

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STEPPING OUTSIDE THE BOX: TRADITIONAL KNOWLEDGE, FOLKLORE, INDIGENOUS TEXTILES AND CULTURAL APPROPRIATION—IS THERE ROOM FOR FOLKLORE PROTECTION UNDER INTELLECTUAL PROPERTY LAW?

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ABSTRACT

The protection of folklore is contentious. This stems from differing perceptions of the meaning and value of folklore to different countries and ethnic groups. Folklore is unique because it is viewed not only as part of a community's culture but also as a commodity. By focusing on traditional textiles as a branch of folklore, this dissertation examines the importance of traditional textiles, the practice of culture appropriation and the right legal mechanism for the protection of traditional textiles.

Specifically, this dissertation argues that not all works of folklore are a part of the public domain and that adopting a contrary view may contribute to the appropriation of traditional designs. Further, it might erode the value of the respective culture and may even result in the complete loss of culture. It argues further that the West should not be too ready to dismiss the importance of folklore to indigenous communities. Rather, cultural diversity should be acknowledged and respected. This thesis also argues that the philosophies justifying intellectual property protection do not necessarily exclude the protection of traditional textile designs. Rather, the tension in 'fitting' traditional textiles protection under the intellectual property umbrella arises from the manner in which intellectual property has been traditionally drafted under international law and national legislation. It challenges the view that protecting folklore will obstruct progress in the arts and stifle creativity.

In conclusion, this thesis recommends a consideration of *sui generis* options for traditional textiles protection. It also proposes that there should be international cooperation to strengthen folklore protection. Last, it recommends that it is time for the perception of traditional designs as part of the public domain to be corrected.

LIST OF ABBREVIATIONS AND ACRONYMS

ARIPO	African Regional Intellectual Property Organization
AU	African Union
CBD	Convention on Biological Diversity
EU	European Union
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILM	International Legal Materials
ILO	International Labour Organization
OAPI	African Intellectual Property Organization
OAU	Organization of African Unity (now African Union)
TCES	Traditional Cultural Expressions
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UPOV	Union pour la Protection des Ostentations Végétales
US	United States
W.A.C.A.	West African Court of Appeal

WHO	World Health Organization of the United Nations
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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CHAPTER 1

1: INTRODUCTION

It is an accepted fact that over the centuries some cultures and languages have vanished and others are in danger of disappearing. Of the more than 6,900 living languages catalogued in SIL International's premier publication, the *Ethnologue: Languages of the World*, at least 516 are classified as almost extinct.[1] It is estimated further that about half of the world's living languages are in danger of disappearing within the next several decades.[2] For example, on 27 April 2009, the Malaysian National News Agency, Bernama, reported that the Kenyah language, spoken by about 100,000 Orang Ulu in Sarawak, is endangered and can become extinct if no steps are taken to preserve it.[3]

It is also clear that without a concerted effort to protect cultural heritage, more cultures will vanish. Although the importance of culture to human civilization is beyond debate, there is controversy on the issue of ownership and control of culture, the nature of legal rights in culture and whether culture qualifies as property. In spite of significant achievements such as the 1972 UNESCO Convention concerning the Protection of the World Cultural and Natural Heritage which aims to preserve designated World Heritage sites, other UNESCO instruments discussed below, and myriad efforts afoot at the domestic level, the international community has not yet reached a consensus on the optimal policy to protect cultural heritage.

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[1] This means that only a few elderly speakers of the language are still alive. See "Ethnologue Report of Nearly Extinct Languages," online: <http://www.ethnologue.com/nearly_extinct.asp>.
[2] See Michael Cahill, "Why Care about Endangered Languages," online: SIL International <http://www.sil.org/sociolx/ndg-lg-cahill.html>.
[3] See "Kenyah Language in Danger of Becoming Extinct," *Malaysia National News Agency, Bernama* (27 April 2009), online: Bernama <http://www.bernama.com/bernama/v5/newsindex.php?id=407275>.

Traditional cultural expressions (TCES) are an important part of cultural heritage. TCES hold special significance for indigenous and traditional communities and most developing countries not only as a record of and link to the past, but also as a means of preserving and sustaining their existence and way of life. As a component of cultural expressions, traditional textiles play a distinctive societal role within their cultural context. Yet, like local languages, this aspect of heritage is fragile and in danger of disappearing. In response, a number of indigenous communities are embarking on projects to preserve their textile traditions. For example, the Center for Traditional Textiles of Cusco was established in 1996 in Cusco, Peru, as a Special Project of Cultural Survival to preserve and study Andean textiles and help the community economically. The motivation for the establishment of the Center was the alarming discovery that the 2000-year-old textile traditions of Peru were in danger of vanishing in this generation. Peruvian weaving is a symbolic ritualistic activity and the textiles honor *Pachamama*, Mother Earth. As Nilda Callañaupa, the Director of the Center and an expert Andean weaver stated, "Here in Peru weaving is an art that we live with every day and for us it is more than an art, it is an historical part of the living culture."[4]

Indigenous peoples, traditional communities and developing countries are also increasingly expressing dissatisfaction about the unauthorised commercialisation of their TCES. The first concern is how to prevent the unauthorised reproduction of culture and TCES, a practice which has been compounded by globalization and by technological developments such as the internet. Further, the proceeds of such unauthorised commercialisation are monopolised and not shared with the creators of the cultural expressions. Added to this are uses of culture that violate the customary law rules and

[4]The Center for Traditional Textiles of Cusco, online: <http://www.incas.org/SPChinchero.htm#sav>.

principles of the relevant communities. There is dissatisfaction with cultural appropriation practices such as the unauthorised reproduction of aboriginal designs on T-shirts, carpets and tea towels and the use of indigenous art and images to advertise and sell foreign products.[5] These practices are deleterious to indigenous peoples and represent a continuation of them being silenced and of their voice being ignored. Consequently, developing countries and indigenous peoples are exerting pressure for equitable protection of their intellectual creations.

There is scholarly support for the need to address the unauthorised use of TCES. For example, in the 1997 book *Borrowed Power: Essays on Cultural Appropriation*,[6] one of the principal studies on cultural appropriation, Bruce Ziff and Pratima V. Rao highlighted how acts of cultural appropriation reveal political relations and power dynamics. They defined the relationship between politics and cultural appropriation as follows: "Politics is generally about power: who gets to control the process for allocating scarce resources. In the context of cultural appropriation, the resources at issue are the many and varied forms of cultural production, expression and creation."[7] Naomi Roht-Arriaza urged that "An end to appropriation required recognition of the role of indigenous and traditional or local communities as stewards of scientific and ecological knowledge and resources, as innovators, and as practitioners of sustainable production and life

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[5] See *e.g.* Kamal Puri, "Preservation and Conservation of Expressions of Folklore" (1998) 32:4 Copyright Bull. 5; Rosemary J. Coombe, "Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World" (1996) 48 Stan. L. Rev. 1357.

[6] Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997).

[7] Bruce Ziff & Pratima V. Rao, "Introduction to Cultural Appropriation: A Framework for Analysis" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 1 at 8.

systems."[8] Rosemary J. Coombe found that there should be international recognition of indigenous peoples' knowledge.[9] The work of these scholars was central in the 1990s for their critical approach to cultural appropriation which highlighted the problems it causes and drew attention to its adverse consequences.

Susan Scafidi expanded on this research in her 2005 book, *Who Owns Culture?: Appropriation and Authenticity in American Law.* She pointed out that cultural appropriation has potential benefits to a nation as well as the source communities in it. However, she asserted that by focusing on individual rights and those of the nation as a whole, American society has tended to ignore those of sub-communities. She therefore urged that it was time for the law to "correct these omissions by striking a balance between protection and appropriation of cultural products in American life."[10]

These studies reveal the need for greater research in this area and for solutions to address the harmful effects of cultural appropriation. This dissertation builds on the work of scholars like these and contributes to the field by focusing on how to protect traditional textiles and reduce cultural misappropriation and the adverse effects of cultural appropriation.

TCES protection has taken centre stage in international discussions. One contributory factor is the independence of countries that were former colonies, a group

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[8] Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" in Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 255 at 277.

[9] Rosemary J. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 74. Rosemary J. Coombe, "The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law" (2001) 14 St. Thomas L. Rev. 275.

[10] Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law* (New Brunswick, N.J.: Rutgers University Press, 2005) 148.

many developing countries belong to. Most of these countries have civilizations and traditions that are essentially oral in nature yet are rich in TCES resources. However, colonial policy ignored the value systems of the colonised and the conservation, preservation and legal protection of TCES. European colonial powers regarded themselves as culturally and racially superior to indigenous and other non-Western cultures and treated them and their local knowledge practices derogatively.[11] Since independence, some of these countries have been exerting pressure for a change to this situation. Second is the changing perception of indigenous peoples and an increasingly growing recognition of indigenous peoples' rights in international law as reflected in several international instruments such as the International Labour Organization *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries* of 1989[12] and the *United Nations Declaration on the Rights of Indigenous Peoples*[13] which was adopted in

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[11] See Chidi Oguamanam, "Local Knowledge as Trapped Knowledge: Intellectual Property, Culture, Power and Politics" (2008) 11 J. World I.P. 29 at 33.

[12] International Labour Organization *Convention* (No. 169) *Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 1650 U.N.T.S. 383, 28 I.L.M. 1382 (entered into force 5 September 1991) [ILO Convention (No. 169)], online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/menu3/b/62.htm>. The earlier International Labour Organization *Convention (No. 107) Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 U.N.T.S. 247 (entered into force 2 June 1959) [ILO Convention (No. 107)] used the term "indigenous populations" and was later rejected as discriminating against indigenous peoples which led to its revision in ILO Convention (No. 169). ILO Convention (No. 169) uses the term indigenous peoples. Although ILO Convention (No. 107) has been closed for ratification, it remains valid for those countries which have ratified it, but have not ratified ILO Convention (No. 169). For useful background information on this topic, see "Leaflet No. 8: The ILO and Indigenous and Tribal Peoples," online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/html/racism/indileaflet8.doc>; Peter-Tobias Stoll & Anja von Hahn, "Indigenous Peoples, Indigenous Knowledge and Indigenous Resources in International Law" in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004) 5 at 12-14, 20-25; Richard Guest, "Intellectual Property Rights and Native American Tribes" (1996) 20 Am. Indian L. Rev. 111.

[13] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295, UN GA, 107th plenary meeting (2007), online: United Nations <http://www.un.org/esa/socdev/unpfii/en/declaration.html>.
The General Assembly adopted this declaration on 13 September 2007. One hundred and forty-three members voted in favour of it, eleven abstained and four countries (Australia, Canada, New Zealand and the United States) voted against it. There are an estimated 370 million indigenous people in the world. This is a non-binding declaration which sets out indigenous peoples' individual and collective rights and their rights to culture, education, language, identity and other issues. General Assembly President Sheikha Haya Rashed Al

2007. The effect of such instruments is not only to affirm the status of indigenous peoples, but also to give a human rights backing to indigenous peoples' arguments for the protection of their TCES.

The United Nations Educational, Scientific and Cultural Organization (UNESCO) is committed to preserving intangible cultural heritage and cultural diversity. UNESCO's notable work in this area includes the *Convention for the Safeguarding of Intangible Cultural Heritage*,[14] which was adopted by delegates of 190 countries in 2003 and entered into force in 2006, and the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*,[15] which was adopted by delegates of 148 countries in 2005 and entered into force in 2007. UNESCO's previous work on culture focused on the tangible parts of culture. These recent developments signal an expansion of UNESCO's work and provide options for the protection of traditional textiles.

The intellectual property law system is also involved in the debate as a possible answer to TCES protection. The intellectual property system is the international community's mechanism for protecting intellectual creations of the mind, including artistic works, as property. Although there are international treaties and conventions on intellectual property, the system still remains largely territorial and nation-based, since international norms and standards are implemented in domestic legislation and very few countries allow

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Khalifa, Secretary-General Ban Ki-moon and High Commissioner for Human Rights Louise Arbour all welcomed the adoption of the declaration. Sheikha Haya stated "the importance of this document for indigenous peoples and, more broadly, for the human rights agenda, cannot be underestimated. By adopting the Declaration, we are also taking another major step forward towards the promotion and protection of human rights and fundamental freedoms for all." UN News Centre, News Release, "United Nations adopts Declaration on Rights of Indigenous Peoples" (13 September 2007), online: UN <http://www.un.org/apps/news/story.asp? NewsID=23794&Cr=indigenous&Cr1>.

[14] *Convention for the Safeguarding of Intangible Cultural Heritage*, 17 October 2003, online: UNESCO <http://unesdoc.unesco.org/images/0013/001325/132540e.pdf>.

[15] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, online: UNESCO <http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html> (entered into force 18 March 2007). For a discussion on the Convention, see Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40 U.C. Davis L. Rev. 971.

direct application of international intellectual property treaties. From its inception in the 19th century to the present day, the international intellectual property system, based on the *Berne Convention for the Protection of Literary and Artistic Works* of 1886, the *Paris Convention for the Protection of Industrial Property* of 1883[16] and the World Trade Organization (WTO) *Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods*,[17] has undergone several changes and is still in a state of flux. From its early and humble beginnings as monopolies that states granted to nationals for acts of invention, the intellectual property system has grown to assume a prominent seat on the international stage. From its birth in the United Kingdom,[18] national copyright legislation developed into bilateral treaties in Europe and culminated in the Berne Convention, the first multilateral copyright agreement. During that phase, colonial powers adhered to international intellectual property agreements on behalf of their colonies and exported these Western intellectual property norms to the legal systems of those territories without considering the cultural, economic and societal differences between the colonial powers and those territories or the suitability of these Western intellectual property norms for those territories. In most cases, those territories inherited and continued to apply these Western norms after independence. One of the conceptual foundations for the debate surrounding the protection of TCES is a reexamination of the appropriateness of

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[16] *Paris Convention for the Protection of Industrial Property*, 20 March 1883, revised at Brussels on 14 December 1900, at Washington on 2 June 1911, at The Hague on 6 November 1925, at London on 2 June 1934, at Lisbon on 31 October 1958, and at Stockholm on 14 July 1967, and as amended on 28 September 1979, online: WIPO <http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html> [Paris Convention].

[17] General Agreement on Tariffs and Trade-Multilateral Trade Negotiations (The Uruguay Round), Annex 1C: Agreement on Trade Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, 15 December 1993, (1994) 33 I.L.M. 81, online: WTO <http://www.wto.org/english/tratop_e/trips_e/t_ agm0_e.htm> [TRIPS or TRIPS Agreement].

[18] The Statute of Anne of 1710 is generally regarded as the first national copyright legislation. See further, Lionel Bently, "R. v the Author: From Death Penalty to Community Service" (2008) 32 Colum. J. L. & Arts 1 at 5. The Statute of Anne is discussed in subsequent chapters in this dissertation.

those norms and notions for developing countries. The international scene has changed since the emergence of the international intellectual property system, and the question is whether the system is adequate to meet the needs of TCE-rich developing countries. For instance, the world has witnessed the independence of most former colonies, the formation of regional intellectual property organizations and revisions to international intellectual property agreements. The intellectual property system faces many challenges which stretch at the seams of its fabric and compel constant re-evaluations of the workings of the system and questionings of its *raison d'être*.

The challenges ahead take many forms. Globalization, described as "a coalescence of varied transnational processes and domestic structures, allowing the economy, politics, culture, and ideology of one country to penetrate another,"[19] creates many issues for intellectual property policy consideration such as how to prevent piracy and protect intellectual property in a globalized world. Technological developments permit the creation of new works such as computer programmes while digitization and the internet facilitate instant transmission and distribution of copyright works and other content all over the world. The intellectual property system has adapted in response to some of these issues by extending the scope of existing categories with, for example, the recognition of computer software as a literary work. It has also created new intellectual property rights for those works like integrated circuits which do not fit under the main intellectual property categories of patents, trademarks, copyright and industrial designs. The increasing significance of intellectual property to international trade, starting especially from the 1980s, resulted in the TRIPS Agreement under the auspices of the World Trade

[19] James H. Mittelman, "The Dynamics of Globalization" in James H. Mittelman, ed., *Globalization: Critical Reflections* (London: Lynne Rienner Publishers, 1996) 1 at 3.

Organization. The merger of intellectual property and trade rules led to intellectual property being increasingly influenced and driven by commercial considerations. Accordingly, intellectual property subject matter is protected primarily because of its trading and economic value and not for its cultural significance. As I discuss in the second chapter, the origins of Western intellectual property norms in the wake of the Enlightenment and the teachings of Kant and Hegel emphasized the special nature of intellectual creation. Though the progress of "culture" was not those philosophers' principal concern, their work arguably reflected the fact that intellectual creation embraced more than commercial and profit motives and contributed more broadly to human development. While their focus on individual intellectual effort may not be consonant with some of the communal or collective approaches I discuss later, their teachings could be reconciled with the view that intellectual creation is about more than commerce, and sometimes not about commerce at all.

There are also concrete policy problems confronting the international intellectual property system. One issue concerns the wisdom of harmonizing intellectual property laws, since countries are at different developmental levels and may not benefit equally from a harmonized intellectual property system.[20] In fact, some cultures have their own rules governing products of the mind which could be regarded as intellectual property; however,

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[20] See *e.g.* William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford: Stanford University Press, 1995). As Renée Marlin-Bennett states:

> These definitions of intellectual property forms and rights have now spread around the world through international agreements and commercial relations. Nevertheless, these are fundamentally Western rules, emerging from medieval Europe and, later, from Industrial Age Europe and North America. Some of the current tensions in international debates about intellectual property, however, arise from contending sets of beliefs about owning creativity and innovation. Many suggest that there is tension between Asian culture and intellectual property.

Renée Marlin-Bennett, *Knowledge Power: Intellectual Property, Information, and Privacy* (Boulder, Colo.: Lynne Rienner Publishers, 2004) at 39.

such laws do not arise from Western concepts of property.[21] There are also debates over how much intellectual property is enough intellectual and whether there is not already too much intellectual property.[22] Thus, the intellectual property system is in a state of constant shift as developments shake it from all angles. One of the biggest challenges at present comes from traditional knowledge and TCES.

Protecting TCES under the intellectual property system is a complex issue because there are differences between Western tradition and the indigenous holistic worldview. Because of its origins as a Western construct, the intellectual property system is weighted in favour of protecting the intellectual creations of the Western world. Compounding the problem further is the fact that the intellectual property system, with its rules on individual authorship for instance, has ignored and excluded cultural expressions of indigenous and traditional communities by putting them in the public domain as material that is free for anyone to use. It thus facilitates the exploitation of knowledge and information from the "South"[23] without the acknowledgement of the source of this knowledge. Thus, the intellectual property system, while serving as a mechanism to protect property, has also served as a tool for the appropriation of indigenous cultural property.

Further, the intellectual property system has its own traditions, history, philosophy and eligibility criteria which are not on all fours with traditional cultural expressions. Also, TCES are linked to other issues such as the commodification of culture, sovereignty, expression of voice, power, economics, human rights, cross-cultural relations, identity,

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[21] Renée Marlin-Bennett, *Knowledge Power: Intellectual Property, Information, and Privacy* (Boulder, Colo.: Lynne Rienner Publishers, 2004) at 40 (commenting on Jewish laws concerning products of the mind).
[22] See *e.g.* Keith Aoki, "Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" (1998) Ind. J. Global Legal Stud. 11 at 22-28.
[23] In this dissertation, the terms "South" and "West" refer, as in most of the literature, to developing countries and most industrialised nations respectively, despite their geographic inaccuracy.

authenticity, perceptions of ourselves and others, colonialism and post-colonial discourse, cultural survival, the control of wealth and knowledge, value systems, *et cetera.*

There is much scholarly debate on the suitability and limitations of intellectual property law to protect traditional cultural expressions. In 1997, Christine Haight Farley argued that the presumption that intellectual property law did not protect indigenous art was erroneous since it "fails to distinguish the diversity of interests within the indigenous community."[24] Michael F. Brown in his 1998 article "Can Culture Be Copyrighted?" noted that there are many challenges to protecting TCES under copyright.[25] Kamal Puri in his 1999 study argued that the current intellectual property law system was unsuited to provide adequate protection to traditional knowledge and expressions of indigenous culture because it focused on individual rather than communal rights.[26] Copyright has traditionally been the most popular category for TCES protection because of the similarities between copyright products and those of TCES. Research which highlighted copyright's limitations prompted studies on whether the solution lies in intellectual property complemented by other legal concepts such as contract[27] or in the creation of new rights.

Because of the limitations of the existing intellectual property system, the debate now is whether there is the need for a system tailored specifically to TCES, a *sui generis* system. While several scholars have explored the *sui generis* option,[28] scholarly literature

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[24] Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" (1997) 30 Conn. L. Rev. 1 at 56-57.

[25] Michael F. Brown, "Can Culture be Copyrighted?" (1998) 39 Curr. Anthropology 193.

[26] Kamal Puri, "Protection of Expressions of Indigenous Cultures in the Pacific" (1999) 33:4 Copyright Bulletin 6 at 24, online: UNESCO <http://unesdoc.unesco.org/images/0012/001225/122508eb.pdf#122501>.

[27] On this, see *e.g.* Robert K. Paterson, & Dennis S. Karjala, "Looking Beyond Intellectual Property in Resolving Protection of the Intangible Cultural Heritage of Indigenous Peoples" (2003) 11 Cardozo J. Int'l & Comp. L. 633 (finding that perhaps the solution is not to create new intellectual property, but to use existing legal regimes and concepts).

[28] These include Kamal Puri "Preservation and Conservation of Expressions of Folklore," *supra* note 5; A.O. Amegatcher "Protection of Folklore by Copyright-a Contradiction in Terms" (2002) 36:2 Copyright Bull. 33,

is inconclusive on the form that *sui generis* rights should take and how to deal with its unique challenges.

The World Intellectual Property Organization (WIPO) has on its own and in collaboration with UNESCO been exploring TCES protection. For example, WIPO and UNESCO developed the 1976 *Tunis Model Law on Copyright Law for Developing Countries*[29] which explored the *sui generis* option. WIPO's fact-finding missions, conducted between 1998-1999, were important in revealing the needs and expectations of indigenous and traditional communities. The study found that there were divergent needs ranging from excluding others from using indigenous imagery to controlling the exploitation of these images.[30] WIPO's Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC), established in September 2000, has for the past few years been working on draft provisions in this area which also approach the issue from a *sui generis* perspective. However, research on the *sui generis* option is ongoing and no solution has yet been agreed on. Hopefully, this dissertation will make a useful contribution to the advancement of that international discussion by focusing on the very concrete yet highly symbolic world of traditional textiles.

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online: UNESCO <http://unesdoc.unesco.org/images/0012/001277/ 127784e.pdf#page=31>; and Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection" (1999) 44 McGill L.J. 953.

[29] *Tunis Model Law on Copyright Law for Developing Countries*, online: UNESCO <http://portal.unesco.org/culture/ en/files/31318/11866635053tunis_model_law_en-web.pdf/tunis_model_law_en-web.pdf>.

[30] WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999),* WIPO Publication 768 (Geneva: WIPO, 2001) [*Intellectual Property Needs and Expectations*].

Delimiting the Dissertation

There are several studies on intellectual property and TCES. Yet the issue of traditional textiles and intellectual property protection has been only sporadically studied. In fact, there is very little research on the suitability of the existing intellectual property categories for traditional textile designs protection. Further, there appears to be little research on how *sui generis* rights might relate specifically to traditional textiles. Affirming much of the existing research and expanding it, this study seeks to fill that gap.

The research is important for several reasons. First, as I will show in the following chapters, traditional textiles contribute significantly to the preservation of traditional communities. Second, there are a number of international instruments affirming the rights of indigenous peoples which gives the protection of their culture greater significance and may thus serve as normative "hooks" on which to hang proposals for a *sui generis* regime. Third, the importance of preserving cultural diversity is increasingly attracting the attention of the international community. Fourth and finally, as Daniel Gervais points out, traditional knowledge is one of the challenges currently confronting the intellectual property system which, unlike past challenges, might necessitate a rethinking of the intellectual property system itself.[31] Thus, resolving this issue is important to indigenous peoples and traditional communities, the intellectual property system and the world.

Research into the protection of TCES by intellectual property is a relatively recent field of study which has gained prominence especially during the last two decades. Prior to that time, there is hardly any mention of it in international intellectual property instruments. As a new topic, most of the literature on it has appeared only within the past

[31] Daniel J. Gervais, "The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New" (2002) 12 Fordham I.P. Media & Ent. L.J. 929 at 953-954.

two decades. While there are academic journals and academic literature dealing with aspects of this,[32] there are few journals devoted solely to this issue as for example occurs with journals specifically devoted to food and agriculture, or to intellectual property. Most of the scholarly work in this area is in reality on traditional knowledge and genetic resources. Considerably fewer books are devoted to TCES and intellectual property[33] and even fewer focus on one specific category or sub-set of traditional cultural expressions as I do in this dissertation by focusing on traditional textiles. There are few studies which address traditional designs and intellectual property protection internationally. My dissertation focuses specifically on traditional textiles and textile designs protection. I chose to use traditional textiles because of their dual nature. Traditional textiles have both tangible and intangible (symbolic) aspects. As such, textiles occupy a unique position at the intersection of the tangible and intangible realms.

One central point the dissertation makes is that there is no effective protection of TCES. It has two central questions: (1) why protect traditional textiles; and (2) is the intellectual property law system a suitable framework for traditional textiles protection? It reveals why the existing intellectual property categories are not a suitable solution. It also argues that *sui generis* rights provide a better option for protecting traditional textile designs. While some studies in the area discuss the challenges of a *sui generis* system, there are few studies on how to resolve them. I build on existing studies by making

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[32] Legal journals include UNESCO's Copyright Bulletin; the International Journal of Cultural Property; Current Anthropology; The Journal of World Intellectual Property, and Indigenous Peoples' Journal of Law, Culture, and Resistance.

[33] Notable books which consider traditional cultural expressions are Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006); Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004); J. Michael Finger & Philip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004).

recommendations on how to implement a *sui generis* system. This makes this study vital to inform policy making and policy research.

While the focus, namely traditional textiles, is narrowly defined, this dissertation thus uses a large toolbox, one which spans many disciplines including history, cultural and museum studies, communication, political science, economics, art, international trade, law and anthropology. I have chosen to use a narrow beam and shine it on the multifaceted reality of traditional textiles for those who "own," create and cherish them. This has enabled me to differentiate this type of cultural product with high symbolic meaning from other fields of study, such as genetic resources, which highlight somewhat different concerns (for example biodiversity) and tend to interface more with patent law and copyright law. It has also allowed me to seek a solution specific to a field rather than general principles which, while they may have broad implications, lack the specificity to be implemented. While I have attempted to simplify this complex area by focusing on traditional textile designs, it has not always been possible completely to divorce traditional textile designs from other aspects of TCES. Thus, occasionally this dissertation refers to other aspects of TCES such as traditional music where necessary to enrich the discussion. Also, examples are drawn and analogies made to traditional knowledge where necessary since traditional knowledge and traditional textiles are interconnected.

Another challenge has been that of language. This dissertation concerns different peoples whose first language is not English. I speak in the dissertation about the limitations of the English language, terminology and the role of semantics. Some terms like TCES, traditional knowledge and folklore have been defined or described using definitions in international documents. I, however, realise that these and other terms like property may

not exist in indigenous and traditional communities. Not everything is written, documented, and can be interpreted using the English language.[34] However, it was necessary to use these terms for the purposes of this dissertation. Furthermore, even singling out traditional textile designs alone may not do justice to this topic as no such division or category exists in traditional thought. I have, however, expressed the indigenous, traditional community and developing country voice by stating as much as possible what they have expressed as their needs, expectation and world view.

Finally, I should perhaps reiterate that the dissertation does not claim to exhaustively examine all the vehicles for protecting traditional cultural expressions. In a field as broad as this there are many approaches and combinations of variables that could be applied. The dissertation focuses on only a few of the methods outside the intellectual property field which can be applied in combination with the use of the intellectual property law system.

The dissertation conducts this analysis in six chapters. Chapter 2 focuses on folkloric property rights in traditional societies. The main aim of Chapter 2 is to examine the nature and meaning of folklore to indigenous communities. The chapter examines the definition and scope of folklore and explores the significance of folklore. The analysis is conducted by using concrete examples from indigenous communities. It also tackles the issue of the communal protection of folklore through customary law and evaluates the effects of folklore protection. Chapter 2 emphasizes that expressions of folklore are not about myths; rather, they contribute to the survival and continued existence of a people. Furthermore, indigenous communities had their own customary laws regulating the use of

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[34] See *e.g.* Paul Sillitoe, "The Development of Indigenous Knowledge: A New Applied Anthropology" (1998) 39:2 Current Anthropology 223.

traditional textiles before European contact. The chapter argues that TCES are crucial to the survival and development of traditional societies, because they are a fundamental part of the identities of traditional societies and play a vital role in the preservation of their values, history and way of life. TCES may deserve greater protection than law currently provides. As we will see, the next major question will be which kind of protection (for whose benefit, against what, etc). The chapter is also important because it lays the foundation from which the indigenous system can be compared to and contrasted with the Western one.

Chapter 3 discusses intellectual property laws and philosophies in relation to textiles and textile designs. Chapter 3 is broadly divided into two areas. The first area is an examination of the relevant intellectual property law categories and their relation to textile designs. The chapter uses some national and international provisions to analyze the intellectual property system. The second area is a critique of the justificatory theories for intellectual property law in relation to textile designs and their applicability to folklore. Although the critique focuses on the justification in the common law world, it also considers justifications in the civil law world. The chapter's main point is that the philosophical justifications for the existence of intellectual property rights do not fully explain the existence and scope of intellectual property rights in textiles.

Chapter 4 discusses the cultural appropriation of folklore, specifically textiles, and analyzes the international protection of cultural property other than through intellectual property law. Chapter 4 has three aims: first, to consider the importance of textiles to international trade; second, to discuss cultural appropriation; and third, to assess the international protection of cultural property by examining applicable international

conventions. Chapter 4 is essential to the thesis for several reasons. The examination of the effects of cultural appropriation strengthens the argument that TCES should be protected and are valuable to the international community. In assessing international provisions for the protection of traditional textiles, it argues that the international framework does not adequately protect traditional textile designs.

Chapter 5 evaluates the extent to which traditional textiles qualify and can be protected as intellectual property within the existing intellectual property categories. It establishes the limitations of the conventional intellectual property system concerning protecting traditional textiles. This analysis considers national and international intellectual property provisions. It also explores how concepts in other divisions of law such as contract can be applied in arriving at a solution. Further, it examines and evaluates some policy considerations affecting the extension of intellectual property protection to folklore. It argues that fitting traditional textile designs into the existing intellectual property categories is not the best solution because these categories offer limited protection for traditional textiles.

Chapter 6 therefore argues that the creation of a well calibrated *sui generis* right for traditional textiles is the optimal way forward in view of the needs and expectations of indigenous peoples and traditional communities. In conducting the analysis, it examines the role regional arrangements, education and public awareness would play in this new framework. In discussing the role of national legislation, it discusses some *sui generis* rights in national legislation. The chapter also specifically states how challenges such as the protection of another country's traditional textiles could be addressed in order to make a *sui generis* system effective. The chapter proposes a workable and comprehensive way

forward. Its recommendations do not, however, create a totally new way or a completely chiseled model for a number of reasons. First, a measure of flexibility is required for national implementation. Second, much of the earlier research in this field was, based on my studies, valid and constructive. It sometimes lacks the sector-specific focus that would have pointed the way to a full model, which is the lacuna I attempt to correct. Finally, my research suggests that any viable model will be based on a mixture of political initiatives, including coalition-building efforts, legal efforts to re-imagine parts of "intellectual property" regimes, and attempts to look beyond commerce which, ironically, may bring the Western intellectual property system closer to its roots. Chapter 7 concludes this dissertation by analyzing my research findings and the implications for the future. It also suggests that there is the need for more research and points to a continuing research agenda. The success of a *sui generis* system will ultimately be determined by the degree to which traditional and indigenous communities, governments and at least some key members of the international community are able to work together.

CHAPTER 2

2: FOLKLORE, INDIGENOUS TEXTILES AND PROPERTY RIGHTS IN TRADITIONAL SOCIETIES

This chapter explores rights in and protection of traditional textiles in indigenous communities. Its investigation has two central questions. First, it considers how important traditional textiles are to indigenous societies. Second, it analyzes the effectiveness of mechanisms in place in such societies to protect traditional textiles.

The chapter's central point is that indigenous textiles play a vital role in these societies. Traditional textiles are vibrant, living and hold an important position in traditional communities. Although these societies recognise communal rights in culture and traditional textiles have some protection under customary law, that protection is inadequate when applied to the international community. The chapter proposes that extending the recognition of communal rights in culture beyond customary law systems is a step forward in adequately protecting these cultural items. The chapter also suggests that group rights in culture has support in some international instruments.

Part 1 of this chapter discusses the origin of folklore. Part 2 examines the nature and scope of folklore. Although the chapter focuses on traditional societies, it draws on global definitions of folklore due to the absence of an indigenous definition. This section also considers the meaning of indigenous communities and the nature of traditional textiles by surveying several types of textiles. Part 3 discusses the significance of folklore including textiles designs. Part 4 examines customary law and community protection of folklore. Part 5 then evaluates the implications of the protection of folklore. The chapter concludes in Part 6 with a summary of the key points.

2.1: ORIGIN OF FOLKLORE

The word "folklore" has been used to describe a broad range of things. There are published works on the folklore of the world, countries, cities, regions, specific races and peoples, art, music and literature. Folklore is also linked to the history of people and regarded as a science with its own rules and laws. What are the origins of folklore?

Folklore is dateless and timeless. It is paradoxical in that a term that is linked to history and describes things that have existed for centuries is itself a relatively recent creation in the English Language. The word "folklore" was coined in 1846 by William John Thomas, an English antiquary,[35] as a replacement for the phrase "popular antiquities."[36] Prior to that, however, Jacob and Wilhelm Grimm published several oral narratives and German mythology under the subject *Volkskunde* in 1812.[37] Folklore is a combination of two words: "folk" and "lore" which have roots in the Old English and Germanic languages[38] and generally mean "common people, tribe and multitude"[39] and "learning, teaching, doctrine, science"[40] respectively. Although the term "folklore" has

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[35] See Ernest Klein, *A Comprehensive Etymological Dictionary of the English Language*, Vol. I, A-K (Amsterdam: Elsevier Publishing Company, 1966) *s.v.* "folklore". William John Thomas lived from 1803 to 1885 and was also the editor of the British *Athenaeum*. See William & Mary Morris, *Morris Dictionary of Word and Phrase Origins* (New York, Hagerstown, San Francisco, London: Harper & Row Publishers, 1977) *s.v.* "folklore".

[36] See Ernest Klein, *ibid. s.v.* "folklore"; *The Oxford English Dictionary*, vol. IV, F-G (Oxford: Oxford University Press, 1970) *s.v.* "folklore".

[37] See Richard. M. Dorson, "Concepts of Folklore and Folklife Studies" in Richard. M. Dorson, ed., *Folklore and Folklife, an Introduction* (Chicago: University of Chicago Press, 1972) at 1.

[38] The Old English word *folc* is of Germanic origin and is related to the German *Volk* and the Dutch *volk*. "Archaic uses of *folk* include 'a people, a nation' and 'the common people (often in relation to a superior)." Glynnis Chantrell, ed., *The Oxford Dictionary of Word Histories*, (Oxford: Oxford University Press, 2002) *s.v.* "folk". The word lore from the Old English word *lār* meaning "instruction, piece of instruction" has Germanic origins and is also related to the Dutch *leer* and the German *Lehre* (*ibid. s.v.* "lore").

[39] Robert K. Barnhart, ed., *The Barnhart Dictionary of Etymology* (U.S.A.: H. W. Wilson Company, 1988) *s.v.* "folk". "English has been written only since 700 A.D., when Roman missionaries introduced the Latin alphabet into Great Britain. The language of these early texts was formerly often described as *Anglo-Saxon*—since it was largely Angles and Saxons who became the English people—but is now properly referred to as *Old English*" (*ibid.* at xviii).

[40] Ernest Klein, *A Comprehensive Etymological Dictionary of the English Language*, Vol. II, L-Z (Amsterdam: Elsevier Publishing Company, 1967) *s.v.* "lore".

roots in the Old English and Germanic Languages, what the expression describes is not something that originated from the English peoples.[41] It was not unique to England or Europe for that matter.

There is no evidence of folklore having originated with any particular group of peoples. Against the background of the fact that the coinage of folklore in 1846 was just a combination of two already existing words, it is clear that 1846 was not the beginning of folklore. The coinage of the word in 1846 can be seen as proof of a process or phenomenon that was already in place, evidence of a greater awareness of the elements and importance of folklore in nineteenth century Europe.

One writer's approach to studying the history of folklore in Europe has been not to start with the coinage of the term in 1846, but to situate its intellectual roots in the sixteenth century, in the Renaissance period and then with such thinkers as Montesquieu, Montaigne, Herder, Vico, Voltaire and Rousseau.[42] He asserts that major events, such as the discovery of the New World, gave Europe a greater appreciation for its culture, traditions and the need to protect them.[43]

The fact that folklore is not a creation of statute necessitates that a study and a definition of folklore not be restricted to current categories in legislation. Since the origin of folklore cannot be traced to a distinct group of peoples or to 19th century Europe, by implication there could have been terms in other languages and cultures before 1846 to

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[41] As discussed in section 2.2, below, many communities had what today is called folklore before the 19th century. For some current theories of folklore, see Richard. M. Dorson, "Concepts of Folklore and Folklife Studies," *supra* note 37 at 7. He discusses several theoretical approaches to this topic, namely: the Finnish historical-geographical method, historical-reconstructional method, ideological, functional, psychoanalytical, oral-formulaic, cross-cultural, folk-cultural, mass-cultural, hemispheric and contextual (*ibid.* at 7-47).

[42] See Dan Ben-Amos, "Foreword" in Guiseppe Cocchiara, *The History of Folklore In Europe*, trans. by John N. McDaniel (Philadelphia: Institute for the Study of Human Issues, 1981) xvii at xviii.

[43] See "Preface" in Guiseppe Cocchiara, *The History of Folklore In Europe*, trans. by John N. McDaniel (Philadelphia: Institute for the Study of Human Issues, 1981) 1 at 7-8.

describe folklore. Before examining folklore protection, the nature of folklore must be defined.

2.2: NATURE AND SCOPE OF FOLKLORE INCLUDING INDIGENOUS TEXTILES

2.2.1: DEFINITION OF FOLKLORE

Folklore has many labels. It has been defined as "the traditional beliefs and legends of the common people,"[44] "the traditional customs, beliefs and tales of a people,"[45] and "traditional beliefs, legends, and customs, current among the common people; the study of these."[46] Common to these definitions is the word "traditional." The use of the word "traditional" refers to an established practice. From these definitions as well as from the combined meanings of the words "folk" and "lore," folklore could be described as referring generally to the traditional beliefs, customs, legends, tales, science, teachings and doctrines of a distinct group of people. However, adopting such a definition would be too simplistic and would amount to just scratching the tip of the iceberg. It would be ignoring the diverse corridors of this expression.

One scholar advocated a wider approach to the understanding of folklore. He asserted that the meaning of folklore should not be restricted to the traditions or heritage of the "common folk of civilized nations (generally recognized as the working class)" because the concept of folk is not exclusively a sociological one. It can have different meanings depending on which discipline is under consideration. Thus, it can mean

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[44] William and Mary Morris, *Morris Dictionary of Word and Phrase Origins* (New York: Harper & Row Publishers, 1977) *s.v.* "folklore".
[45] Ernest Klein, *A Comprehensive Etymological Dictionary of the English Language*, Vol. I, A-K (Amsterdam: Elsevier Publishing Company, 1966) *s.v.* "folklore".
[46] *The Oxford English Dictionary*, vol. IV, F-G (Oxford: Oxford University Press, 1970) *s.v.* "folklore".

different things to the historian, the sociologist and the political scientist. The folk are a reflection of their history. He argues that in deciding what is and is not folk:

> it is necessary to consider as folk everything that, from a creative standpoint, is presented as elemental and artless, directly adhering to the real, to the sensible, to what concretely and immediately solicits our feelings and emotions. It is impossible, however, to define the folk without considering values inherent in tradition—in, that is, the continuous vitality and presence of the past. It is necessary, then, to see in the concept of *folk* the disposition, need and demand of the individual who lives with others, of one who contemplates, with a spirit that is his spirit and that of others, the vast little world that surrounds him, the world in which his reality and his history exist.[47]

In modern times, legislation, international instruments and scholarly writings have expanded the meaning of the term folklore. Various terms such as "traditional knowledge,"[48] "expressions of folklore,"[49] "folklife expressions,"[50] and "cultural expressions of indigenous peoples"[51] have been used to refer to folklore.

Referring to folklore as traditional knowledge makes an appreciation of the scope of folklore even more complex because the meaning of traditional knowledge is under construction. The identification and narrowing of the elements of traditional knowledge is an ongoing process. Traditional knowledge has been referred to as indigenous knowledge, local knowledge, tribal knowledge and many other terms. Traditional knowledge has been

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[47] See "Preface" in Guiseppe Cocchiara, *The History of Folklore In Europe*, trans. by John N. McDaniel (Philadelphia: Institute for the Study of Human Issues, 1981) 1 at 5.

[48] "Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources" (Symposium-Global Intellectual Property Rights: Boundaries of Access and Enforcement) (2002) 12 Fordham I.P. Media & Ent. L.J. 753 at 757.

[49] See *e.g.* UNESCO—WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action*, 1982, online: WIPO <http://www.wipo.int/ tk/en/documents/pdf/1982-folklore-model-provisions.pdf> [UNESCO—WIPO Model Provisions].

[50] Lucy M. Moran, "Intellectual Property Law Protection for Traditional and Sacred "Folklife Expressions" - Will Remedies Become Available to Cultural Authors and Communities?" (1998) 6 U. Balt. Intell. Prop. L.J. 99.

[51] "Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources," (Symposium-Global Intellectual Property Rights: Boundaries of Access and Enforcement) (2002) 12 Fordham I.P. Media & Ent. L.J. 753 at 757.

further classified into areas including traditional ecological knowledge[52] and traditional environmental knowledge.[53]

WIPO defines traditional knowledge as covering "tradition-based literary, artistic or scientific works; performances; inventions; scientific discoveries, designs; marks; names and symbols; undisclosed information; and all other tradition-based innovations and creations resulting from intellectual activity in the industrial, scientific, literary or artistic fields."[54] This definition does not specify whether an individual or a group can be considered as the originator of the traditional knowledge. As it stands, WIPO's definition is wide enough to cover all peoples so long as there is the key element of "tradition" involved in whatever work is under consideration.

The word "traditional" in the expression "traditional knowledge" should not be taken to refer to something that is old or to imply a lack of novelty. Rather, the emphasis in the word tradition is more on the means by which a work is developed, preserved and passed on from one generation to the other. It has been pointed out:

> [W]hat is 'traditional' about traditional knowledge is not its antiquity, but the way in which it is acquired and used, which in turn is unique to each indigenous culture. Much of this knowledge is actually quite new, but it has a social meaning and legal character, entirely unlike the knowledge indigenous peoples acquire from settlers and industrialized societies. This is why indigenous leaders believe that protecting indigenous knowledge effectively requires the recognition of each people's own laws, including their own local processes of discovery and teaching.[55]

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[52] For further discussion on the difference between traditional ecological knowledge and western knowledge see Graham Dutfield, "TRIPS-Related Aspects of Traditional Knowledge" (2001) 33 Case W. Res. J. Int'l L. 233.

[53] See Rosemary J. Coombe, "The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law" (2001) 14 St. Thomas L. Rev. 275.

[54] WIPO, *Glossary of Terms*, online: WIPO <http://www.wipo.int/tk/en/glossary/index.html> at "traditional knowledge." WIPO used this definition for its 1998-1999 fact-finding missions.

[55] Russel Lawrence Barsh, "Indigenous Knowledge and Biodiversity" in Darrell A. Posey, ed., *Cultural and Spiritual Values of Biodiversity* (London: Intermediate Technology, 1999) 73, at 74-75.

In addition to it being erroneous to equate traditional knowledge with a lack of novelty, it is also wrong to describe it as static. Traditional knowledge practices are dynamic, constantly evolving and adapting in response to time and change. It has been stated:

> traditional knowledge is not necessarily ancient. It is evolving all the time, a process of periodic even daily creation as individuals and communities take up the challenges presented by their social and physical environment. In many ways, traditional knowledge is actually contemporary knowledge.[56]

There are different views concerning the nature of the relationship between folklore and traditional knowledge: whether folklore is a sub-set of traditional knowledge or vice versa. One approach divides traditional knowledge into two categories: first, a restricted traditional knowledge referring to science and technical know-how and, second, a cultural part which is folklore. Under this approach, folklore is a sub-set of traditional knowledge.[57] Thus, folklore is sometimes described as "traditional cultural knowledge" or "expressions of folklore."

WIPO and UNESCO define "expressions of folklore" as "productions consisting of characteristic elements of the traditional artistic heritage developed and maintained by a community in the country or by individuals reflecting the traditional artistic expectations of such a community."[58] This definition not only defines expressions of folklore but, arguably, also ascribes a purpose or standard to it: "reflecting the traditional artistic

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[56] WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore*, online: WIPO <http://www.wipo.int/about-ip/en/studies/publications/genetic_resources.htm> at "Many Issues, Much at Stake."

[57] Folklore has been referred to as one of sub-sets of traditional knowledge with other sub-sets including "indigenous knowledge" and "traditional medicinal knowledge." See WIPO, *Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore*, online: WIPO <http://www.wipo.int/about-ip/en/studies/ publications/genetic_resources.htm>.

[58] UNESCO—WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions*, 1982, online: WIPO <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> at Part II, Article 25 section 2.

expectations of such a community." It is noteworthy that this definition makes no mention of scientific or technical knowledge. The WIPO IGC[59] has since proposed the following definition. "Traditional cultural expressions" or "expressions of folklore" are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof...."[60]

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[59] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO IGC).

[60] See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 12th Sess., *Reproduction of Document WIPO/GRTKF/IC/9/4 "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles,"* WIPO/GRTKF/IC/12/4(c) (2008), Annex at Part III, Article 1, online: WIPO <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_12/wipo_grtkf_ic_12_4_c.pdf>. This was discussed at the WIPO IGC's twelfth session in Geneva in 2008. The provisions in the Annex are the unaltered reproductions of the Annexes of the previous WIPO/GRTKF/IC/8/4, WIPO/GRTKF/IC/9/4 and WIPO/GRTKF/IC/10/4 and WIPO/GRTKF/IC/11/4(c) which the WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore considered at its eighth, ninth, tenth and eleventh sessions respectively. The unaltered reproductions of the Annexes of the just-mentioned documents are [WIPO IGC Draft Provisions—Annex]. WIPO IGC Draft Provisions—Annex, provides at Part III, Article 1:

> Part III, Article 1 of the Annex of WIPO/GRTKF/IC/11/4 (c) states as follows:
> (a) 'Traditional cultural expressions' or 'expressions of folklore' are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
> (i) verbal expressions, such as: stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
> (ii) musical expressions, such as songs and instrumental music;
> (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances,
> whether or not reduced to a material form; and,
> (iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta,mosaic,
> woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms;
> which are:
> - (aa) the products of creative intellectual activity, including individual and communal creativity;
> - (bb) characteristic of a community's cultural and social identity and cultural heritage; and
> - (cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.
> (b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

Some countries adopt the other approach by not distinguishing traditional knowledge from folklore. A determination of whether folklore is part of traditional knowledge or vice versa is not within the scope of this paper; clearly, differences between them are so slim they sometimes blur the demarcation separating them. Due to this interconnection, legislation in one area will affect the other. Consequently, policy in any of these fields should not ignore developments in the other.

In addition to the lack of international consensus on the definition of folklore, there are other criticisms surrounding the use of the word "folklore." Dissatisfaction with the term centres mainly on its association with rural, lower, disadvantaged, illiterate or uncivilized societies.[61] Further, there are some historical negative undertones attached to folklore based on its association with myth, superstition and similar phenomena. In Australia, for example, there is an aversion to the word folklore with a preference for the expressions "traditional knowledge" or "cultural expressions of indigenous peoples."[62] To avoid any negative connotations of the word folklore, the expression "folk life" is sometimes preferred to "folklore."[63] However, it appears that the historical negative undertones associated with the use of the term folklore are diminishing with the passage of time.

Despite the controversy and contention surrounding folklore, this thesis will use the term folklore, for want of a better expression. This thesis defines folklore as that domain of

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[61] See 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" (1999) 48 Am. U. L. Rev. 769.

[62] See Michael Blakeney's comments in "Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources," (Symposium-Global Intellectual Property Rights: Boundaries of Access and Enforcement) (2002) 12 Fordham I.P. Media & Ent. L.J. 753 at 757.

[63] See 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" (1999) 48 Am. U. L. Rev. 769 at 777.

existing, evolving and innovative customs, practices and traditions of communities and individuals that deals with their art, literature, designs and music expressions. Thus, this work adopts a limited definition of folklore that excludes the scientific part since the focus of this work is on the cultural aspect.[64] In this work, folklore, expressions of folklore, traditional cultural expressions and TCES are used interchangeably.

With respect to the scope of folklore, the UNESCO—WIPO Model Provisions divide expressions of folklore into four groups:

> (i) verbal expressions, such as folk tales, folk poetry and riddles;
> (ii) musical expressions, such as folk songs and instrumental music;
> (iii) expressions by action, such as folk dances, plays and artistic forms or rituals whether or not reduced to a material form; and
> (iv) tangible expressions, such as: (a) productions of folk art, in particular, drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewellery, basket weaving, needlework, textiles, carpets, costumes; (b) musical instruments; [(c) architectural forms].[65]

The WIPO IGC Draft Provisions—Annex also divide expressions of folklore into similar categories:

> (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.[66]

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[64] It has been suggested that where legislation appears to ignore areas like plant varieties, folklore's scope should be wide enough to include them to the extent that they were developed through scientific techniques handed down through the generations. See 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" (1999) 48 Am. U. L. Rev. 769 at 779.

[65] UNESCO—WIPO, *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action*, 1982, online: WIPO <http://www.wipo.int/tk/en/documents/pdf/1982-folklore-model-provisions.pdf> at Part II, Article 25 section 2.

[66] WIPO IGC Draft Provisions—Annex, *supra* note 60 at Part III, Article 1.

The two just-mentioned documents both mention textiles in their tangible expressions category. Unlike the UNESCO—WIPO Model Provisions, the WIPO IGC Draft Provisions—Annex also includes designs in that category.

Thus, once a group of people has these traditional customs and teachings, they have a form of folklore. Folklore is not restricted to the Western world or southern countries, to developed or developing countries. It is also not a preserve of indigenous peoples.

Before ending this section, it is worth mentioning that the above definition of folklore and traditional knowledge and the categories they are divided into are primarily Western ones. Indigenous thought and the indigenous worldview does not make a distinction between culture and traditional knowledge or divide traditional knowledge into these categories. For instance, the Maori of New Zealand use the expression Matauranga Maori to refer to traditional knowledge. Matauranga Maori has been defined as follows:

> Matauranga Maori in a traditional context means the knowledge, comprehension or understanding of everything visible or invisible that exists across the universe (ie: Aorangi, sometimes referred to as Rangi and Papa).[67]

This definition does not divide traditional knowledge into science on the one hand and culture on the other. Further, it includes tangible and intangible realms.

2.2.2: INDIGENOUS PEOPLE AND TRADITIONAL COMMUNITIES

The use of the term "indigenous peoples" is the subject of controversy. Labeling peoples as indigenous or otherwise is significant because it affects their local and

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[67] C. Mohi, "Matauranga Maori – A National Resource," (paper prepared for the Ministry of Research Science and Technology, 1993) quoted in David Williams, *Matauranga Maori and Taonga—The Nature and Extent of Treaty Rights Held by Iwi and Hapu in Indigenous Flora and Fauna, Cultural Heritage Objects, Valued Traditional Knowledge* (Waitangi Tribunal Publications, 2001) at 15, online: Waitangi Tribunal <http://www.waitangi-tribunal.govt.nz/doclibrary/public/wai262/matauranga_maori/Chapt02.pdf>.

international rights and privileges. As one writer has observed, "The purpose of seeking the status of an indigenous group is usually to assert collective, rather than individual, rights."[68] Although this may not always be the case, it shows the power and importance associated with classifying peoples. Classifying peoples as indigenous or non-indigenous involves (1) delving into the relationships between peoples; (2) specifying what makes a person a part of a group or an outsider; and (3) defining what distinguishes one group from another thus giving them their unique identity. "The designation of any given population in a region as 'indigenous' acquires substance when there are other populations in the same area that can reasonably be described as settlers or aliens."[69]

The term "indigenous peoples" has not been conclusively defined. A wide range of communities fit under the term "indigenous peoples," yet some of the communities have characteristics very different from others in the indigenous peoples' group. Another consideration is that different terms have been and continue to be used to refer to indigenous peoples such as native, tribe, ethnic group, local community or aboriginal peoples. Some of these terms have historical roots in the colonial period. In addition, the aversion to the use of the term indigenous derives from it having negative or inferior undertones, especially when used in comparison with the West. This is not surprising bearing in mind that the term indigenous has long been associated with primitive, inferior or uncivilised peoples.[70]

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[68] Robert Paterson, "Claiming Possession of the Material Cultural Property of Indigenous Peoples" (2001) 16 Conn. J. Int'l L. 283.

[69] André Bétaille, "The Idea of Indigenous People" (1998) 39:2 Curr. Anthropology 187 at 188, online: The University of Chicago Press, Journals Division <http://www.journals.uchicago.edu/CA/journal/index.html>.

[70] Historically, many negative and derogatory meanings have been associated with the term "indigenous peoples." This dates back several centuries especially to the 17th century and the period of European colonial expansion. People who championed the cause of civilization such as Thomas Hobbes regarded indigenous peoples as savages. It was felt that civilizing them would be for their own good. For more on this, see

The contention surrounding the use of the term indigenous peoples also affects the term "indigenous knowledge." Indigenous knowledge has been contrasted with scientific knowledge, and the debate on whether indigenous knowledge is scientific or comprises elements of superstition is ongoing. Controversy also centres on applying the term to non-western and non-scientific things. It has been observed that scientific practices are used to evaluate what is correct or incorrect indigenous knowledge. A result of this is that "much of what could be seen as indigenous knowledge is relegated to 'superstition' or 'symbolism' and marginalised in many discussions."[71]

While indigenous knowledge is a subset of traditional knowledge, not all traditional knowledge is indigenous. A traditional practice may not always be indigenous, bearing in mind that tradition refers to an established way of doing something. It is irrelevant to the concept of "tradition" who or which peoples are practising the method, or whether they are indigenous peoples. Tradition is blind to systems of classifying peoples in the same way folklore is.

However, the term indigenous does not now have as much of a stigma as it did in the past. In addition, there is increasing international respect for indigenous knowledge systems and for the rights of indigenous peoples. Indigenous peoples live on various

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"Indigenous People," online: wordIQ Dictionary and Encyclopedia <http://www.wordiq.com/definition/Indigenous_people>.

[71] R.L. Stirrat (commenting on Paul Sillitoe's paper) in Paul Sillitoe, "The Development of Indigenous Knowledge: A New Applied Anthropology" (1998) 39:2 Curr. Anthropology 223 at 242, online: The University of Chicago Press, Journals Division <http://www.journals.uchicago.edu/CA/journal/index.html>. On problems with understanding and interpreting indigenous knowledge by outsiders such as scientists, see Paul Sillitoe, "The Development of Indigenous Knowledge: A New Applied Anthropology" (*ibid.* at 229-230).

continents. The Inuit in Canada, the Aborigines of Australia, the Sami,[72] the Nuba of Sudan[73] and the Enxet of Paraguay are some indigenous groups.[74]

Indigenous peoples have been described as "peoples who make claims to indigeneity, although they may not yet be recognized as such within their states or by the United Nations; they may have very diverse interests."[75] This description highlights the fact that who is or is not indigenous is not a settled issue. However, the description does not provide much insight into the yardstick used to determine indigenous peoples. Some approaches used to define indigenous peoples have included assessing the peoples' attachment to the land, their vulnerability and whether they are descended from the earliest population.[76] The examples of the Sami and Aymara illustrate some characteristics of indigenous societies such as their strong attachment to nature.

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[72] The Sami form part of Europe's indigenous people and are found in Norway, Russia, Finland and Sweden. Language is the main yardstick used to define the Sami people in Nordic countries. A person is a Sami if he considers "himself Sami and either has himself learned Sami or has at least one parent or grandparent who has learned Sami as his mother tongue." See "Sami People," online: <http://www.yle.fi/samiradio/ saamelen.htm>.

[73] The issue of who is indigenous in Africa is not a settled one. It has been suggested that the term "indigenous'"operates in two distinct contexts in Africa: (1) in classifying peoples by examining the relationship between Africa and the European colonial powers, including settlers; and (2) classifying peoples with respect to which dominant ethnic groups have power in the country or control the state apparatus at a particular time and their suppression of aboriginal African groups. See Indigenous Peoples of Africa Co-ordinating Committee (IPAC), "Who is Indigenous in Africa," online: First Peoples Worldwide <http:www.firstpeoples.org/land_ rights/southern-africa/whatsnew/whatafrica.htm>.

[74] For a list of some indigenous peoples in the world and some history on this area, see Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples*, online: Minority Rights Group International http://www.minorityrights.org/directory>; "Indigenous People," online: wordIQ Dictionary and Encyclopedia, <http://www.wordiq.com/definition/ Indigenous_people>; Robert K. Paterson, "Claiming Possession of the Material Cultural Property of Indigenous Peoples" (2001) 16 Conn. J. Int'l L. 283; Rosemary J. Coombe, "The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law" (2001) 14 St. Thomas L. Rev. 275 at 277.

[75] Rosemary J. Coombe, "The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law" (2001) 14 St. Thomas L. Rev. 275 at 277.

[76] See Robert K. Paterson, "Claiming Possession of the Material Cultural Property of Indigenous Peoples" (2001) 16 Conn. J. Int'l L. 283.

The Sami, also known as the "Sámi" (*sápmelaš*)[77] or "Saami," are one of the largest groups of indigenous peoples in Europe. They were formerly described as the "Lapps" or "Lapplanders" by foreigners or outsiders, but today that term is considered to be derogatory. Sami culture is an oral one and this extends to their laws. There are several Sami languages and dialects. Descriptions of the various Sami groups are sometimes based on the geographical area they live in and their main means of livelihood. Thus, there are the Forest Sami, the Eastern Sami, the Mountain Sami and the Coastal Sami.[78] Like the San of Southern Africa, the Sami inhabit parts of several countries. There are currently groups of Sami in Finland, Sweden, Norway and Russia. The oldest written record of the Sami is found in the writings of the Roman historian Tacitus in 98 A.D. who wrote about the Fenni, a Nordic people.[79]

Contact with land and the environment is at the heart of Sami culture and identity. A strong relationship exists between them, the land and natural resources. As one writer has observed, the "essence of their culture is best summed up by their maxim: What is good for

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[77] "The name Sámi (*sápmelaš*) is an ethnic designation signifying that Sámi view themselves as members of a culture set apart from the dominant cultures. It supplants the term 'Lapp' which was given by outsiders." Veli-Pekka Lehtola, *The Sámi People: Traditions in Transition,* trans. by Linna Weber Müller-Wille (Fairbanks: University of Alaska Press, 2004) 10.

[78] See generally Gerald T. Conaty & Lloyd Binder, *The Reindeer Herders of the Mackenzie Delta* (Toronto: Key Porter Books, 2003).

[79] On this point, see Sweden, "The Sami - an Indigenous People in Sweden (1)," Ministry of Agriculture, Food and Consumer Affairs, February 2005, online: Government Offices of Sweden <http://www. sweden.gov.se/ content/1/c6/03/97/05/4ef76212.pdf >. See also "Important years in Sami history," online: <http://www.itv.se/boreale/history/htm>. See generally Sweden, "The Sami - an Indigenous People in Sweden (2)," Ministry of Agriculture, Food and Consumer Affairs (February 2005), online: Government Offices of Sweden <http://www.sweden.gov.se/content/1/c6/03/97/05/c69ac554.pdf>. For an excerpt from Cornelius Tacitus' book *Germania* of 98 A.D., see Veli-Pekka Lehtola, *The Sámi People: Traditions in Transition,* rev. 2d ed., trans. by Linna Weber Müller-Wille (Fairbanks: University of Alaska Press, 2004) at 22. On the question of Sami origins, see Veli-Pekka Lehtola, (*ibid.* at 20-21). On archaeological evidence on Sami origins, see Kirsikka Moring, "Uncovering the secrets of the Sámi" *Helsingin Sanomat* (February 2006), online: Helsingin Sanomat, International Edition <http://www.hs.fi/english/article/ Uncovering+ the+secrets+of+the+S%C3% A1mi/1135218761063>.

the reindeer is good for the Sami."[80] Traditionally, the livelihood of the Sami indigenous peoples of Scandinavia and northern Russia was derived largely from either fishing or hunting. The Sami have strong ties with the animals they hunt. It has been observed that the "traditional Sami find that their lives are intertwined with the animals. Their cultural and personal identity is based upon a close association with the reindeer."[81] Consequently, a disruption or change in animal patterns directly affects them. Customary law is an important feature of Sami society.[82]

The Sami experienced periods of occupation by other countries such as Sweden, Norway, Russia and Finland. Initially, these non-Sami countries recognised and respected Sami customary law and allowed the Sami to continue to apply them.[83] However, and especially from the mid-19th century, this policy was replaced by assimilation policies, influenced by cultural hierachist theories which coincided with this colonization period.[84]

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[80] Gerald T. Conaty & Lloyd Binder, *The Reindeer Herders of the Mackenzie Delta* (Toronto, Ontario: Key Porter Books Limited, 2003) at "Introduction."

[81] Gerald T. Conaty & Lloyd Binder, *The Reindeer Herders of the Mackenzie Delta* (Toronto, Ontario: Key Porter Books Limited, 2003) 16.

[82] Mattias Ahren, "Indigenous Peoples Culture, Customs, and Traditions in Customary Law—the Saami Peoples' Perspective" (2004) 21 Ariz. J. Int'l & Comp. L. 63.

[83] On this point, see Mattias Ahren, "Indigenous Peoples Culture, Customs, and Traditions in Customary Law—the Saami Peoples' Perspective" (2004) 21 Ariz. J. Int'l & Comp. L. 63 at 79-80.

[84] "At that time, the policy towards the Saami people became tainted by theories that have been labelled as "cultural hierarchist," social-Darwinist, or simply racist. In the latter parts of the 19th century, non-Saami authorities gradually began to view the Saami culture as inferior and less developed than the Scandinavian cultures, and the Saami people of less value than the Scandinavian peoples, incapable of bringing any contribution to a developed society." Mattias Ahren, "Indigenous Peoples Culture, Customs, and Traditions in Customary Law—the Saami Peoples' Perspective" (2004) 21 Ariz. J. Int'l & Comp. L. 63 at 81. For more on this area, see Mattias Ahren, "Indigenous Peoples Culture, Customs, and Traditions in Customary Law—the Saami Peoples' Perspective" (2004) 21 Ariz. J. Int'l & Comp. L. 63 at 82-85. European colonizers reinforced their claims with John Locke's theory of property, sovereignty, indigenous peoples and cultures as justification for taking away the lands of nomadic, fisher and hunter groups. On the influence of John Locke's theories, see Mattias Ahren, *ibid.* at 82-84; Erling Berge, "The Importance for Indigenous Peoples of the Rights to 'the Lands Which They Traditionally Occupy': The Case of the Sámi," at 4-5, online: Digital Library of the Commons <http://dlc.dlib.indiana.edu/archive/00001182/>.

The Sami are actively working to have a greater political voice and to protect their culture. Veli-Pekka Lehtola, a Sami, notes:

> The expression of Sámi identity, revealed in the form of symbols, is a result of the "awakening" of the Sámi people over the course of the last quarter century. In the early 1970s, young Sami, reacting against a long process of assimilation, began to become aware of Sámi heritage and to fight for it....The most important turning point in Sámi political and cultural history was the Áltá Conflict, a movement in the early 1980s, which spoke out against a hydo-electic dam proposed for the Áltá River. This gave impetus to Sámi culture and resulted in important changes in Sámi politics in Norway, and inspired a whole generation of Sámi throughout Sápmi.[85]

They have achieved a large degree of autonomy as compared with other indigenous minority groups. Some important milestones are the formation of the Sami Parliament in Finland, Norway and Sweden in 1973, 1989 and 1993[86] respectively and the establishment of the Sami Parliamentary Council in 2000.

The Aymara[87] Indians are one of the First Peoples of South America and live in Chile, Bolivia, Peru, Argentina and Ecuador. Today, about half of the Aymara live around the Titicaca plateau in the Bolivian and Peruvian altiplano.[88] Traditionally, Aymara Indians live in communities known as *ayllus*.[89] These communities have an assembly which democratically decides issues affecting the community. The *ayllus* in turn have ties and bonds with each other. The main sources of livelihood for the Aymara are farming, animal

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[85] Veli-Pekka Lehtola, *The Sámi People: Traditions in Transition,* rev. 2d ed., trans. by Linna Weber Müller-Wille (Fairbanks: University of Alaska Press, 2004) at 9.

[86] For more information on the Sami Parliament in Sweden, see online: Sametinget <http://www.sametinget.se>. For information of the Sami Parliament in Norway, see online: Samediggi <http://www.samediggi.no/>.

[87] Aymara is also the name given to the language of the Aymara people. It is spoken in Chile, Bolivia, Peru and Argentina.

[88] On this point, see James Eagen, *The Aymara of South America* (Minneapolis: Lerner Publications Company, 2002) at 4.

[89] The ayllus are the traditional structure of the Aymara Indian communities in Bolivia and Chile. See generally, Barbara A. Tenenbaum *et al*, eds., *Encyclopaedia of Latin American History and Culture*, vol. 1 (New York: C. Scribner's Sons, 1996) *s.v.* "ayllu". For general information on the Aymara, see Barbara A. Tenenbaum *et al*, eds., (*ibid. s.v.* "Aymara").

husbandry and fishing. Potatoes are one of the main crops grown by the Aymara and this crop has been their traditional means of livelihood.[90]

The Aymara people have a close relationship with nature and the environment:

> reverence to the Pachamama (Mother Earth), and the ordering of life according to Nature's cycles, geographical space and ancestral wisdom, are the base of their culture....The aymara cosmovision orders its world in three dimensions: social relations, relations with divinity and ancestors, and relations with Nature. The religious vision is based on myths about history and geography, and is the base for the community structures. Their social organization is based on an Indian hierarchy, strongly connected with their traditions, both original or derived from Catholicism. Each group of people has a community assembly formed by the owners of the land (which one gets by birth, marriage or special petition), and which decides democratically upon issues of common interest.[91]

To the Aymara, the seasons are more than just cycles of nature. They serve as a guide for when certain activities should be performed. The "tinku" or natural balance helps them to stay within the earth's rhythm. Maintaining that balance is very important to them:

> The manner in which the Aymara structure the universe follows such a pattern of correspondence between different spheres.... It is not because fetuses cause hail that the Aymara are apprehensive about abortions, but because the act of interrupting the normal development of a child in a community may find a parallel in nature when hail impedes the normal maturation of the crops. In other words, in order to maintain a balance between the forces of nature, a complementary normality in reproduction must be maintained.[92]

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[90] For more on this, see Isabel Maria Madaleno, "Aymara Indians in Chile: Water Use in Ancestral Cultures at Odds with Water Rights in Modern Times," Paper presented at a Conference on International Agricultural Research for Development, Deutscher Tropentag, Berlin (2004), online: Deutscher Tropentag 2004 <http://www.tropentag.de/2004/abstracts/full/33.pdf>.

[91] See Rosario Mena, "Aymara Cosmovision: Descendants of the Pacha Mama," (2004), online: nuestro.cl (Chilean Cultural Heritage Site) <http://www.nuestro.cl/eng/stories/recovery/aymara.ht>. See also Hans C. Buechler & Judith-Maria Buechler, *The Bolivian Aymara* (New York: Holt, Rinehart and Winston, 1971) at 90-92.

[92] Hans C. Buechler & Judith-Maria Buechler, *The Bolivian Aymara* (New York: Holt, Rinehart and Winston, 1971) at 103.

Religion and religious ceremonies are central to Aymara culture and identity. "The Aymara religion is based on the idea of giving something each time you take something."[93] Water is also very important to the Aymara people as is evident in one of their myths as to how the earth was founded.[94]

Like the Sami, the Aymara were also colonised. The Aymara were conquered by the Inca around 1430 and then by the Spanish in the 16th century. It is believed that prior to their conquest by the Inca, the Aymara lived in independent states, chiefdoms or small kingdoms. Periods of colonialization disrupted and changed the lifestyle and traditional practices of the Aymara people and in some cases resulted in their near extermination. For the Aymara in Chile, colonization meant subjection to assimilation. It also affected their control of their traditional lands and territories.

From the late 1990s in particular, the Aymara have been having more of a political voice locally and in national politics. For example, Victor Hugo Cárdenas, an indigenous Bolivian Aymara, was the Bolivian vice president from 1993-1998; in 1998, Gregorio Ticona Gomez, also an Aymara, became the mayor of Puno, Peru; and, Evo Morales, the current president of Bolivia, is Bolivia's first indigenous president.[95]

In its work on indigenous peoples, the International Labour Organization identifies two categories of populations which are the beneficiaries of the rights contained in the *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent*

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[93] James Eagen, *The Aymara of South America* (Minneapolis: Lerner Publications Company, 2002) at 40.
[94] See Rosario Mena, "Aymara Cosmovision: Descendants of the Pacha Mama," (2004), online: nuestro.cl (Chilean Cultural Heritage Site) <http://www.nuestro.cl/eng/stories/recovery/aymara.ht>.
[95] See James Eagen, *The Aymara of South America* (Minneapolis: Lerner Publications Company, 2002) at 19; Minority Rights Group International, *World Directory of Minorities and Indigenous Peoples - Bolivia: Overview* (Minority Rights Group International, 2007), online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/4954ce15c.html>.

Countries of 1989.[96] Article 1 of ILO Convention 169 provides that the convention applies to:

> (a) 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;
>
> (b) 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.

For the purposes of this work, I adopt two definitional elements set out in the ILO Convention 169. Finally, this work uses "indigenous peoples," "aboriginal peoples" and "traditional communities" interchangeably.

2.2.3: NATURE OF TRADITIONAL TEXTILES

There are two broad categories of textiles: traditional and non-traditional ones. As with traditional knowledge, traditional textiles can be further divided into indigenous and non-indigenous ones. The term "traditional textiles" in this work covers textiles developed by groups as opposed to by individuals. References in this work to "traditional textiles" include fabric, traditional dress, costume, clothing as well as the traditional motifs,

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[96] International Labour Organization, *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 1650 U.N.T.S. 383, 28 I.L.M. 1382, online: International Labour Organization <http://www.ilo.org.ilotex/english/convdisp1.htm> [ILO Convention 169].

symbols,[97] designs and patterns that may have been included in the textile. "Cloth," "fabric" and "textiles" are used interchangeably to refer to traditional textiles and dress items. This study focuses on community traditional textiles as opposed to items developed or designed by specific artists or artisans in an indigenous community. However, examples from non-indigenous textiles are also used when necessary.

Textiles are very important in indigenous communities.[98] A high value is placed on such textiles not only for their beauty, but also for their symbolism and the role they play in society.

Traditional textiles have certain distinguishing elements. One characteristic is that they are generally associated with a community as opposed to individuals. While it is not always possible to date the creation of a textile design, the relevant community has produced the textile for a long period of time, even centuries. For example, there are historical records of the Ghana *kente* cloth[99] dating back to at least the 12th century. Some of the sacred Coroma textiles[100] of the Bolivian Aymara Indians are 400 to 500 years old and date back to before the Inca arrival in the Andean region. In many cases, indigenous

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[97] For general information on meanings of African symbols, see Clémentine M. Faïk-Nzuji, *Tracing Memory: A Glossary of Graphic Signs and Symbols in African Art and Culture* (Hull, Québec: Canadian Museum of Civilization, 1996).

[98] For example, "Textiles have been at the center of Andean culture for millennia, and highly skilled people have developed elaborate weaving techniques." Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40 at 41, online: Cultural Survival <http://209.200.101.189/publications/csq/csq-article.cfm?id=923>.

[99] Ghana is located in the western part of Africa. It was a British colony and attained its independence in 1957. The kente cloth is one of Ghana's ceremonial cloths.

[100] The sacred textiles of the Aymara Indians in Coroma are woven cloths with a long history. The textiles are "garments resembling tunics, ponchos, capes, kerchiefs and shawls. They are woven from the hair of the alpaca, vicuna and other animals and are naturally dyed." United States Information Agency, Cultural Property Advisory Commission "Bolivia-U.S. Protection of Aymara Textiles," online: United States Information Agency <http://dosfan.lib.uic.edu/usia/E-USIA/education/culprop/blfact.html>.

communities have continued to produce the traditional item. For instance, the Inuit amauti[101] continues to be sewn and worn today.[102]

A second characteristic is that the knowledge or skill of producing the textile has been handed down from one generation to the next. The traditional Bhutanese[103] textile designs, for example, are subject to transmission through time:

> Bhutan has a well-developed and appreciated traditional weaving practice that has been in existence for centuries. The use of fascinating colors and intricate designs have been passed on and perfected over generations, kept consciously alive as token gifts down the ages from parents to children, mostly from mothers to their daughters although men-folk could also be found engaged to the weaving loom painstakingly working on the ornate patterns.[104]

In addition, a particular textile or costume may be associated with a specific indigenous community or with a particular region of a country. This may also be the case

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[101] The *amauti*, sometimes spelt "amouti" or "amoutiq," is a woman's parka with a "deep hood at the back in which babies and children are placed;" it is usually made from caribou and seal fur and some have designs on the front. See "Inuit Women Seek Parka Copyright" *CBC North News* in *Canku Ota (Many Paths) An Online Newsletter Celebrating Native America*, Issue 37 (2 June 2001) 1, online: Canku Ota <http://www.turtletrack.org/Issues01/Co06022001/CO_06022001_Parka.htm>. It has also been described as "a traditional Inuit jacket worn by women who are carrying children." Maria Canton, "Fashion Faux Pas: Inuit Women Fight for Control over Designs" *Northern News Services* (18 October 1999), online: <http://www.nnsl.com/frames/oldarchive/archive99-2/oct99/oct18_99fashion.html>. On the history of the Inuit parka and differences between the men and women's parka traditions, see Bernadette Driscoll, "The Inuit Parka: Function and Metaphor" in Glenbow-Alberta Institute, *The Spirit Sings: Artistic Traditions of Canada's First Peoples* (Toronto: McClelland and Stewart, 1987) online: <http://www.collectionscanada.ca/north/h16-5304-e.html>.

[102] See Philip Bird, "Inuit Women and the Protection of Their Knowledge," *Bulletin of the Canadian Indigenous Biodiversity Network (CIBN)*, Number 25 (October 2001), online: Canadian Biodiversity Information Network <http://www.cbin.ec.gc.ca/ips/ibin25.cfm?lang=e>.

[103] Bhutan is located in Southern Asia, between China and India. It has an area of approximately 47,000 sq. km. and a population of about 2,000,000. It has the following ethnic groups: Bhote (50%); ethnic Nepalese (35%); and indigenous or migrant tribes (15%).

[104] See the Response of Bhutan in WIPO, Secretariat, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session, December 10-14, 2001, *Survey on Existing Forms of Intellectual Property Protection for Traditional Knowledge*, WIPO Doc. WIPO/GRTKF/IC/2/5 (2001) at 10, online: WIPO <http://www.wipo.int/tk/en/consultations/questionnaires/ic-2-5/replies.pdf> [Bhutan Response to WIPO Survey]. Ikechi Mgbeoji states that there is a gendered dimension to the intellectual property protection of indigenous knowledge of the use of plants. See Ikechi Mgbeoji, *Global Biopiracy: Patents, Plants, and Indigenous Knowledge* (Vancouver: UBC Press, 2006) 55-60. By extension, with respect to the legal protection of traditional textiles, the gendered specific effects might well be considered.

with traditional dress. Some types of fabrics and textile designs may be distinct to a particular ethnic group or region of a country. There are different types of Sami costumes reflecting the various Sami groups. There are five main costume designs among the Finnish Sami including the "Eanodat style" of the Mountain Sami, the "Ohcejohk" style, the "Skolt style" and the "Vuohčču style."[105] Scottish tartans have distinct patterns and colours to signify particular Scottish clans.[106] This is also prevalent among the indigenous peoples of the Philippines:

> The unique textiles designs of the minority cultural communities is another treasure that the Filipinos can be proud of. The tribes of central and eastern Mindanao are known primarily for their abaca clothes decorated with resist-dye techniques. In the coastal regions of western Mindanao and the Sulu archipelago, the colorful silks and the tapestry techniques are well-known. In the north-central Mindanao, a unique hybrid style of dress is very commonly produced with emphasis on appliqué embroidery decoration.[107]

The motifs, symbols and art forms used in indigenous textiles carry a lot of symbolism. For instance, the sacred Coroma textiles have vibrant colours with very beautiful and intricate designs:

> Coroma's ancient clothing is characteristically of rich blues, purples, and yellows, frequently bearing a central area of one color and broad stripes or bands along the edges. Unlike many other altiplano communities, Coroma

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[105] Veli-Pekka Lehtola, *The Sámi People: Traditions in Transition,* trans. by Linna Weber Müller-Wille (Fairbanks: University of Alaska Press, 2004) at 12-14.

[106] Tartans are patterns known as "setts," woven in horizontal and vertical boxes on looms, and have been used in weaving in Scotland for centuries. These fabrics are a means of identification and the patterns are associated with particular Scottish clans. It is not known how old tartans are and whether they are as old as the clan system. On the history or tartans, see Christian Hesketh, *Tartans* (London: Octopus Books Ltd, 1972) at 3. For additional information and images of tartans associated with certain clans, see Ian Grimble, *Scottish Clans and Tartans* (London: Hamlyn, 1973); Donald C. Stewart, *The Setts of the Scottish Tartans: with Descriptive and Historical Notes* (London: Shepheard-Walwyn (Publishers) Ltd., 1974). See also, "Tartans of Scotland: the definitive guide to tartans on the web," online: Tartans of Scotland <http://www.tartans.scotland.net>. For the Scottish Tartans World Registry, see online: Tartans of Scotland <http://www.tartans.scotland.net/ world_register.cfm>.

[107] See P.V. Valsala G. Khutty, "A Study on the Protection of Expressions of Folklore" written for the World Intellectual Property Organization (1999) at 20, online: WIPO <http://www.wipo.int/globalissues/ studies/ cultural/expressions/study/index.html#4>.

> textiles emphasize the interplay of bands, stripes and broad spaces and have no representational figures. The weaving techniques are varied, complex, and finely executed, and the designs contain subtle and intricate symbolic meanings that embody the history and philosophical underpinnings of Coroma's belief system.[108]

In addition, the textiles have the paradoxical characteristic of being both ancient and living. Although the designs originated in the distant past, they are still being used, developed and transformed by the community. This is in line with the view that traditional knowledge does not necessarily refer to something that is ancient or old. Further, the transmission of the art of textile making intergenerationally does not mean that all indigenous works are mere replicas of existing ones. In some cases, indigenous people create by developing works that their ancestors originated. For instance, as Monica Ell, the vice-president of Pauukuutit, an Inuit Womens' Association, commented on Inuit designs, "The older pieces are traditional and something that we've been working to perfect for many, many years."[109] Thus, although traditional does have a sense of dating back to the past, the practice can be carried out to produce new textiles today.

Further, the textiles are living culture in that they play a role in societal, spiritual and other community events. In Ghana, the ceremonial kente cloth "is a visual representation of history, philosophy, ethics, oral literature, moral values, social code of conduct, religious belief, political thought and aesthetic principles" of indigenous

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[108] Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival < http://209.200.101.189/publications/csq/csq-article.cfm?id=923 at 41.

[109] Maria Canton, "Fashion Faux Pas: Inuit Women Fight for Control over Designs" *Northern News Services* (18 October 1999), online: <http://www.nnsl.com/frames/oldarchive/archive99-2/oct99/oct18_99fashion.html>. See also Kamal Puri, "Preservation and Conservation of Expressions of Folklore," *supra* note 5 at 16-17 (commenting that the transmission of folklore does not mean that the Aboriginal peoples act as robots; rather, there is some creativity involved in transmission).

communities.[110] Kente is one of Ghana's ceremonial cloths and is reserved for special occasions. Its importance to Ghana is illustrated by the fact that in 1960 Ghana gave the largest kente on record, measuring 12 by 20 feet, to the United Nations as a gift. The sacred Coroma textiles of the Bolivian Aymara Indians are not viewed as works of art by individuals, but rather as spiritual representations of community ancestors and as a record of the history of the people.[111] Further, the sacred Coroma textiles are a link to the ancestors and are consulted for guidance on community life, such as when to plant and harvest, and on other important occasions.[112] Another distinctive feature of the clothing and textiles of indigenous communities is their regulation by customary law.[113]

2.3: SIGNIFICANCE OF FOLKLORE INCLUDING TEXTILE DESIGNS

This section explores the importance of traditional cultural expressions principally to indigenous peoples and generally from an international perspective. It examines it from four angles: identity, heritage, culture and cultural property and economics or trade.

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[110] See "Kente," online: <http://www.ghana.com/republic/kente/> at 1. For general information on African textiles, see Roy Sieber, *African Textiles and Decorative Arts* (New York: The Museum of Modern Art, 1972).

[111] See Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival < http://209.200.101.189/publications/csq/csq-article.cfm?id=923> at 40.

[112] Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival <http://209.200.101.189/publications/csq/csq-article.cfm?id=923> at 40. See also Sarah Booth Conroy, "Sacred Textiles Returned to Bolivia" *Washington Post*, (25 September 1992), online: <http://exchanges.state.gov/culprop/aymara.html> at 2 (stating that they are consulted on marriages).

[113] This is discussed in greater detail at section 2.4., below.

2.3.1: IDENTITY

There are many indicators of identity such as habitat, language and dialect.[114] Culture is a useful indicator of identity and a yardstick to distinguish ethnic groups. Identity exists in many forms such as individual identity, family identity, group identity, ethnic identity, regional identity and national identity.[115] Basically, identity is that element which defines a person or a group. It is that characteristic or group of characteristics which gives uniqueness and makes a person or a group distinct and unique.

Folklore is evidence of identity and is also a vehicle for maintaining identity. It reveals identity when, for example, folk tales and songs are identified with specific places and peoples. On another plane, folklore provides identity through historical information. Identity is rooted in who a person is, where the person comes from and where the person belongs. Folklore gives meaning to a person's origins. By being an essential part of culture which keeps society together, it helps to preserve identity. It is a piece of the fabric that keeps group identity intact. Thus, folklore reveals more about the essence of the ethnic group including their history, philosophy, belief system and values, thereby creatively adding depth, character and history to a person belonging to a particular ethnic group.

Some ethnic groups have developed distinct textiles, designs and symbols. Consequently, a textile is proof of identity when it provides information on which ethnic group or country a person belongs to. For instance characteristic elements of Bhutanese textile designs "can be clearly discerned and attributed to specific regions of the country.

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[114] On this, see *e.g.* André Bétaille, "The Idea of Indigenous People" (1998) 39:2 Curr. Anthropology 187 at 188, online: The University of Chicago Press, Journals Division <http://www.journals.uchicago.edu/CA/journal/index.html>.

[115] On folklore as national identity, see Brynjulf Alver, "Folklore and National Identity" in Reimund Kvideland & Henning K. Sehmsdorf, eds., *Nordic Folklore: Recent Studies* (Indianapolis: Indiana University Press, 1989) 12.

"Matha," is a well-known design from the Bumthang valley whilst, the region of Kurtoe prides itself to the famous 'Kushuthara' designs."[116] Thus, people who have the requisite knowledge about a textile can identify which part of the country it comes from and even which ethnic groups produced it. It has been written concerning the language of Sami clothing:

> The clothing tells many things. Even a person's character traits can be discerned from the way it is worn.... The garment is a symbol of a Sámi person's identity. It has many subtleties that are difficult to describe, and that contain Sámi cultural vocabulary and codes, just like the shades of meaning in the language. It also reveals an unaccustomed wearer or someone from outside. For that reason many Sámi resent or even become angry at outsiders who wear Sámi clothing without understanding its symbolic language. [117]

Although an ethnic group's folklore may be a tool of ethnic and national identity and unity, it may also sometimes be a vehicle for national disunity in cases where a country is composed of many ethnic groups whose individual cultures are hindering national unity.[118]

2.3.2: HERITAGE

Heritage denotes the essence of an object being bequeathed or transmitted from one person to another and from one generation to the other. It is common to consider heritage in terms of wealth, but heritage does not necessarily imply wealth in money terms. Heritage has been defined as "property that is or may be inherited," and "valued things such as historic buildings that have been passed down from previous generations."[119] It has

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[116] Bhutan Response to WIPO Survey, *supra* note 104.
[117] Veli-Pekka Lehtola, *The Sámi People: Traditions in Transition,* trans. by Linna Weber Müller-Wille (Fairbanks: University of Alaska Press, 2004) at 14. On some types of Sami clothing, see section 2.2., above.
[118] On this point, see Brynjulf Alver, "Folklore and National Identity" in Reimund Kvideland & Henning K. Sehmsdorf, eds., *Nordic Folklore: Recent Studies* (Indianapolis: Indiana University Press, 1998) 13 at 18-20.
[119] *Compact Oxford English Dictionary*, online: Oxford Dictionaries <http://www.askoxford.com/concise_oed /heritage?view=uk>.

also been defined as "what is or may be handed on to a person from his or her ancestors."[120] The object one inherits could be an idea, a formula, or even a practice. Thus, heritage and inheritance may add value to what a person or group owns, but not necessarily in monetary terms. Heritage assumes greater dimensions when considered in relation to a collective such as an ethnic group, a nation, a country or even a continent. The "politics of heritage" or "heritage politics"[121] is a field that is important because it shapes the lives of people and nations.

The protection of the heritage of indigenous people has gained increasing importance among indigenous peoples and at international deliberations, for example, at the United Nations.[122] The difficulty arises in defining what to protect and how to protect it.

Heritage has been defined as follows:

> "Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape,

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[120] *Collins Gage Canadian Paperback Dictionary*, new ed. (Toronto: Nelson, 2006).

[121] These terms are used to describe the policies and considerations concerning heritage.

[122] These United Nations initiatives include the *United Nations Declaration on the Rights of Indigenous Peoples*, *supra* note 13, and the United Nations *Draft Declaration on Principles and Guidelines on the Protection of Indigenous Heritage*. The latter was elaborated by Erica-Irene Daes, Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights in 1995, see E/CN.4/Sub.2/1995/26. This Sub-Commission was formerly the U.N. Subcommission on Prevention of Discrimination and Protection of Minorities. That document has been discussed and reviewed subsequently by the United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, 23d sess., 18-22 July 2005. For that and previous sessions of the Working Group, see, online: <http://www2.ohchr.org/english/issues/indigenous/groups/sessions.htm>; United Nations Permanent Forum on Indigenous Issues, online: <http://www.un.org/esa/ socdev/unpfii/>. This is a body which advises the Economic and Social Council on indigenous issues concerning inter alia on social and economic development, culture and human rights.

> and naturally-occurring species of plants and animals with which a people has long been connected.[123]

Folklore is important to a community as an integral part of community cultural heritage. With textiles, for example, the community has "inherited" the textile or the art of making the textiles from their ancestors and the community will, in turn, transmit the textiles to future generations as part of their heritage. The Inuit amauti, for instance, "embodies traditional designs, motifs, and techniques and reflects the heritage of all Inuit people."[124]

Folklore is not just cultural heritage, but also a vehicle for the transmission of cultural heritage through generations. In other words, the traditional and folklore practices may, and in most cases, do contain within themselves the method by which folklore, this cultural heritage, should be preserved and transmitted to future generations. Folklore served and still serves as both the "cultural message" and the medium for transmitting the message. It should be noted that this dissertation is not saying that it is only through folkloric practices and traditions that culture is passed on to future generations. Although this may have been the case in the past[125] when the world was not as much a global village as it is now, in present times when there are books and articles on the folklore of some ethnic groups, knowledge and experience may be acquired not only by observation, but also by reading (in cases where the society is a literate one).

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[123] Erica-Irene Daes, "Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples," U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/ 1993/28, 28 July 1993, at paragraph 24.

[124] Philip Bird, "Inuit Women and the Protection of Their Knowledge," *Bulletin of the Canadian Indigenous Biodiversity Network (CIBN)*, Number 25 (October 2001), online: Canadian Biodiversity Information Network <http://www.cbin.ec.gc.ca/ips/ibin25.cfm?lang=e>.

[125] On this point, see for example, Christine Haight Farley who discusses some sacred Australian Aboriginal designs and comments that "Traditionally, the Australian Aboriginal peoples have no written history. As a result, these designs are the means by which their culture is passed down through the generations." Christine Haight Farley, *supra* note 24 at 5.

Another question is that of determining whose heritage is being protected. To protect something one must know what is being protected and it must be clearly possible to define its boundaries. In these days where there has been an intermingling of cultures to some extent, one may well question whether heritage is "pure" heritage.

The argument is sometimes made that no people can claim "pure" ownership of an aspect of culture since peoples have intermingled and cultures have "borrowed" from each other. Undoubtedly, some indigenous cultures have been influenced by external contact. The less contact an indigenous community has had with external cultures, the greater the chance that the community has preserved its culture. Consequently, indigenous communities who have had a lot of exposure to foreign influences have also had their culture affected accordingly. The answer to that argument, however, is that exposure to other cultures does not necessarily imply borrowing from other cultures. In addition, even where they may be borrowing, borrowing does not necessarily affect every facet of a community's culture. Despite exposure to other cultures, some indigenous communities have been able to preserve some distinct parts of their culture. For example, due to its location on the sea route between Europe and Asia, Indonesia is a country whose ethnic groups have been exposed to and influenced by other cultures. However, despite this contact, there are parts of Indonesia's culture which are authentically Indonesian:

> Despite profound influence of other cultures, Indonesia has been able to claim certain cultural traditions which are unique to their country. The Gamelan music, the performing arts of the Wayang puppet dramas and dances, handmade textiles, the art and mysticism about the Kris (ceremonial sword) are very specific aspects of the islands' artistic heritage.[126]

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[126] P.V. Valsala G. Kutty, "A Study on the Protection of Expressions of Folklore" written for the World Intellectual Property Organization (1999), online: WIPO <http://www.wipo.int/globalissues/studies/cultural/expressions/study/index.html#4> at 27.

Relating this to traditional textiles, the issue is not whether an indigenous culture has or has not been exposed to other cultures. Most indigenous cultures have been exposed to other cultures in varying degrees. Notwithstanding the exposure, the individual communities have been able to preserve the art of making that textile such that the textile is known as belonging to that community or ethnic group. Rather, the key is whether, despite such exposure, a people has been able to maintain a unique element of its culture, something that is distinctly its own. Further, the fact that a cultural object is not "secret" in the sense that it can be viewed or even purchased by people from other cultures does not mean that it belongs to everyone.

2.3.3: CULTURE AND CULTURAL PROPERTY

Culture is used in many expressions such as cultural values, culture wars, cultural politics, the political economy of culture, cultural geography,[127] cultural industries, sub-cultures, counter-cultures, resistant cultures, cultural commodity, cultural products and goods, cultural consumption, cultural plurality and cultural relativism. Basically, culture is at the core of a people; it defines and expresses who they are. Culture is also a process since some cultural practices transform with time.

There is no simple definition of cultural property. It has been defined as follows:

> This term refers to artifacts considered to be of significant cultural or historical value. Typically these are monuments, archives, archaeological finds and sites, works of art and craft, and items of ethnological interest. Their value is related to claims that they have a special connection with a community, such as a nation or ethnic group, that they are integral to the identity of such a group, and that they provide significant information about

[127] For an introduction to cultural geography, see Don Mitchell, *Cultural Geography: A Critical Introduction* (Oxford: Blackwell Publishers, 2000).

> a group or about humanity. 'Cultural heritage', and its close cognate 'patrimony', are collective terms for such objects and sites.... There is disagreement over how old objects and sites need to be to qualify as cultural property. The terms 'cultural property' and 'cultural heritage' also include and frequently refer to *intangible* artifacts such as historical events and narratives, myths, and legends. Nor is the definition of what *particularly* constitutes cultural property at all static; the field of cultural heritage is characteristically one of competing claims to significance, value, and ownership.[128]

Another approach is to regard cultural property from two angles: a world view and a national view. As John H. Merryman has written:

> One way of thinking about cultural property–i.e., objects of artistic, archaeological, ethnological, or historical interest–is as components of a common human culture, whatever their places of origin or present location, independent of property rights or national jurisdiction....
>
> Another way of thinking about cultural property is as part of a national cultural heritage. This gives nations a special interest, implies the attribution of national character to objects, independently of their location or ownership, and legitimizes national export controls and demands for the "repatriation" of cultural property. As a corollary of this way of thinking, the world divides itself into source nations and market nations.[129]

The above discussion shows that the question of cultural property is complex for the following reasons: 1) it is hard to provide a uniform definition for cultural property; and 2) the definition of what amounts to cultural property may vary from country to country or even regionally. In the context of art, which is most relevant for this study,

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[128] *The New Oxford Companion to Law* (Oxford: Oxford University Press, 2008) *s.v.* "cultural property".

[129] John Henry Merryman, "Two Ways of Thinking about Cultural Property" (1986) 80 A.J.I.L 831 at 831-832 [footnote omitted]. A useful definition of cultural property is in Article 1 of the UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, 823 U.N.T.S. 231, online: UNESCO <http://portal.unesco.org/en/ev.php URL_ID=13039&URL_DO=DO_ TOPIC&URL_SECTION=201.html>. That convention is discussed in section 4.5.1., below. The *UNIDROIT Convention* and the *Convention for the Safeguarding of Intangible Cultural Heritage*, *supra* note 14, also provide definitions for cultural property. These two conventions are discussed in sections 4.5.2. and 4.5.3. respectively, below.

cultural property has been defined as referring "to group-owned art treasures."[130] However, indigenous and traditional communities may not regard culture as property in the sense of ownership, as property is sometimes defined in the West, since the former tend to regard themselves as custodians as opposed to owners of culture. Nevertheless, the term cultural property will be used in this dissertation and applied to indigenous and traditional communities, with the above qualification understood, and using cultural property and cultural heritage interchangeably. [131]

There is contention about the nature of "rights" in culture[132] as property. There is no consensus among indigenous people as to what culture as property means. This dilemma in determining the boundaries or culture as property may exist even within an ethnic group or ethnic nation.[133] The next section examines the economic importance of traditional cultural expressions.

2.3.4: ECONOMIC SIGNIFICANCE

Does the existence of some cultural objects in a market mean that even though they can be bought there are still restrictions on their use; is there some element that is supposed to exist beyond the sale of the item? The answer differs according to the group and the object under discussion.

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[130] Leonard D. DuBoff, Sherri Burr & Michael D. Murray, *Art Law: Cases and Materials* (Buffalo, N.Y.: W.S. Hein, 2004) at xxv.

[131] There are some international agreements under the aegis of UNESCO dealing with tangible and intangible forms of culture such as *The Convention for the Safeguarding of the Intangible Cultural Heritage*, online: UNESCO <http://portal.unesco.org/culture/en/ev.phpURL_ID=16429&URL_DO=DO_TOPIC&URL_SECTION= 201.html>.

[132] See generally, Michael F. Brown, *Who Owns Native Culture?* (Cambridge, Mass.: Harvard University Press, 2003).

[133] On this point, see for example, Trond Thuen, "Culture as Property? Some Saami Dilemmas" in Erich Kasten, ed., *Properties of Culture – Culture as Property. Pathways to Reform in Post-Soviet Siberia* (Berlin: Dietrich Reimer Verlag, 2004) 87-108 (commenting on the meaning of property from an indigenous perspective), online: siberian-studies.org <http://www.siberian-studies.org/publications/PDF/cpthuen.pdf>.

The first consideration is whether the item is alienable. Is the cultural product an item of trade and is it marketed? The sacred Coroma textiles of the Aymara people, for example, are not items of trade. Indeed it appears highly unlikely and implausible that they ever will be. They are at the highest echelon of sanctity. Coroma community law is explicit on the inalienability of the textiles.[134] The textiles are property in the sense that they "belong" to the Aymara people, but they are not property in the sense of items to be bought and sold.

However, there are degrees of sanctity and complications that arise with items which hold a lot of significance in a society, but are sold on the market such as the Ghana kente cloth. It is produced and sold for use by Ghanaians at special occasions. The cloth is sold because that it how people can acquire them and use them for the acceptable purposes. Clearly, such items are cultural commodities; however, the sale does not detract from the cloth's importance and acceptable uses. There is an obligation and expectation of acceptable use attached to the item that exists beyond the sale.

Not all cultural items are commodities to be bought and sold. Further, in cases where such items are sold in the national marketplace, that sale does not imply that the ethnic group or the nation in question considers that the item loses its importance and that the rules attaching to its proper use no longer apply. Neither can one conclude that the existence of an object of folklore in a national market means that the ethnic group "owners" want that item to be in the global marketplace. National commercialisation does not necessarily translate into international commercialisation. However, there are nations who desire to market their folklore internationally. Consequently, an assessment of the

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[134] See Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival <http://209.200.101.189/publications/csq/csqarticle.cfm?id=923> at 41.

extent to which folklore is a source of revenue and an economic tool from an indigenous perspective is a complicated task.

There is an undeniable interest in commercializing folklore, whether legitimately or otherwise,[135] because of its potential as a source of revenue and contributor to the global economy. Ethnic art, artworks and traditional textiles are highly prized not only for their beauty but also as artifacts from ancient civilizations. "Today traditional art is a million-dollar business."[136] Indigenous music and folk tunes are sometimes incorporated into modern and contemporary music in an effort to give the latter a unique tune or beat. For example, Paul Simon's 1990 album, *Rhythm of the Saints*, included some African and South American tunes. In the first four weeks of its release, *Rhythm of the Saints* sold 1.3 million copies.[137] However, commercialisation is not always done legitimately as occurred, for instance, with the Taiwanese indigenous group's Ami[138] Song of Joy, which was incorporated by the German band Enigma in their song "Return to Innocence" without compensation to the Ami and without their knowledge. "Return to Innocence" was later used by the United States as one of the songs advertising the summer 1996 Olympic Games. [139]

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[135] This is discussed in greater detail at Chapter 4, below.

[136] Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (Geneva, Switzerland: World Intellectual Property Organization, 2002) at 250, online: WIPO <http://www.wipo.int/about-wipo/en/dgo/wipo_pub_888/index_wipo_pub_888.html>. "The National Aboriginal and Torres Strait Islander Cultural Industry Strategy estimated the indigenous arts and crafts market to be worth almost $US200 million per year. The percentage of returns to indigenous people is marginal. In 1989, the *Review of the Arts and Crafts Industry* estimated that indigenous people receive over US$7 million per year from the sale of arts and crafts. The Strategy notes that the economic benefits to indigenous artists have improved and could now be about US$50 million per year, but the major portion of sales benefits goes to the art traders rather than to the artists themselves" (*ibid.* at 250).

[137] Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (Geneva, Switzerland: World Intellectual Property Organization, 2002) at 251, online: WIPO <http://www.wipo.int/about-wipo/en/dgo/wipo_pub_888/index_wipo_pub_888.html>.

[138] The Ami are one of the largest indigenous groups in Taiwan.

[139] See Angela R. Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities" (2000) 18 Cardozo Arts & Ent. L.J. 175.

The full potential of folklore as a source of revenue cannot be estimated. Not all indigenous groups regard their folklore as marketable since some items and images are sacred and it would be a taboo to sell them. The position may be summarised as follows: First, if an item is a guarded secret and known only to the relevant community, then it is highly unlikely that it will be sold. Second, if the item is ceremonial or holds some significance for the community, then there might be some revenue from the sale of the item. The revenue potential of the item depends on the customary or other laws in the country. Third, if the item holds no significance other than the fact that it is traditional, then this is where the greatest revenue will be made. In short, the extent to which folklore is an economic tool to a community depends on the object under question, its significance and role in the respective community.

2.4: CUSTOMARY LAW AND COMMUNITY PROTECTION OF FOLKLORE

Collective or communal ownership already exists in various jurisdictions in relation to land. The issue, however, is whether communal ownership of culture is recognised. An examination of communal or collective ownership of culture is relevant to this study because culture is not owned by an individual; rather, it belongs to a community and on a larger scale, is national heritage. This section focuses on customary law and the community protection of rights in traditional textiles. It also examines the extent to which individual and group rights in culture are recognised in some international instruments.

2.4.1: CUSTOMARY LAW RULES AND PRINCIPLES

Customary law[140] has many branches and divisions such as customary international law. The modern codification of civil law developed out of customary law. The British Common Law developed out of customs which became accepted rules and assumed the force of law. The native legal system of indigenous peoples constitutes another branch of customary law. This branch of customary law has existed for centuries. "In mediaeval Europe the Germanic tribes were mostly regulated by customary practices and laws, and the existing 'barbarian laws' regulated only parts, frequently small parts, of their social relationships."[141] In this work, the use of the term "customary law" refers to indigenous laws unless otherwise indicated.

Indigenous peoples have used their native or customary laws to regulate societal conduct over the centuries. In some countries that were former colonies, a plural legal system operates: a combination of the legal system introduced by the colonial power and customary law.[142] Thus, there are two bodies of laws running parallel to each other.

Customary laws continue to play an important role in indigenous communities. The extent to which indigenous groups are allowed to use their customary law largely depends on the policies and laws of the government in the countries these groups live in. Although they are subject to government policies in countries like Finland and Norway, the Sami are

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[140] Customary law generally refers to a body of rules applied traditionally over a period of time and which over a period of consistent use becomes recognised as a body of laws. One distinct element of customary law is its unwritten nature.

[141] David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980) s.v. "customary law". See also, Sir Henry Sumner Maine, *Dissertations on Early Law and Custom: Chiefly Selected from Lectures Delivered at Oxford* (London: J. Murray, 1883).

[142] This is the position in many African countries, for example. On the legal systems in Africa, see Antony Allott, *Essays in African Law: With Special Reference to the Law of Ghana* (London: Butterworths, 1960). For an examination of various models used to incorporate indigenous customary legal systems and an evaluation of such models, see Jacob T. Levy, "Three Modes of Incorporating Indigenous Law" in Will Kymlicka and Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 297.

able to operate their customary laws.[143] Sami customary law has rules regarding the division of land, rules on inheritance, on fishing rights, access to reindeer and has been used to resolve disputes.[144]

In addition, customary law usually provides for the protection of folklore in order to maintain its significance and preserve cultural practices. Some aspects of folklore may be under the care and supervision of respected elders in a community.[145] Another distinctive feature of the clothing and textiles of indigenous communities is their regulation by customary law. There may be rules concerning who can produce an item and what constitutes appropriate use of the item. The Sami costume has traditionally been produced by the Sami and wearing the costume is a sign of identifying with the Sami.[146] Although it is currently also manufactured by some Norwegian stores, only a few special non-Sami people such as the royal family on visits to Finnmark, have been seen to wear the costume unchallenged.[147]

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[143] "Indigenous law is accorded the greatest status when self-government forms the foundation of the recognition of indigenous law, which implies that indigenous peoples have at least in principle been recognized as sovereign nations. Indigenous law is respected in a way analogous to the respect accorded the laws of foreign states." Jacob T. Levy, "Three Modes of Incorporating Indigenous Law" in Will Kymlicka and Wayne Norman, eds., *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 297 at 298.

[144] On these points, see Mattias Ahren, "Indigenous Peoples Culture, Customs, and Traditions in Customary Law—the Saami Peoples' Perspective" (2004) 21 Ariz. J. Int'l & Comp. L. 63 at 68-70.

[145] For example, an Ami tribal leader, Lifvon Guo, was a keeper of Ami traditional folksongs. See Angela R. Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities" (2000) 18 Cardozo Arts & Ent. L.J. 175 at 176.

[146] See Veli-Pekka Lehtola, *The Sámi People: Traditions in Transition,* trans. by Linna Weber Müller-Wille (Fairbanks: University of Alaska Press, 2004) 10 at 12. "It has become quite common, via media, to discuss who has the right to use the Sami costume...." Sami – An Indigenous People, online: <http://www.yle.fi/samiradio/saamelen.htm>. For more on the production and use of the Sami costume, see Trond Thuen, "Culture as Property? Some Saami Dilemmas" in Erich Kasten, ed., *Properties of Culture – Culture as Property. Pathways to Reform in Post-Soviet Siberia* (Berlin: Dietrich Reimer Verlag, 2004) 87, online: siberian-studies.org <http://www.siberian-studies.org/publications/PDF/cpthuen.pdf> at 96.

[147] "This may be evidence that royal persons are individuals considered to be 'above' the ethnic boundary, and that their occasional use of the *gakti* is a sign of reverence." Trond Thuen, "Culture as Property? Some Saami Dilemmas" in Erich Kasten, ed., *Properties of Culture – Culture as Property. Pathways to Reform in Post-Soviet Siberia* (Berlin: Dietrich Reimer Verlag, 2004) 87, online: siberian-studies.org <http://www.siberian-studies.org/publications/PDF/cpthuen.pdf> at 96.

Some communities have specific rules on who can make the textiles and the uses of the textiles. This includes when the textiles can and cannot be worn. Heavily influenced by Ghanaian traditional protocol, the contemporary use of the kente is reserved for very important occasions such as weddings, naming ceremonies and state functions.[148] Further, some traditional garments may be associated with some particular festivals or music performances. For instance, the sacred Coroma textiles are worn during a festival in November.[149]

Just as customary law determines how textiles are to be treated, so customary law would also punish members of the community who violate these rules. In the Australian case of *Milpurrurru et al. v. Indofurn Pty. Ltd. et al.*,[150] some Aboriginal painters brought a copyright action against the manufacturers of some patterned carpets. The manufacturers had copied sacred Aboriginal designs and included the sacred designs in carpets they had produced in Vietnam. The plaintiffs' claim succeeded. Although this case involved copyright law, the court examined the traditional rules or customary law of the Aboriginal community the plaintiffs belonged to and stated:

> Painting techniques, and the use of totemic and other images and symbols are in many instances, and almost invariably in the case of important creation stories, strictly controlled by Aboriginal law and custom. Artworks are an important means of recording these stories, and for teaching future generations. Accuracy in the portrayal of the story is of great importance. Inaccuracy, or error in the faithful reproduction of an artwork can cause deep offence to those familiar with the dreaming.

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[148] See Josephine Asmah, "Historical Threads: Intellectual Property Protection of Traditional Textile Designs: The Ghanaian Experience and African Perspectives" (2008) 15 Int'l J. Cult. Prop. 271; Steven J. Salm & Toyin Falola, *Culture and Customs of Ghana* (Westport, Conn.: Greenwood Press, 2002) at 117; "Ghana National Cloth-Kente," online: Ghana Embassy in Japan <http://www.ghanaembassy.or.jp/general_info/native.html>

[149] See Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival <http://209.200.101.189/publications/csq/csqarticle.cfm?id=923> at 41.

[150] *Milpurrurru et al. v. Indofurn Pty. Ltd. et al* (1995) 130 A.L.R. 659, 30 IPR 209 (F.C.A.).

> The right to create paintings and other artworks depicting creation and dreaming stories, and to use pre-existing designs and well recognized totems of the clan, resides in the traditional owners (or custodians) of the stories or images. Usually that right will not be with only one person, but with a group of people who together have the authority to determine whether the story and images may be used in an artwork, by whom the artwork may be created, to whom it may be published, and the terms, if any, on which the artwork may be reproduced....
>
> If unauthorised reproduction of a story or imagery occurs, under Aboriginal law it is the responsibility of the traditional owners to take action to preserve the dreaming, and to punish those considered responsible for the breach. Notions of responsibility under Aboriginal law differ from those of the English common law. If permission has been given by the traditional owners to a particular artist to create a picture of the dreaming, and that artwork is later inappropriately used or reproduced by a third party the artist is held responsible for the breach which has occurred....[151]

This Australian case illustrates communal ownership and group rights in culture. As it states "The right to create paintings and other artworks depicting creation and dreaming stories, and to use pre-existing designs and well recognized totems of the clan, resides in the traditional owners (or custodians) of the stories or images." Thus, the designs and totems do not belong to an individual, but belong to the clan for the collective clan's use.

Customary law rules do not always make sense to foreigners. This is not surprising since a legal system is a reflection of the values and philosophy of a people. However, there are limitations to the application of customary laws since foreigners may ignore and violate these laws. Further, for economic reasons some members of an indigenous group sometimes sacrifice communal well-being for individual interests by helping foreigners to illegally have access to communal property.[152] Other factors such as assimilation policies

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[151] *Milpurrurru et al. v. Indofurn Pty. Ltd. et al* (1995) 130 A.L.R. 659, 30 IPR 209 (F.C.A.) at 663, per von Doussa, J. [cited to A.L.R.]. See also, Elliott Johnston, Martin G. Hinton & Daryle Rigney, *Indigenous Australians and the Law*, 2ed. (New York: Routledge-Cavendish, 2008).

[152] On this point, see Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival <http://209.200.101.189/publications/csq/csq-

during colonialism and globalization[153] have weakened the force of customary law. In view of the erosion of some of the force of customary law, one may question whether customary law has a future.[154]

Nevertheless the survival of customary law, from the pre-colonial period to present times, implies that customary law has a future. Its chances of surviving in the future are strengthened further by some initiatives to explore its relationship to international agreements. Probably, the major change customary law will experience might be some codification and more influence from globalization. A related consideration is whether indigenous peoples are vanishing and have a future. If the world is witnessing the last years of indigenous people, then one may question the value of discussions on indigenous customary law systems. However, although the end of some indigenous peoples has been predicted for a while, they have not yet come to an end and appear unlikely to do so.[155]

2.4.2: RIGHTS IN CULTURE IN INTERNATIONAL LAW

International law recognises rights in culture and provides for the protection of those rights. Rights in culture for indigenous peoples have a broad scope. They cover the narrow definition of culture and a wider one based on recent human rights jurisprudence.

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article.cfm?id=923> at 46 (where a Coroma member revealed having 'sold' one of the Coroma sacred weavings due to financial hardship). See also, 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" at 787 (commenting that even within some indigenous groups the advent of the modern state and the idea of private wealth have weakened the strength of customary law norms and sanctions).

[153] On the effect of globalization on indigenous people, see Claire Smith, Heather Burke & Graeme K. Ward, "Globalisation and Indigenous Peoples: Threat or Empowerment" in Claire Smith & Graeme K. Ward, *Indigenous Cultures in an Interconnected World* (Vancouver: UBC Press, 200) 1.

[154] On the future of customary law, see generally Leon Sheleff, *The Future of Tradition: Customary Law, Common Law, and Legal Pluralism* (London: Frank Cass, 2000).

[155] "Anthropologists have predicted the end of the indigenous people of the Americas for a long time." Angela R. Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities" (2000) 18 Cardozo Arts & Ent. L.J. 175 at 224. She comments further, that despite this prediction, there are still many deer dancers. Angela R. Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities," (*ibid.* at 224).

For instance, Article 27 of the *Universal Declaration of Human Rights* provides:

> (1) Everyone has the right freely to 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.[156]

This Declaration underlines an individual's right to participate in his or her community's cultural life and for an individual author's right in his or her creations to be respected. The Declaration focuses on an individual's rights.

Article 27 of the 1966 *International Covenant on Civil and Political Rights*[157] provides that "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." This provision makes it clear that minorities have a right to enjoy their culture, in concert with other members of their group. It thus outlines a clear right to culture, but does not define exactly what that right means or what actions constitute the right to enjoy culture.

The *International Covenant on Economic, Social and Cultural Rights*[158] also recognises the right to participate in culture as a human right, but goes further than the

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[156] *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc.A/810 (1948) 71, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/ udhr/lang/eng.htm>.
[157] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR].
[158] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR], online: OHCHR <http://www.unhchr.ch/html/ menu3/b/a_cescr.htm>.

ICCPR. Article 15 of the ICESCR states:

> 1. The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[159]

Article 15(1) of the ICESCR echoes Article 27 of the *Universal Declaration of Human Rights* in recognising a person's right to partake in cultural life and to have rights in his or her creations protected. Further, under Article 15(2) "The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture."

On 21 November 2005, the United Nations Committee on Economic Social and Cultural Rights agreed on *General Comment No. 17*[160] outlining in greater detail the extent of the human right in Article 15(1)(c). *General Comment No. 17* recognises that the use of

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[159] The full Article 15 of the ICESCR states:

> 1. The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

[160] United Nations Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006. E/C.12/GC/17, [*General Comment No. 17*], online: UNHCR Refworld <http:// www.unhcr.org/refworld/ type,GENERAL,,,441543594,0.html>.

the term "author" applies to an individual and may also apply to a group of individuals.[161] It states further:

> 9. The Committee considers that "any scientific, literary or artistic production", within the meaning of article 15, paragraph 1 (c), refers to creations of the human mind, that is to "scientific productions", such as scientific publications and innovations, including knowledge, innovations and practices of indigenous and local communities, and "literary and artistic productions", such as, inter alia, poems, novels, paintings, sculptures, musical compositions, theatrical and cinematographic works, performances and oral traditions.
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> 32. With regard to the right to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of indigenous peoples, States parties should adopt measures to ensure the effective protection of the interests of indigenous peoples relating to their productions, which are often expressions of their cultural heritage and traditional knowledge. In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties. In implementing these protection measures, States parties should respect the principle of free, prior and informed consent of the indigenous authors concerned and the oral or other customary forms of transmission of scientific, literary or artistic production; where appropriate, they should provide for the collective administration by indigenous peoples of the benefits derived from their productions.

These provisions clearly recognise that indigenous and local communities can be creators. Thus Article 15(1)(c) does not apply only to individuals. In addition, it specifically recognises traditional knowledge and cultural heritage and obliges states to protect those rights. The ICESCR thus recognises a cultural human right and enjoins states to protect it. It appears that article 15(1) of the ICESCR recognises an individual and a collective right in cultural creations.

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[161] *General Comment No. 17*, *ibid.* at paragraphs 7 and 8.

However, *General Comment No. 17* expressly mentions in paragraph 35 that an author's right to benefit from his or her creations should be balanced against other rights in the Covenant. Therefore, *General Comment No. 17*, though useful in recognising that communities can be authors, is of limited usefulness because it does not define the expanse of these rights nor provide clear guidelines thereon.

Other international instruments state that indigenous peoples should have some legal control over the use of their TCES and traditional knowledge and recognise communal ownership. For instance, ILO Convention 169 recognises collective ownership at Article 13(1) and at Article 7(1) recognises that indigenous peoples have the right to take measures to exert control to the extent possible over their social, economic and cultural development. One implication of this provision is to affirm the importance of indigenous protocols and customary law.

Similarly, the recently adopted *United Nations Declaration on the Rights of Indigenous Peoples*[162] is also relevant here. Article 31 of this Declaration provides as follows:

> 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.[163]

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[162] *United Nations Declaration on the Rights of Indigenous Peoples*, see *supra* note 13.
[163] *Ibid.* at Article 31. In addition to the Preamble, about a third of the forty-six Articles of the Declaration deal with how to protect and promote indigenous culture.

The Declaration encompasses both individual and collective rights. In some cases it uses the words "indigenous individual" while in others it uses "indigenous peoples" and "collective right."[164] It appears that the use of the words "indigenous peoples" refers to the collective and applies to the collective right. The language in the Declaration and in this Article supports communal or collective ownership and protection of cultural heritage and TCES including their designs. Further, it states that indigenous peoples have the right to maintain and protect their intellectual property over such cultural heritage and TCES. It thus clearly underlines that indigenous peoples have the right to self-determination in relation to protecting their culture. However, in practice the extent to which an ethnic group can protect and enjoy its culture is co-dependent on national legislation and policies especially in cases where countries have many ethnic communities. In recognition of the role of states, the Declaration thus provides that states shall work in conjunction with indigenous peoples to give effect to such rights.

Although the Declaration is not legally binding, it is a tool which represents states' commitments to abide by the stated principles in dealing with indigenous issues. It is also a tool which recognises that communal and community ownership can exist in TCES and indigenous peoples' intellectual property. The combined effect of the instruments considered in this section appears to be the recognition of collective rights in traditional knowledge and TCES as part of human rights.

The issue has been raised on the extent to which international human rights instruments have the ability to protect a non-western collective, cultural, custom-based definition of property for indigenous peoples. In some instances, they clearly do. The more

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[164] See *e.g. ibid.* at Article 7.

recent extension of the meaning of rights in culture is seen by the decision of the Inter-American Court on Human Rights in the landmark case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua.*[165] The Awas Tingni, an indigenous group, sought legal recognition of their rights to their traditional territories from the Nicaraguan government. They had concerns about incursions onto their territory by logging companies and the consequent destruction of their traditional lands. The Awas Tingni alleged in their petition to the Inter-American Commission that Nicaragua had not protected their traditional lands due, in part, to the state's decision to authorise logging by a Korean company in the Awas Tingni's territory.

In 2001, the Inter-American Court on Human Rights decided *Mayagna (Sumo) Awas Tingni Community v. Nicaragua.* The Inter-American Court agreed with the findings of the Inter-American Commission that Nicaragua had violated the Mayagna (Sumo) community of Awas Tingni's land and resources rights under Article 21 of the American Convention on Human Rights. As part of the remedies the Court awarded in favour of the Awas Tigni community, Nicaragua was to enact the necessary measures for the delimitation, demarcation, and titling of the indigenous community's lands, with full participation by the community and taking into account its customary laws and values. On 14 December 2008, the Government of Nicaragua granted to the indigenous Awas Tingni community the much-awaited title to its traditional territory.[166]

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[165] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* 2003 Inter-American Court of Human Rights, Series C no. 79, (Aug. 31, 2001), online: http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing. pdf>. See also "Order of the President of the Inter-American Court of Human Rights March 14, 2008 Case of the *Mayagna (Sumo) Awas Tingni Community v. Nicaragua (Monitoring Compliance with Judgment).*"

[166] See the University of Arizona James E. Rogers College of Law, Indigenous Peoples Law & Policy Program, "Awas Tingni *v.* Nicaragua," online: <www.law.arizona.edu/Depts/IPLP/advocacy/ awastingni /index.cfm?page=advoc>.

This judgement is significant for various reasons. The Inter-American Court adopted the definition of "property" as contained in Article 21 of the Inter-American Convention by stating that "'[p]roperty' can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporal and incorporal elements and any other intangible object capable of having value."[167] Furthermore, the court recognised that the relationship the community had with the land was a way of preserving the cultural legacy which they have to transmit to future generations.[168] It thus linked rights in land to culture.

2.5: IMPLICATIONS OF THE PROTECTION OF FOLKLORE

There is scholarly debate on whether the issue at heart is really one of independence and self-determination[169]when indigenous groups argue for the protection of their culture. Whether an assertion of a right to protect culture and folklore masks claims to autonomy and self-determination depends on the ethnic group as well as on national

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[167] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* 2003 Inter-American Court of Human Rights, Series C no. 79, (Aug. 31, 2001), online: http://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing. pdf> at paragraph 144 of the judgement.

[168] See especially the joint separate opinion of judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli at paragraphs 1, 7 and 15 (discussing the communal form of the collective property in land among the Awas Tingni, and their relationship with the land as a way of preserving the cultural legacy which they have to transmit to future generations).

[169] "The indigenous claim to ownership of their cultures may be seen as a substitute for a claim to self-government. At the very least, it legitimizes the political assertion of a right to maintain distinctive units in an increasingly globalized world." Trond Thuen, "Culture as Property? Some Saami Dilemmas" in Erich Kasten, ed., *Properties of Culture – Culture as Property. Pathways to Reform in Post-Soviet Siberia* (Berlin: Dietrich Reimer Verlag, 2004) 87, online: siberian-studies.org <http://www.siberianstudies.org/publications/PDF/cpthuen.pdf> at 103. In the Svartskogen case ("The Black Forest") the Norwegian Supreme court granted ownership rights of land to a group of people, mainly of Sami descent, living in a northern Norwegian fjord community. In discussing indigenous rights using the outcome of this case, Trond Thuen comments on an "inherent contradiction" namely the protection of cultural practices yet at the same time, an assertion of collective minority rights and some claim to autonomy. Trond Thuen "Culture as Property? Some Saami Dilemmas" in Erich Kasten, ed., *Properties of Culture – Culture as Property. Pathways to Reform in Post-Soviet Siberia* (Berlin: Dietrich Reimer Verlag, 2004) 87, online: siberian-studies.org <http://www.siberian-studies.org/publications/PDF/cpthuen.pdf> at 103. See generally, Rosemary J. Coombe, "The Recognition of Indigenous Peoples' and Community Traditional Knowledge in International Law" (2001) 14 St. Thomas L. Rev. 275 at 277-278.

policy. Where the protection of that cultural practice or item is already nationally recognised, then an indigenous group asserting the right to protect that practice or item may not necessarily be advocating for self-determination. Another consideration is whether the protection of an ethnic group's culture and local identity would negatively affect national identity and national consolidation especially in countries with diverse ethnic groups.[170]

From an indigenous group perspective, the protection of folklore has many implications. First, it allows a community to continue to maintain the significance of a cultural item. The community is thus empowered to continue to survive. Second, the community is able to carry out its duty as the present custodian of culture and to transmit it to the next generation for the benefit of future generations. In cases where the item is marketed and a community has been the sole producer of the item, there is the hope that the community would continue to derive revenue from the sale of it. However, customary law and national laws have limitations in this area and effective folklore protection would require international co-operation.

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[170] Brynjulf Alver comments:

> In some instances folklore and folklore scholarship actually hinder national consolidation and even become a troublesome or even dangerous political force. This is particularly true of countries constituted of several ethnic groups or language groups, or populations of different national background.... Modern Turkey needs national consolidation emphasizing Turkish identity. Folklorists, however, are not willing to ignore the fact that the population of Turkey consists of various ethnic, language, and religious groups, and that each has its own folklore. Nor can folklorists ignore the fact that Turkish tradition is a variation of a much larger system. The political confrontation has been so difficult that folklore has been eliminated as a subject taught at universities, folklorists have been imprisoned, while official organizations of folk singers and musical performers of Turkish traditions are given preferential treatment.... The national desire for independence and the cultural response to that are related to the level of interest in folklore and folklore scholarship. It is no accident that Finland and Ireland, two countries that had to struggle for national and linguistic independence, boast the largest folklore archives anywhere, built from systemic collecting of national traditions in the vernacular.

Brynjulf Alver, "Folklore and National Identity" in Reimund Kvideland & Henning K. Sehmsdorf, eds., *Nordic Folklore: Recent Studies* (Indianapolis: Indiana University Press, 1989) 12 at 18-19.

2.6: CONCLUSION

The initial question this chapter set out to investigate was the significance of traditional textiles and the extent of the protection available to them. It found several characteristics of folklore. For example, folklore is not static; rather, the works evolve as successive generations build on or add to works developed by ancestors. The indigenous worldview does not distinguish between traditional knowledge and folklore, but regards them as an interconnected whole. The chapter showed the limitation of language and the fact that there might not necessarily be comparable indigenous concepts to the English language term "ownership." It found that traditional textiles play an important role in the spiritual, religious, historical and social life of these societies. Indigenous peoples regard themselves as guardians of culture with a duty of transmitting it to future generations. This is a communal and group duty because TCES belong to the collective and not to an individual.

The protection of traditional cultural expressions has had varying degrees of success in the past. Notwithstanding the fact that indigenous peoples were colonised and intermingled with foreign cultures, some of these people have been able to maintain distinct elements of their culture. They have survived by adapting to changing conditions while at the same time trying to maintain their traditions. However, the protection offered by customary law rules is limited, especially with the increasing interest in traditional knowledge and its commercialisation potential in the scientific and cultural fields.

Because of the meaning and significance of TCES, of collective interest in them and the limitation of customary law, there is the need for a group approach and for a recognition of communal rights in international law for progress to be made in this area.

The international system does recognise collective rights in culture. This is commendable because a contrary view would amount to a rejection of the customary laws of indigenous and traditional communities that have provided for communal protection of their culture; in some instances, these indigenous protocols and customary law protection predate colonialism and have survived the colonial era. However, the recognition of collective rights in culture in the international system does not imply that customary law principles should be the only ones applied or considered in protecting culture. International human rights law calls for a balance between cultural rights and other rights.

The next chapter examines the intellectual property law on textiles and the philosophies concerning intellectual property rights in textiles under the conventional intellectual property law system.

CHAPTER 3

3: THE WESTERN CONCEPT OF PROPERTY RIGHTS: EVOLUTION AND PHILOSOPHIES OF INTELLECTUAL PROPERTY RIGHTS IN TEXTILES AND TEXTILE DESIGNS

3.1: INTRODUCTION

Intellectual property law has traditionally been the multilateral system for creating and protecting rights in intangibles. The justificatory theories for intellectual property rights are supposed to explain the rationale for the intellectual property system. This chapter examines the relevance of the justificatory theories to the existence of intellectual property rights in textiles and the scope of such rights. It further analyzes intellectual property protection for textiles and the relationship between that protection and the justificatory theories for intellectual property by testing how the latter apply to intellectual property protection for textiles.

This investigation of intellectual property rights for textiles focuses on copyright, industrial designs and the trademark certification mark system. It examines the existing framework to assess the protection available to an individual designer and several designers working together on a textile. While comparing and contrasting these systems, this research also addresses overlaps among these categories. It also discusses the applicability and relevance of the justificatory theories to textile protection. It conducts this study by discussing international and national provisions and case law on these intellectual property categories and the role the justificatory theories play in the scope of the intellectual property law protection granted to textiles.

This investigation allows the research to conclude which intellectual property category grants the most favourable treatment to textiles and the role the justificatory theories play in the scope of intellectual property protection granted to textiles in these categories. It finds some contradictions in the protection under the categories and argues that the justificatory theories are limited in explaining the existence and scope of intellectual property rights in textiles. The analysis in this chapter lays a foundation for the later chapters which will analyze intellectual property in relation to communities' traditional textiles.

The chapter is set out as follows. Section 2 commences by discussing the categories of intellectual property laws and their relation to textile designs. This examination is in two parts. First is a discussion of the western legal system and the division between tangible and intangible property. The second part explores the history of rights in intangibles and the intellectual property system. Section 3 examines the main intellectual property law categories and applies them to textiles and textile designs. The depiction of the intellectual property system centres on provisions at the international level. However, references to national laws are made as and when necessary. This section also touches on some of the different conceptions of intellectual property from the Common Law approach, the Continental European approach as well as developing/developed country approaches or what is sometimes referred to as the North/South divide. In addition, the section traces the evolution of these different intellectual property categories and discusses their main feature. Section 4 is an analysis of the justificatory theories for intellectual property. Although section 4 focuses on the justification in the Common Law world, it also

considers some justifications in the Civil Law world. Section 5 presents other considerations while section 6 concludes this chapter.

3.2: CONCEPT OF PROPERTY RIGHTS

This section focuses on the concept of property rights[171] in Western legal thought. This is important to this study in terms of analyzing the rights which attach to the various property categories. This section discusses legal systems before ending with the concept of tangible and intangible property. It explores the difference and intersection between the tangible and intangible property dimensions and lays the foundation for the in-depth study of intangible property that occurs later in the chapter.

The term property has many definitions and is used in different contexts. Property has been defined as follows:

> In its widest sense, property includes all a person's legal rights, of whatever description. A man's property is all that is *his in law*. This usage, however, is obsolete at the present day, though it is common enough in the older books.... In a second and narrower sense, property includes not all a person's rights, but only his proprietary as opposed to his personal rights. The former constitutes his estate or property, while the latter constitute his status or personal condition. In this sense, a man's lands, chattels, shares, and the debts due to him are his property; but not his life or liberty or reputation.... In a third application, which is that adopted [here], the term includes not even all proprietary rights, but only those which are both proprietary and *in rem*. The law of property is the law of proprietary rights *in rem*, the law of proprietary rights *in personam* being distinguished from it as the law of obligations. According to this usage a freehold or leasehold estate in land, or a patent or copyright, is property; but a debt or the benefit of a contract is not.... Finally, in the narrowest use of the term, it includes nothing more than corporeal property – that is to say, the right of ownership in a material object, or that object itself.[172]

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[171] On the theoretical aspects of property, see Stephen R. Munzer, *A Theory of Property* (New York: Cambridge University Press, 1990).

[172] John Salmond, *Jurisprudence*, Glanville L. Williams, 10th ed. (London: Sweet & Maxwell, 1947).

Property is used in two main contexts. First, it defines a relationship between a person and an object giving the person some proprietary rights over the object. These may be regarded as "ownership rights" in some parts of the world while in others such a label may not be applicable. In some systems property may be a bundle of proprietory rights while in other systems such a terminology is non-existent. The bundle of property rights is divided into categories which may not all exist when defining the relationship between a person and an object. These can be summarised as follows: (1) the right to sell an item; (2) the right to bequeath it; (3) a limited right to enjoy the use of the item without having a right to alienate it; (4) a right to exclude all others from using the object; (5) a right of access to an object; (6) a right of entitlement to an object; and (7) a right to lend an object. The second context in which property is used focuses on the object as property without delving into the rights a person can exercise over the object. The concept of property therefore is integral to the nature of the legal system.[173]

There are four main legal systems or traditions in the world:[174] the civil law system,[175] common law,[176] customary law and religious law. However, some countries have plural legal systems being a mixture or a variation of these four main legal traditions. The meaning of property and types of property is derived from a society's value system. The use of the term "Western" in reference to legal systems in this section or chapter refers to the common law and civil law traditions in the West.

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[173] For a definition of property, see David M. Walker, *The Oxford Companion to Law* (Oxford: Clarendon Press, 1980) *s.v.* "property". On the theoretical aspects of property, see Stephen R. Munzer, *Theory of Property* (New York: Cambridge University Press, 1990).

[174] For a graphic representation of the world's legal systems, see "Les Systèmes Juridiques dans le Monde," online: University of Ottawa, Faculty of Law, Civil Law Section/ Faculté de droit, Section de droit civil, de l'Université d'Ottawa: <http://www.droitcivil.uottawa.ca/world-legal-systems/fra-monde.php>.

[175] Countries with the civil law tradition include France, Germany and Brazil.

[176] Countries which practice the common law tradition include Australia, the United Kingdom, Canada, with the exception of the Quebec region which is based on French civil law, and some former colonies of the United Kingdom.

The meaning of 'property' depends upon the nature of the legal system with which it is associated. Therefore, what qualifies as property reflects the value system of the particular legal system. Moreover, legal systems and property rights are social tools, particular to societies, their structure, goals and needs. A legal and property system in one culture might not function in another. The meaning of 'ownership' of property becomes entrained in considerations of communality and individuality that are strongly society relative. In many instances, these category divisions become geographical divisions in which the Western concept of property rights is contrasted with property rights in traditional communities.

Property in the West can be subsumed under a wide range of categories, such as immovable, private or public. These primary categories can be further sub-divided, for example, private into tangible, intangible or abstract. Further sub-divisions are possible, for example, intellectual property as a sub-category of intangible property.

There is a widespread view that the concept of property in Western societies is different or even more sophisticated than that found among traditional communities. This conjures a picture of a development ladder with developed nations and traditional societies at the top and bottom respectively. From this perspective, it is expected that as a country develops, its concept of property rights will transform if not totally, then substantially to resemble that found among the countries at the top of the echelon. Whether that is desirable is often not questioned.

Western philosophy divides culture into many forms such as tangible, intangible,[177] movable and immovable. As a sub-set of culture, folklore is both tangible and intangible. It

[177] There are some international agreements under the aegis of UNESCO dealing with tangible and intangible forms of culture such as *The Convention for the Safeguarding of the Intangible Cultural Heritage*, online:

is tangible with respect to objects like textiles and intangible when considering practices, processes such as dances, stories and folktales. Although Western philosophy divides culture into various divisions, indigenous systems traditionally do not make such a distinction. A North American Indian leader said, "Much of what they want to commercialize is sacred to us. We see intellectual property as part of our culture. It cannot be separated into categories as [Western] lawyers would want."[178]

The right of ownership is an important term in Western property thought. This right of ownership in turn gives rise to a bundle of rights. In the next section, we examine the nature of the bundle of rights that exist in the intellectual property system

3.3: INTELLECTUAL PROPERTY RIGHTS AND TEXTILES

This section examines the history and meaning of intellectual property and analyzes the various intellectual property law categories. It makes the point that the overlap between the categories is a key consideration in decisions on how to protect intellectual creations since different rights attach to the various categories. Further, the history of the intellectual property law system is one of hurdles, different conceptions of the focus of the system as well as ongoing obstacles. The section is important because it is the springboard from which an analysis of whether folklore fits into intellectual property law can be made. By examining the scope of intellectual property laws, this section's purpose is to assess the bundle of rights that attach to these categories and the control intellectual property right

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UNESCO <http://portal.unesco.org/culture/en/ev.phpURL_ID=16429&URL_DO=DO_TOPIC&URL_SECTION= 201.html>.

[178] Quoted in Siegfried Weissner, "Defending Indigenous People's Heritage: An Introduction" (2001) St. Thomas L. Rev. 271 at 273, [footnote omitted]. "Furthermore, for indigenous communities, their heritage does not consist of mere economic rights over things but of a bundle of relationships with the animals, plants, and places involved." Naomi Roht-Arriaza, *supra* note 8 at 260.

holders have over the use of their creations by others. Although this section focuses on the basic features of intellectual property laws as reflected in international agreements, it makes references to national laws as and when required. The section starts by examining the various intellectual property categories and ends with an analysis of the intersection between these categories as well as their relation to textile designs.

Intellectual property refers to fruits of the mind or of the intellect. The intellectual property law system is a Western construct and developed in Europe. Intellectual property laws define the bundle of rights that attach to the various intellectual property categories. The intellectual property system is divided into two categories: industrial property covering trademarks, patents, industrial designs and geographic indications of source and copyright. The system protects the expression of an idea as opposed to the idea itself. The scope of intellectual property laws vary from country to country although international attempts at harmonization are making these national laws more uniform. Nevertheless, and as will be discussed later,[179] there are differences as to the aims and rationale of intellectual property in several legal traditions. There are also differences in the concept of intellectual property in different cultures.[180]

The history of the intellectual property system has by no means been smooth; rather, the intellectual property system has experienced bumps, obstacles and challenges which are ongoing.[181] The international intellectual property law system is not static and continues to evolve in relation to advancements in the world. It has faced and continues to

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[179] See section 3.4., below.

[180] On this point, see Renée Marlin-Bennett, *Knowledge Power: Intellectual Property, Information, and Privacy* (Boulder, Colo.: Lynne Rienner Publishers, 2004) at 39. On the tension between Asian culture and intellectual property, see William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford, Cal.: Stanford University Press, 1995) at 25.

[181] On this area, see *e.g.*, Christopher May & Susan K. Sell, *Intellectual Property Rights: A Critical History* (Boulder, Colo.: Lynne Rienners Publishers, 2006).

face challenges such as technological advancement, the ever increasing importance of intellectual property to trade that has resulted in part in the intellectual property and trade "merger" as reflected in the TRIPS Agreement, the North/South divide or differing perspectives on the aim and usefulness of the intellectual property law system, globalization[182] and, currently, traditional knowledge and folklore.

Gervais divides the history of the intellectual property law system into four phases:

1. Pre-1883: the Bilateral Phase
2. 1883-1971: The BIRPI Phase
3. 1971-1994: The TRIPS Phase
4. 1994-Today: The Paradigmatic Phase[183]

In relation to ongoing developments in the intellectual property field such as attempts to harmonize national intellectual property laws, Gervais asserts that "Other developments in the field of intellectual property, however, may force a reconsideration of the *fundamental tenets* of intellectual property, not just 'minor' changes or adjustments along entirely predictable lines. These challenges come from the very old and the very new."[184]

As the following discussion reveals, textiles fall within various intellectual property categories. Due to the lack of uniformity among national laws, textiles protection may be found within different categories. The TRIPS Agreement provides in the section on industrial design protection, at Article 25(2) "Each Member shall ensure that requirements

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[182] On intellectual property law in the face of globalization, see Susan K. Sell, *Private Power, Public Law: The Globalization of Intellectual Property Rights* (Cambridge: Cambridge University Press, 2003).
[183] Daniel J. Gervais, "The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New," *supra* note 31 at 935-948.
[184] Daniel J. Gervais, "The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New," at 949.

for securing protection for textile designs, in particular in regard to any cost, examination or publication, do not unreasonably impair the opportunity to seek and obtain such protection. Members shall be free to meet this obligation through industrial design law or through copyright law." This provision gives textiles a prominence in the TRIPS industrial design provisions since it is the only type of design expressly mentioned and also shows the chameleon nature of textiles in that they can fit within several intellectual property law categories. While TRIPS only mentions copyright and industrial designs, some aspects of trademark law are also relevant to textiles as is discussed later in this section. Depending on the country in question, these categories may not be mutually exclusive.

3.3.1: COPYRIGHT

There are differing opinions on the exact origin of copyright. However, the origin is generally linked to print technology with copyright being "enacted for the protection of technology,"[185] the technology in this case being printing. Paul Goldstein has described copyright as the child of technology.[186] Two main developments led to the birth of the formal national copyright system in the eighteenth century. First was the impact of technological developments, notably Johann Gutenberg's invention of typography, a form of printing.[187] This created the possibility of the mass reproduction of identical copies of a

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[185] Yvonne M. Smyth, "Broadcasting, Cable and Satellite Transmissions" in James Lahore, Gerald Dworkin & Yvonne M. Smyth, *Information Technology: The Challenge to Copyright* (London: Sweet & Maxwell, Centre for Commercial Law Studies, 1984) at 61.

[186] Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (Stanford, Calif.: Stanford Law and Politics, 2003) at 27.

[187] "It is not clear who invented the printing press. It is widely accepted, however, that the Chinese were successfully engaged in the art of printing by the twelfth century. In Europe, although the Dutch claim that the mobile type was invented by one Larant Costerm it was Johan Gutenberg who took credit for inventing the hand press in 1455. The first book to be printed in Europe was the Mazarian Bible, which is also known as the 42 line Bible due to the number of lines contained in each column of its double column page." Victor

work at a quicker and cheaper rate.[188] The second factor was the state practice of granting monopoly rights to publishers and the push for greater protection. This led to the passage of what is regarded as the first copyright legislation in the world, the British Statute of Anne of 1709.[189] The statute provided for the registration of works, recognised rights in copies and books and gave "a means of legal redress against the activities of pirates."[190] Although this statute is generally regarded as the first formal copyright statute, some rulers had already granted some protection for rights in works. Cees J. Hamelink, for example, asserts that the protection the late fifteenth century republic of Venice gave to its printers was the first record of proprietary rights in intangibles being given legal recognition.[191]

The formal national copyright system spread to other parts of Europe while the inadequacy of national copyright laws to deal with piracy led to bilateral agreements among European countries. During the colonial era, some colonial masters introduced the copyright system in their colonies.[192] Later, developments and inventions during the

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Scholderer, *John Gutenberg, the inventor of printing* (London: British Museum, 1963). For a history and the scope of copyright in the UK, France and the USA, see Makeen Fouad Makeen, *Copyright in a Global Information Society: The Scope of Copyright Protection under International, US, UK, and French Law* (The Hague: Kluwer Law International, 2000).

[188] "The origins of copyright are closely related to the development of printing, which enabled rapid production of copies of books at relatively low cost." World Intellectual Property Organization, *The International Protection of Copyright and Neighboring Rights: Treaties Administered by WIPO* WIPO/CNR/ACC/97/5, 14 April 1997 (Document presented at the WIPO National Seminar in Accra, Ghana, May 26 and 27, 1997) at 2. See also, Makeen Fouad Makeen, *Copyright in a Global Information Society: The Scope of Copyright Protection under International, US, UK, and French Law* (The Hague: Kluwer Law International, 2000) at 1.

[189] The *Statute of Anne*, 8 Anne, c.19 (1710). The long title of the statute is "An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of Such Copies, During the Times Therein Mentioned." The Act was enacted in 1709 and entered into force on April 10, 1710.

[190] John Feather, *Publishing, Piracy and Politics – An Historical Study of Copyright in Britain* (London: Mansell Publishing, 1994) at 62.

[191] Cees J. Hamelink, *The Politics of World Communication* (London: Sage Publications, 1994) at 11.

[192] The United Kingdom, for example, acceded to copyright on behalf of herself and her colonies.

Industrial Revolution led to the creation of the first multilateral agreement on copyright, the *Berne Convention for the Protection of Literary and Artistic Works*.[193]

There is no single definition of copyright. This is because there are different concepts of copyright, differences in national copyright laws and, since its inception, there have been additions to the types of works which copyright covers. In the civil law tradition, it is known as author's rights while in the common law one it is known as copyright.[194] This work uses the term copyright to refer to both the civil and common law terms unless otherwise stated.

Copyright law is far from static, but is constantly evolving in response to technological developments and other factors. It faces many challenges such as technology, developing country perspectives and traditional knowledge. From its humble beginnings of being confined to literary works, copyright has expanded[195] to include

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[193] *Berne Convention for the Protection of Literary and Artistic Works*, 9 September 1886, completed at Paris on 4 May 1896, revised at Berlin on 13 November 1908, completed at Berne on 20 March 1914, revised at Rome on 2 June 1928, at Brussels on 26 June 1948, at Stockholm on 14 July 1967, and at Paris on 24 July 1971, and amended on 28 September 1979, online: WIPO <http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html> [Berne Convention]. The Berne Convention has 162 contracting parties, see "Contracting Parties" online: WIPO <http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY &end_year=ANY&search_what=C&treaty_id=15>. For a history and analysis of the Berne Convention, see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, Eng.: Centre for Commercial Law Studies, Queen Mary College, 1987).

[194] On this point, see *e.g.* Paul Goldstein, *International Copyright: Principles, Law, and Practice* (Oxford: Oxford University Press, 2001) at 4.

[195] There is debate about whether the extension of copyright is philosophically justified. Samuel Trosow, for example, argues that:

> the traditional philosophical justifications for copyright all fall short of providing plausible or adequate justification for the expansionary trends we are now witnessing. There is a certain intuitive appeal to attribute this failure to pure economic pragmatism and leave it at that. But I think it is more precise to locate these developments within the expansionary nature of capital in the information intensive global economy....My general thesis is that contemporary copyright law has been outpaced by a technology that undermines both the legal framework and the underlying economic theory it is based on, requiring a new theoretical framework rooted in political economy to harmonize the use and dissemination of information with the developing productive forces in society.

Samuel E. Trosow, "The Illusive Search for Justificatory Theories: Copyright, Commodification and Capital" (2003) 16 Can. J.L. & Jur. 217 at 217-218. "Is the current expansionary copyright policy regime justified by the traditional philosophical grounds that have been applied to copyright law? This section will argue that

controversial additions such as computer programs being recognised as literary works.[196] Copyright also covers technology-based works like electronic databases.

By the late 1960s it was also possible to divide perspectives on copyright into two: developed and developing country perspectives, commonly referred to as the North/South divide. The recently independent developing countries that were bound to the Berne Convention and the Universal Copyright Convention,[197] by virtue of their former colonial administration having been a party to these international agreements, expressed dissatisfaction at the agreements not being in their favour and meeting their needs as developing countries. For example, at a meeting of African countries on copyright at Brazzaville in August 1963, developing countries contended that:

> International copyright conventions are designed, in their present form, to meet the needs of countries which are exporters of intellectual works; these conventions, if they are to be generally and universally applied, require review and re-examination in the light of the specific needs of the African continent.[198]

The developing country perspective does not appear to have changed much since the 1960s. Even some "concessions" that were made in their favour such as the Protocol

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neither rights-based theories nor utilitarian analysis provide a sufficient justification for the types of policy measures that are present in the current environment." Samuel E. Trosow, (*ibid.* at 224).

[196] This extension was done by the TRIPS Agreement. Article 10(1) of TRIPS provides that "Computer programs, whether in source or object code shall be protected as literary works under the Berne Convention (1971)."

[197] Universal Copyright Convention as revised at Paris on 24 July 1971, online: UNESCO <http://www. unesco. org/culture/laws/copyright/images/copyrightconvention.rtf>.

[198] Quoted in Irwin A. Olian, Jr., "International Copyright and the Needs of Developing Countries: The Awakening at Stockholm" (1974) 7 Cornell Int'l L.J. 81 at 95. Developing country copyright needs included being permitted to reprint imported books thus conserving the much needed foreign currency they would have spent on book imports and copyright fees, having access to books at affordable prices and developing their local printing and publishing industries. On these points, see Sadanand Bhatkal, "The Needs of Developing Countries in the Field of International Copyright" in *International Copyright: Needs of Developing Countries–Symposium* (India: Ministry of Education, 1967) [Indian Symposium] 7-9; K.S. Mullick, "The Copyright Situation in Developing Countries" in Indian Symposium, at 43; Irwin A. Olian, Jr., "International Copyright and the Needs of Developing Countries: The Awakening at Stockholm" (1974) 7 Cornell Int'l L.J. 81 at 88-92.

for developing countries that was adopted at the Stockholm Conference in 1967 for a revision of the Brussels text of the Berne Convention were not really effective.[199]

Copyright In Textiles Under The Berne Convention

At the international level, the Berne Convention protects copyright in literary and artistic works. Based on the principles of national treatment, automatic protection and independence of protection, the Berne Convention sets minimum standards of protection that member countries should provide for in their domestic laws. One important feature of the Berne Convention is that the list of works it protects is not exhaustive. Article 2(1) of the Berne Convention protects literary and artistic works [200] "whatever may be the mode or form of its expression, such as … works of drawing, painting, architecture, sculpture, engraving and lithography; … works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science."

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[199] The Protocol contained preferential provisions for developing countries including a system of compulsory licenses for translation purposes. Developing countries felt the concessions did not go far enough, while developed countries were generally opposed to the Protocol since in their view it did not reflect the aims behind the negotiation of the Berne Convention. Despite the opposition, the Protocol was adopted with support from some socialist countries and also because it was clear that without concessions in favour of developing countries, the latter might have chosen not to support the international copyright regime. For a discussion of the Protocol, see Irwin A. Olian, Jr., "International Copyright and the Needs of Developing Countries: The Awakening at Stockholm" (1974) 7 Cornell Int'l L.J. 81 at 98-104; Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, Eng.: Centre for Commercial Law Studies, Queen Mary College, 1987).

[200] Article 2(1) of the Berne Convention states:

> The expression "literary and artistic works" shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.

Although the Berne Convention does not mention textiles, textile designs or textile patterns, this silence does not mean that textiles are not protected under the Berne Convention. First, this is because the list of protected works in the Berne Convention is not exhaustive. Second, from the types of literary and artistic works the Berne Convention protects, it appears that textile designs could qualify for copyright protection as works of drawing or painting or as applied art. However, the type of protection granted to textiles is dependent on national legislation. Article 2(7) of the Berne Convention provides that:

> Subject to the provisions of Article 7(4)[201] of this Convention, it shall be a matter for legislation in the countries of the Union to determine the extent of the application of their laws to works of applied art and industrial designs and models, as well as the conditions under which such works, designs and models shall be protected. Works protected in the country of origin solely as designs and models shall be entitled in another country of the Union only to such special protection as is granted in that country to designs and models; however, if no such special protection is granted in that country, such works shall be protected as artistic works.

Article 2(2), which gives countries the authority to decide whether or not literary and artistic works must be fixed in some material form in order to obtain copyright protection under their respective copyright law, would be inapplicable to textile designs because the latter are usually fixed. Further, the Berne Convention protects published and unpublished works.[202] Registration is not a prerequisite for a work to have copyright protection.

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[201] Article 7(4) states that "It shall be a matter for legislation in the countries of the Union to determine the term of protection of photographic works and that of works of applied art in so far as they are protected as artistic works; however, this term shall last at least until the end of a period of twenty-five years from the making of such a work."

[202] Berne Convention, at Article 3(1). Article 3(3) defines publication as follows:

> The expression "published works" means works published with the consent of their authors, whatever may be the means of manufacture of the copies, provided that the availability of such copies has been such as to satisfy the reasonable requirements of the public, having regard to the nature of the work. The performance of a dramatic, dramatico-musical, cinematographic or musical work, the public recitation of a literary work, the

The duration of protection is normally for a period of fifty years after the author's death.[203] This period applies with slight modification to anonymous and pseudonymous works[204] and to joint authors.[205] With respect to works of applied art that are protected as artistic works "It shall be a matter for legislation in the countries of the Union to determine the term of protection ... however, this term shall last at least until the end of a period of twenty-five years from the making of such a work."[206]

Generally, copyright is that bundle of rights that enables individual or joint creators of published or unpublished original literary, musical, dramatic and artistic works to control, subject to some exceptions or permitted uses,[207] the use of their creations by the public. Although the Berne Convention recognises both moral[208] and economic rights,[209] some national copyright legislation provide only for economic rights while others also provide for moral rights. The term of copyright protection varies due to differences in national legislation. However, it is usually the life of the author plus 50 or 70 years.

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communication by wire or the broadcasting of literary or artistic works, the exhibition of a work of art and the construction of a work of architecture shall not constitute publication.

[203] Berne Convention, Article 7(1).

[204] *Ibid.* at Article 7(3).

[205] *Ibid.* at Article 7*bis*

[206] *Ibid.* at Article 7(4)

[207] These permitted uses generally include private use or use for educational purposes. For some permitted free uses under the Berne Convention, see, for example, Article 9(2). Different jurisdictions have different names for the exceptions or permitted uses. In Canada, they are known as fair dealing while in the United States, they are known as fair use. For more on this area, see Carys Jane Craig, *Fair Dealing and the Purposes of Copyright Protection: An Analysis of Fair Dealing in the Copyright Law of the United Kingdom and Canada* (LL.M. Thesis, Queen's University at Kingston (Canada), 2001) [unpublished].

[208] Moral rights are those rights which associate an author with the author's work and allow an author to prevent others from using a work for purposes the author does not agree with. There are two types of moral rights under the Berne Convention 1971: the right to be named as the author and, the right to object to uses of the work that are prejudicial to the author's honour or reputation. See the Berne Convention 1971 at Article 6bis.

[209] Economic rights are those rights which enable an author to benefit in monetary terms from the use or exploitation of the work by himself or herself or by others. In the Berne Convention 1971, the copyright holder's economic rights are: the right to reproduce a work; the right to communicate the work to the public through such means as public performances, and transformation rights, such as the right to translate or adapt a work. For more on this, see the Berne Convention 1971 at articles 8, 9, 11, 12 and 14.

Copyright's aim is to balance the rights of authors against the public's right of access to information or to copyright works. As it is currently drafted in legal agreements, copyright is an attempt to reward creativity for *a limited time*[210] in order not to limit future creativity. As Brown comments:

> The notion of copyright emerged as an untidy, negotiated arrangement that weighed principle against a calculus of utility. Copyright acknowledges the legitimacy of an author's desire to be rewarded for inventiveness and intellectual labor. At the same time, lawmakers recognized that permanent copyright could stunt creativity by throwing up walls around ideas. So from the time that formal copyright laws were drafted in England and the United States, copyright has always been designed to expire. Although copyright resembles real property, it differs from other forms of property in its impermanence. The term of copyright protection has tended to lengthen with each revision of copyright laws - U.S. law currently protects works for seventy years after an author's death - but the conviction that it should not be perpetual has thus far managed to prevail.[211]

The international copyright framework is a mixture of multilateral agreements and national copyright laws. Ratification of international copyright agreements by countries makes them binding in those countries. However, and as seen above, the Berne Convention lays down minimum standards thus giving countries both the discretion to extend copyright protection to other types of works and the freedom to decide how to carry out their obligations under international copyright law. Nevertheless, a consideration of some national copyright legislation reveals certain basic features as to copyright protection. Works that can be protected by copyright must be original. For example, the Australia *Copyright Act 1968*[212] provides that copyright exists in original published and unpublished

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[210] Emphasis added.
[211] Michael F. Brown, *Who Owns Native Culture?* (Massachusetts: Harvard University Press, 2003) 55-56.
[212] *Copyright Act 1968*, online: Commonwealth of Australia Law <http://www.comlaw.gov.au/comlaw/Legislation/ActCompilation1.nsf/0/8A3FE9B23658D949CA256FE700837789/$file/Copyright1968_WD02_Reprint.pdf>.

literary, dramatic, musical or artistic works.[213] Generally, an individual or several people can have copyright in a work. For instance, the *Copyright Law* of the United States[214] provides for copyright protection of joint works with a joint work being defined as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole."[215] The United Kingdom *Copyright, Designs and Patents Act 1988*[216] has a similar provision known as "works of joint authorship."[217] Thus, two or more people who work to produce the same textile design may have joint authorship rights in the design. The last noteworthy feature here is that the Berne Convention provides remedies for infringement of copyright. Authors and artists can seek redress for infringements of their copyright from the courts.

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[213] Section 32 of the Australia *Copyright Act 1968* provides that original works in which copyright subsists are:

> (1) Subject to this Act, copyright subsists in an original literary, dramatic, musical or artistic work that is unpublished and of which the author:
> (a) was a qualified person at the time when the work was made; or
> (b) if the making of the work extended over a period—was a qualified person for a substantial part of that period.
> (2) Subject to this Act, where an original literary, dramatic, musical or artistic work has been published:
> (a) copyright subsists in the work; or
> (b) if copyright in the work subsisted immediately before its first publication—copyright continues to subsist in the work; if, but only if:
> (c) the first publication of the work took place in Australia;
> (d) the author of the work was a qualified person at the time when the work was first published; or
> (e) the author died before that time but was a qualified person immediately before his or her death.
> (3) Notwithstanding the last preceding subsection but subject to the remaining provisions of this Act, copyright subsists in:
> (a) an original artistic work that is a building situated in Australia; or
> (b) an original artistic work that is attached to, or forms part of, such a building.
> (4) In this section, qualified person means an Australian citizen or a person resident in Australia.

[214] *Copyright Law* of the United States and Related Laws, 17 U.S.C., online: <http://www.copyright.gov/title17/92chap1.pdf>.

[215] 17 U.S.C. § 101, online: <http://www.copyright.gov/title17/92chap1.pdf> (defining joint work).

[216] *Copyright, Designs and Patents Act 1988*, online: Office of Public Sector Information <http://www.opsi.gov.uk/acts/acts1988/ukpga_19880048_en_1>.

[217] Section 10 of the *Copyright, Designs and Patents Act 1988* provides that "a 'work of joint authorship' means a work produced by the collaboration of two or more authors in which the contribution of each author is not distinct from that of the other author or authors."

In the United States case of *Peter Pan Fabrics, Inc. and Henry Glass & Co. v. Martin Weiner Corp.,* [218] the plaintiff, Peter Pan Fabrics, Inc and the defendant, Martin Weiner Corp, were both textile converters. The plaintiff had registered a design known as "Byzantium" for copyright. Section 10 of the *Copyright Act*[219] provided that notice of copyright "be affixed to each copy [of the copyrighted work] published or offered for sale ... by authority of the copyright proprietor." The plaintiff printed the Byzantium design on bolts of cloth which bore the copyright notices on a continuous strip on the selvedge at each repetition of the design. The plaintiff sold the textile to a dress manufacturer who in making dresses either cut off or hid the copyright notices. The defendant bought one of these dresses and made a textile design based on it. The plaintiff sued the defendant for copyright infringement. The court granted a preliminary injunction restraining the defendant from selling, manufacturing or delivering the printed textiles which bore a reproduction of the plaintiff's design.

On appeal to the Second Circuit, the defendant-appellant contended that the defendant's design did not sufficiently resemble the plaintiff's and, moreover, the plaintiff had forfeited copyright by not complying with section 10 of the *Copyright Act*. The two issues the appeal raised for the Second Circuit Court of Appeals, as stated by Judge Hand, were whether the defendant's design infringed the plaintiff's and whether the absence of an adequate copyright notice as required by section 10 meant that the design was dedicated to the public. On the first question, Judge Hand found that the designs would be sufficiently

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[218] *Peter Pan Fabrics, Inc. and Henry Glass & Co., Appellees, v. Martin Weiner Corp., Appellant* (United States Second Circuit Court of Appeals) 274 F.2d 487 (2d Cir.1960). The decision is available on Justia US Court of Appeals Cases and Decisions, online: <http://cases.justia.com/us-court-of-appeals/F2/274/487/361005/>.

[219] *Copyright Act*, 17 U.S.C. (1958).

similar to an observer. On the second question, the judge found that the plaintiff did comply with the copyright notice, but that after the plaintiff sold the textiles and at the time the dresses were made from the textiles and sold, the notice was no longer there. Siding with the plaintiffs, the Court held that "We do hold that at least in the case of a deliberate copyist, as in the case at bar, the absence of 'notice' is a defense that the copyist must prove, and that the burden is on him to show that 'notice' could have been embodied in the design without impairing its market value."[220] The defendant had offered no evidence on this point. The court therefore held that the plaintiff's design should be protected and affirmed the preliminary injunction. The appeal court thus construed a broad protection for textile designs despite the absence of the copyright notice from the finished dresses. It liberally construed section 10 of the *Copyright Act*.

Similarly in Scotland in 2008, the Court of Session in Edinburgh heard a claim that Gold Brothers, a firm based in Kirkcaldy, Fife, which operated several shops in Edinburgh and other places and some websites, were in breach of Rosemary Samios' copyright in the Isle of Skye tartan. Rosemary Samios acquired rights in this tartan from Angus McLeod, a weaver, in 1992. The Court heard that Gold Brothers were selling cheap and poor quality imitations of the Skye tartan in the form of kilts, scarves and other items using the design on cloth from China in breach of Rosemary Samios' copyright in the tartan. Further, raids conducted at the firm's warehouse revealed hundreds of metres of the cloth. Under Scottish legislation, printing a tartan design without a licence amounts to an infringement of copyright. Rosemary Samios claimed that this unauthorised use of her design had caused serious economic and moral prejudice to the reputation of her registered design and that

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[220] *Peter Pan Fabrics, Inc. and Henry Glass & Co., Appellees, v. Martin Weiner Corp., Appellant* 274 F.2d 487 (2d Cir.1960) at paragraph 4.

Gold Brothers had benefited from their infringing activities. Lady Dorian, at the Court of Session in Edinburgh on 2 July 2008, granted Rosemary Samios an interim interdict against Gold Brothers, banning Gold Brothers from making, marketing, importing or exporting goods made with the design.[221]

3.3.2: INDUSTRIAL DESIGNS

Design rights are generally taken to have started in England with the *Calico Printers' Act*, 1787.[222] However, also in 1787, France extended the protection it had previously given to silk manufacturers in Lyon in 1712 and 1744 to cover silk manufacturers nationwide.[223] The English *Calico Printers' Act*, 1787 gave a very limited

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[221] See John Robertson, "Ban on 'Queen's tartan' sales over breach of copyright law" *The Scotsman* (3 July 2008), online: The Scotsman <http://news.scotsman.com/themonarchy/Ban-on-39Queen39s-tartan39-sales.4249779.jp>. See also, Corinne Day, "Printing any tartan design without a licence is a breach of Copyright law" (29 August 2008), online: Lawdit Solicitors <http://www.lawdit.co.uk/reading_room/room/view_article.asp?name=../articles/6084-CD-Tartan%20-Copyright-Case%20-file.txt>. Another copyright case involving tartans is *Holmes et al v. LL Bean Inc*, Case Number 2:2006cv00211, filed on 30 November 2006 in the Maine District Court. It involved a claim for copyright infringement of a tartan design in which Jane Holmes of Plymouth Maine was suing a U.S. clothing company, LL Bean, for using the design in its Americana Tartan Shirt. Holmes claimed the company did not have permission to use the design and the company defended its use by arguing that the tartan is in the public domain since it is widely recognised as the state tartan of Maine. See Justia Federal District Court Filings and Dockets, online: Justia <http://dockets.justia. com/ docket/court-medce/case_no-2:2006cv00211/case_id-34214/>; "Tartan Centre of Copyright Lawsuit" *CBC News* (26 February 2007), online: CBC <http://www.cbc.ca/canada/novascotia/story/2007/02/26/tartan-maine.html>; Matthew A.C. Newsome, "Restricted Tartans and Copyright," online: <http://www.albanach.org/restricted.htm> (also published in the *Scottish Banner* April 2007); Maine State Symbols, online: <http://www.midcoast.com/~martucci/flags/maine/ other.html>. Judgement in this case does not appear to have been given.

[222] *Calico Printers' Act*, 1787, 27 Geo.III, c.38. The full title of this statute is *An Act for the Encouragement of the Arts of designing and printing Linens, Cottons, Callicoes, and Muslins, by vesting the Properties thereof, in the Designers, Printers and Proprietors, for a limited time.* For an online copy, see L. Bently & M. Kretschmer, eds., *Calico Printers' Act (1787), Primary Sources on Copyright (1450-1900)*, *s.v.* "record Images Commentary," online: <http://www.copyrighthistory.org/cgibin/kleioc/0010/exec/showthumb/%22uk_1787_ im_001_0001.jpg%22>.The Act is referred to in some articles and websites as the *Designing and Printing of Linen Act of 1787*. For commentary and background to the *Calico Printers' Act*, 1787, see Ada K. Longfield, "William Kilburn and the Earliest Copyright Acts for Cotton Printing Designs," (1953) 95 The Burlington Magazine 230, online: JSTOR <http://www.jstor.org>.

[223] See Jeanne Belhumeur, *Droit International de la Mode* (Treviso: Canova Società Libraria Editrice, 2000) at 70-71. See also, Susan Scafidi, "Intellectual Property and Fashion Design" in Peter K. Yu, ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, vol. 1, Copyright and Related Rights* (Westport: Praeger Publishers, 2007).

copyright protection to those who engaged in the arts of designing and printing linens, cottons, calicos and muslin and gave proprietors the sole right of printing and reprinting them for two months from the date of first publication, provided the name of the proprietor was marked at each end of each piece of the designed fabric.[224] This period of protection was expanded to three months in 1794.[225] Thus, industrial design rights originated as rights in textiles before they were enlarged to cover other areas.[226] The concept of industrial designs spread from England to other parts of the world. As occurred with copyright and other intellectual property laws, industrial design laws spread to some colonies during the colonial period.[227]

Industrial designs are applied to a wide range of products of industry and handicraft including textile designs.[228] "An industrial design is the ornamental or aesthetic aspect of an article. The design may consist of three-dimensional features, such as the shape or surface of an article, or of two-dimensional features, such as patterns, lines or color."[229] Industrial design rights protect the aesthetic or ornamental appearance of things as opposed

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[224] *Calico Printers' Act*, 1787. See also, the UK Patent Office, "Designs" *s.v.* History of Designs: Textiles - the start of Industrial Design Protection, online: The UK Patent Office <http://www.patent.gov.uk/design/history/deshistory.htm>. For the history of industrial designs from 1787 to the present, see also Irish Patents Office, "Designs - a brief history," online: Irish Patents Office <http://www.patentsoffice.ie/en/student_designs.aspx>.

[225] The UK Patent Office, "Designs" *s.v.* History of Designs: Textiles - the Start of Industrial Design Protection, online: The UK Patent Office <http://www.patent.gov.uk/design/history/deshistory.htm>.

[226] For example, the *Copyright and Design Act* 1839, apart from extending the law to other fabrics, also provided protection for non-textile works.

[227] For instance, India's first design related legislation, *The Designs Act*, 1911, was enacted by the British Government.

[228] They also cover technical and medical instruments, watches, jewelry and other luxury items, housewares, electrical appliances, vehicles, and leisure goods. See WIPO, "Industrial Designs," online: WIPO <http://www.wipo.int/about-ip/en/industrial_designs.html>. See also, WIPO Magazine Number 3, May/June 2005 (Geneva), online: WIPO <http://www.wipo.int/wipo_magazine/en/pdf/2005/wipo_pub_121_2005_05-06.pdf> on the Hague System and industrial designs.

[229] WIPO, "Industrial Designs," online: WIPO <http://www.wipo.int/about-ip/en/industrial_designs.html>. Section 4(1) of the Australian *Designs Act* 1906 defines a "design" to mean "features of shape, configuration, pattern or ornamentation applicable to an article, being features that, in the finished article, can be judged by the eye, but does not include a method or principle of construction." On industrial designs, see generally Brian W. Gray and Effie Bouzalas, eds., *Industrial Design Rights: An International Perspective* (London: Kluwer Law International: International Bar Association, 2001).

to their utility. Unlike copyright law which does not usually require registration, in most countries industrial design registration is a prerequisite to obtaining protection of a design under industrial design law. An object must have visual appeal to be registrable.

Industrial designs must be new or original to qualify for protection. TRIPS provides that "Members shall provide for the protection of independently created industrial designs that are new or original."[230] National laws express the originality requirement differently. The *Designs Act*, 2000 of India[231] provides that a registrable design must be new or original.[232] The Canadian *Industrial Design Act* states that a design must be original.[233]

In Canada, the case of *Clatworthy & Son Ltd. v. Dale Display Fixtures Ltd.* [234] is taken as laying down the standard for originality. In *Clatworthy & Son Ltd. v. Dale Display Fixtures Ltd.*, the plaintiff unsuccessfully sued the defendant for infringing the plaintiff's registered industrial design. The plaintiff brought an action to restrain the defendant from making, displaying or selling a display stand which was allegedly an imitation of a display stand the plaintiff had already registered in 1926 under the *Trade-*

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[230] TRIPS Article 25.1, online: WTO <http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm>.
[231] *Designs Act*, 2000 (No. 16 of 2000), online: Intellectual Property India <http://www.patentoffice.nic.in/> [*Indian Designs Act*, 2000].
[232] Original is defined in section 2(g) of the *Indian Designs Act*, 2000 as follows: "'original', in relation to a design, means originating from the author of such design and includes the cases which though old in themselves yet are new in their application." Section 4 provides:

> A design which
> (a) is not new or original; or
> (b) has been disclosed to the public anywhere in India or in any other country by publication in tangible form or by use or in any other way prior to the filing date, or where applicable, the priority date of the application for registration; or
> (c) is not significantly distinguishable from known designs or combination of known designs; or
> (d) comprises or contains scandalous or obscene matter shall not be registered.

[233] *Industrial Design Act*, R.S.C. 1985, c. I-9, online: Department of Justice Canada <http://laws.justice.gc.ca/en/I-9/index.html>. See sections 4, 6 and 7 of this Act
[234] *Clatworthy & Son Ltd. v. Dale Display Fixtures Ltd.* [1928] Ex. C.R. 159.

Mark and Design Act.[235] The plaintiff's registered design was a rack for displaying garments in a retail store. The Court held that the plaintiff's design was not original within the meaning of the *Trade-Mark and Design Act*[236] and was therefore not proper subject matter for registration. The plaintiff appealed. Siding with the defendant, the Canadian Supreme Court[237] upheld the previous decision and dismissed the appeal. One of the appellant's arguments was that it was lawful for the appellant to combine old designs into a new form and obtain registration for the latter as a new design. Lamont J. stated in response to this:

> I agree, provided that from the combination there is produced an original design which is substantially different from any of the old designs, or any known combination thereof .... In my opinion, the function of a bedside table is analogous to that of a garment rack. The purpose of each is to have the top bar support a weight. Whether that weight is placed directly upon the upper side of the bar by the weight itself or is placed there by means of a hook to which the weight is attached cannot, in my opinion, be material. Apart, therefore, from the ornamentation, the appellant's design was not original at the time of its registration. There was in it no new idea, nor any new way of applying old designs to manufactured articles of a class which was not analogous. The appellant's design was, therefore, not proper subject-matter for registration.[238]

The appeal was dismissed because the appellant's design was not original at the time it was registered. The appellant's design for a garment rack was similar to a previous design for a bedside table and the latter's function was analogous to that of a garment rack.

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[235] *Trade-Mark and Design Act*, R.S.C. 1906, c. 71.
[236] *Ibid.*
[237] *Clatworthy & Son Ltd. v. Dale Display Fixtures Ltd.* [1929] S.C.R. 429.
[238] *Ibid.* For further discussion on the Canadian legislation, see Harold G. Fox, *The Canadian Law of Copyright and Industrial Designs*, 2d ed. (Toronto, Canada: The Carswell Company Limited, 1967) 661; Canadian Intellectual Property Office, "Industrial Designs: Industrial Design Office Practices" 27 May 2008, online: <http://www.cipo.ic.gc.ca/eic/site/cipointernet-internetopic.nsf/vwapj/idop-e.pdf/$FILE/idop-e.pdf>.

Although the Canadian situation is currently governed by the *Industrial Design Act*,[239] the *Clatworthy & Son Ltd. v. Dale Display Fixtures Ltd.* decision is still relevant as case law on the originality standard. The originality required under the *Industrial Design Act*[240] is that the design be substantially different from previous designs and should proceed from the designer. Under section 4(1)(b) of the *Industrial Design Act*, a design can be registered if the proprietor declared "that the design was not, to the proprietor's knowledge, in use by any person other than the first proprietor at the time the design was adopted by the first proprietor."

However, industrial design rights are limited by being territorial and applying only in the country where registration has been obtained. Consequently, a person or an entity who registers a textile design would obtain protection only in the country where the design is registered. The duration of protection is determined nationally with protection generally being from 5-15 years. For instance, registration of a design[241] under the Indian *Designs Act*, 2000[242] gives the design's registered proprietor copyright for a period of 10 years with the option to renew it for another five years.[243]

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[239] *Industrial Design Act*, R.S.C. 1985, c. I-9, online: Department of Justice Canada <http://laws.justice.gc.ca/en/I-9/index.html>.

[240] *Ibid.*

[241] A design is defined in section 2(d) of the Indian *Designs Act*, 2000 as follows:

> 'design' means only the features of shape, configuration, pattern, ornament or composition of lines or colours applied to any article whether in two dimensional or three dimensional or in both forms, by any industrial process or means, whether manual, mechanical or chemical, separate or combined, which in the finished article appeal to and are judged solely by the eye; but does not include any mode or principle of construction or anything which is in substance a mere mechanical device, and does not include any trade mark as defined in clause (v) of sub-section (1) of section 2 of the Trade and Merchandise Marks Act, 1958 or property mark as defined in section 479 of the Indian Penal Code or any artistic work as defined in clause (c) of section 2 of the Copyright Act, 1957.

[242] *Ibid.*

[243] *Ibid.* at section 11.

However, industrial designs can also be protected internationally. TRIPS provides for WTO member countries to protect industrial designs[244] for at least 10 years.[245] Further, WIPO administers a system of international registration of industrial designs under the *Hague Agreement Concerning the International Deposit of Industrial Designs*. The system enables a person, by filing the design with WIPO's International Bureau, to have effective protection in the countries which are a party to this agreement unless the country refuses protection.[246] The other main international agreement in this area is the *Geneva Act of the Hague Agreement concerning the International Registration of Industrial Designs.* [247] There are variations on industrial designs. Some regions also have community designs, for example, the EU countries have a system for Registered Community Designs (RCD) and a system for Unregistered Community Designs (UCD).[248] Some countries operate a system of design patents.

Industrial designs laws are thus invaluable in helping owners of designs to protect their textile designs. Once the owner of a textile design has been granted the protection of the design, the owner has the exclusive right to reproduce it. Further, the owner of a

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[244] TRIPS, *supra* note 17 at Article 25.
[245] *Ibid.* at Article 26.3.
[246] See WIPO, "Hague System for the International Registration of Industrial Designs," online: WIPO <http://www.wipo.int/hague/en/>.
[247] *Geneva Act of the Hague Agreement concerning the International Registration of Industrial Designs*, adopted by the Diplomatic Conference on 2 July 1999, online: WIPO <http://www.wipo.org/hague/en/index.html>. See also, *Agreed Statements by the Diplomatic Conference Regarding the Geneva Act and the Regulations under the Geneva Act of the Hague Agreement concerning the International Registration of Industrial Designs*, adopted by the Diplomatic Conference on 2 July 1999, online: WIPO <http://www.wipo.org/hague/en/index.html>.
[248] The EU community design came into effect on 1 April 2003 and gives protection in all 25 EU countries. For a design to be registrable, it must be new and have an individual character. The maximum period of protection is 25 years. There is also a system for unregistered designs. See "Designs - a brief history" *s.v.* "2003", online: Irish Patents Office <http://www.patentsoffice.ie/en/student_designs.aspx>.

protected industrial design has the right to prevent the reproduction, sale or import of the design without his or her consent where such use is for commercial purposes.[249]

3.3.3: OVERLAP BETWEEN COPYRIGHT AND INDUSTRIAL DESIGN PROTECTION OF TEXTILES

The previous discussion showed that textile designs can be protected under copyright law or under industrial designs law depending on the relevant national legislation. The implication of both copyright law and industrial designs law follows from the special position of industrial designs in having both functional and artistic or aesthetic aspects. The relationship between industrial designs and art creates the possibility of overlap, the question of the extent to which copyright may overlap with industrial design legislation to protect industrial designs, and dual protection under design law and copyright law with the functional aspect being protected under design law and the aesthetic aspect being protected under copyright law. There are three main protection regimes for industrial designs: cumulative, separate or partial overlap.[250] For example, the *European Directive 98/71 on the legal protection of designs* of the European Parliament and of the Council of

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[249] TRIPS, *supra* note 17 at Article 26.1 provides, "The owner of a protected industrial design shall have the right to prevent third parties not having the owner's consent from making, selling or importing articles bearing or embodying a design which is a copy, or substantially a copy, of the protected design, when such acts are undertaken for commercial purposes." Pakistan's *Registered Designs Ordinance*, 2000 section 2(d) defines "registered", in the absence of anything repugnant, as follows:

> 'registration of design' means the right to prevent third parties from applying a design to an article and from making, importing, selling, hiring or offering for sale or hire any article in respect of which a design is registered, being an article to which the registered design or a design not substantially different from the registered design has been applied and from making anything enabling such article to be made as aforesaid, except with the license or written consent: of the registered proprietor;...

Registered Designs Ordinance, 2000, online: Pakistan Intellectual Property Office <http://www.ipo.gov.pk/Designs/Downloads/DesignsOrdinance2000.pdf>. See also section 7(2) on the effect of registration.

[250] See WIPO, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, 9th Sess., *Industrial Designs and their Relation with Works of Applied Art and Three Dimensional Marks*, SCT/9/6 (2002), online: WIPO <http://www.wipo.int/edocs/mdocs/sct/en/sct_9/sct_9_6.pdf> Annex at 10..

October 13, 1998[251] and the *Council Regulation 6/2002 of 12 December 2001 on Community Designs*[252] allow design right to overlap and cumulate with national copyright and other forms of protection.[253] The challenges and peculiarities resulting from this overlap are discussed in further detail below.

Section 64 of Canada's *Copyright Act*[254] deals with copyright in relation to industrial designs. Section 64(2)[255] specifies circumstances in which it is not an infringement of copyright or moral rights for a person to reproduce copies of a design with the copyright holder's consent, where the copyright holder has already produced 50 copies of that design. However, the copyright holder could lose copyright protection.[256]

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[251] EC, *Directive 98/71 on the legal protection of designs* of the European Parliament and of the Council of October 13, 1998 [1998] O.J. l289/28-35. See Articles 16 and 17 of this Directive.

[252] EC, *Council Regulation (EC) No* 6/2002of 12 December 2001 on Community Designs [2002] O.J. L03/1.

[253] See Articles 16 and 17 of the EC, *Directive 98/71 on the legal protection of designs* of the European Parliament and of the Council of October 13, 1998 [1998] O.J. l289/28-35 and Article 96 of EC, *Council Regulation (EC) No 6/2002 of 12 December 2001 on Community Designs* [2002] O.J. L03/1. For further discussion, see WIPO, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, 9th Sess., *Industrial Designs and their Relation with Works of Applied Art and Three Dimensional Marks*, SCT/9/6 (2002), online: WIPO <http://www.wipo.int/edocs/mdocs/sct/en/sct_9/sct_9_6.pdf>, Annex at 9-13; Charles-Henry Massa & Alain Strowel, "Community Design: Cinderella Revamped" (2003) 25:2 Eur. I.P. Rev 68 at 68 and 71.

[254] *Copyright Act* (R.S., 1985, c. C-42), online: Justice Canada <http://laws.justice.gc.ca/en/C-42/index.html>.

[255] *Ibid.* at section 64(2):

> Where copyright subsists in a design applied to a useful article or in an artistic work from which the design is derived and, by or under the authority of any person who owns the copyright in Canada or who owns the copyright elsewhere,
> (*a*) the article is reproduced in a quantity of more than fifty, or
> (*b*) where the article is a plate, engraving or cast, the article is used for producing more than fifty useful articles,
> it shall not thereafter be an infringement of the copyright or the moral rights for anyone
> (*c*) to reproduce the design of the article or a design not differing substantially from the design of the article by
> (i) making the article, or
> (ii) making a drawing or other reproduction in any material form of the article, or
> (*d*) to do with an article, drawing or reproduction that is made as described in paragraph (*c*) anything that the owner of the copyright has the sole right to do with the design or artistic work in which the copyright subsists.

[256] As Elizabeth F. Judge & Daniel Gervais state:

> In summary, the *Copyright Act* provides that copyrighted articles lose their copyright protection when they are designs lawfully applied to a useful article (*e.g.* a boat, a chair) and there are more than 50 units of them. In that case, subject to the formalities provided therein, the *Industrial Design Act* will protect the visual elements of designs (that "appeal

Section 64(3) however provides exceptions to the above, meaning that there is still copyright protection if more than 50 articles are made. A notable exception is in section 64(3)(c) which states at section 64(3):

> Subsection (2) does not apply in respect of the copyright or the moral rights in an artistic work in so far as the work is used as or for
> (*a*) a graphic or photographic representation that is applied to the face of an article;
> (*b*) a trade-mark or a representation thereof or a label;
> (*c*) material that has a woven or knitted pattern or that is suitable for piece goods or surface coverings or for making wearing apparel;[257]

This means that textile designs fall within the exception. Thus, an artist would still have copyright in the design, but not the article, if more than 50 articles are made, but the copyright holder did not consent to the production of more than 50 articles.[258]

In *Inhesion Industrial Co. v. Anglo Canadian Mercantile Co.*[259] the issue was whether the defendant, Anglo Canadian Mercantile Co., had copied the poinsettia design of the plaintiff, Inhesion Industrial Co. One argument the defendant raised was that the poinsettia pattern did not fall under copyright, but under industrial design legislation. The judge ruled for summary judgement.

> to and are judged solely by the eye") that are applied to manufactured objects. It is important to note that once 51 copies have been made with the copyright owner's consent, copyright protection in the article is lost, whether or not industrial design protection is applied for.

Elizabeth F. Judge & Daniel Gervais, *Intellectual Property: The Law in Canada* (Thomson Canada: 2005) at 593 [footnote omitted].

[257] Section 64 (4) provides: Subsections (2) and (3) apply only in respect of designs created after the coming into force of this subsection, and section 64 of this Act and the *Industrial Design Act*, as they read immediately before the coming into force of this subsection, as well as the rules made under them, continue to apply in respect of designs created before that coming into force.

[258] Elizabeth F. Judge & Daniel Gervais, *Intellectual Property: The Law in Canada* (Thomson Canada Limited: 2005) at 594.

[259] *Inhesion Industrial Co. v. Anglo Canadian Mercantile Co.* [2000] F.C.J. No. 491, 6 C.P.R. (4th) 362.

However, in examining sections 64(2) and 64(3)(a) of the *Copyright Act*, the judge stated:

> Given the wording [of] the exception in subsection (3) for graphic representations applied to a useful article, I would question whether the defendant's submissions have merit. However, the application of the subsection is contingent upon a finding that the article in question is reproduced in quantities of more than fifty by or under the authority of any person who owns copyright in Canada or who owns the copyright elsewhere. Therefore, the question of ownership of copyright must be decided before a defendant can rely on the subsection.[260]

The Indian *Copyright Act*, 1957[261] provides in section 15 that no design registered under the Indian *Designs* Act, 1911[262] can be registered under India's *Copyright Act.* Section 15 (2) provides that "Copyright in any design, which is capable of being registered under the Designs Act, 1911, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright or, with his license, by any other person." In other words, if a person has copyright in a design and the design qualifies for registration under industrial design legislation, but the person does not register the design under industrial design legislation, or the relevant legislation, then the person loses copyright so long as the item has been reproduced more than 50 times.

Another example concerns Brimful Designs, a textile design studio based in Lahore, Pakistan. Brimful Designs, a small entrepreneurship venture, has been operating since 1999 and has been successfully producing and marketing a high designer brand of lawn, a refined form of cotton worn in the summer, under the label *Yahsir Waheed*

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[260] *Inhesion Industrial Co. v. Anglo Canadian Mercantile Co.* [2000] F.C.J. No. 491, 6 C.P.R. (4th) 362 at paragraph 27.
[261] Indian *Copyright Act*, 1957, online: Indian Copyright Office <http://copyright.gov.in/CprAct.pdf>.
[262] The Indian *Designs Act*, 1911 was replaced with the *Designs Act*, 2000.

Designer Lawn. In 2003, there was large scale unauthorised copying of the designs and the fake copies were sold under a different label for about a third of the price of the original product. Brimful consulted local experts at a seminar on intellectual property about how to protect the textiles. The options open to Brimful Designs under Pakistani law were to register the lawn under copyright law or under industrial design legislation. Concerning registration under the *Copyright (Amendment) Act*, 1992, the *Copyright Ordinance* provided at section 12 that a design which was mechanically reproduced more than 50 times could not have copyright protection. Textiles or other industrial designs could be protected under the *Designs Ordinance 2000*[263] for an initial period of ten years with the option to renew for two additional ten year periods, making a total of a possible thirty-year protection period.[264] The consultants therefore advised Brimful Designs to register the lawn under the *Designs Ordinance 2000*. This registration was done in 2004. While infringers are no longer replicating the exact designs, they are reproducing copies similar enough to confuse the public. Brimful's owners would like strong intellectual property textile protection to deter additional wide scale copying.[265] Industrial design law provides explicit protection for textiles; this, however, is not as strong as copyright because the former typically has a shorter protection period.

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[263] *Designs Ordinance 2000*, online: Pakistan Intellectual Property Office <http://www.ipo.gov.pk/Designs/Downloads/DesignsOrdinance2000.pdf>.

[264] See section 7 of the *Designs Ordinance 2000*. See also "Pakistani Textile Designer Seeks to Limit Competition from Imitators - Brimful Designs," online: WIPO <http://www.wipo.int/sme/en/case_studies/brimful_designs.htm>.

[265] See WIPO Magazine Number 3, May/June 2005 (Geneva), online: WIPO <http://www.wipo.int/wipo_magazine/en/pdf/2005/wipo_pub_121_2005_05-06.pdf>.

3.3.4: CERTIFICATION MARKS

Unlike copyright and industrial design, which do not provide any information about the quality of an item, certification marks indicate that products have a particular quality even if they come from different sources. The certification marks system is closely related to trademarks and geographical indications.[266] Because of this intersection, although this discussion is on certification marks in relation to textiles, it is necessary to mention geographic indications and trademarks to make this discussion complete. Since certification marks is not a category in the TRIPS Agreement, this section discusses the TRIPS definitions on trademark and geographical indications to set the stage before launching into an analysis of national legislation on certification marks and their relation to textiles and textile designs.

The current trademark system originated from the practice in ancient times of merchants and craftsmen putting their signatures or marks on their products to indicate their manufacture.[267] A trademark is a distinctive mark on a product which identifies it with its trade source.[268] Registration of a trademark enables the trademark holder to have exclusive use of that trademark in respect of the goods it is registered with or to allow others to use the trademark subject to payment.

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[266] Geographical indications are signs, names or words that provide information about where a product was made. Because of the intersection between geographical indications and other law categories, geographical indications have been protected under various types of laws in the past and still are to an extent, including trademark law and consumer protection law.

[267] The origin of trademarks "dates back to ancient times, when craftsmen reproduced their signatures, or "marks" on their artistic or utilitarian products." WIPO, "Trademarks," online: WIPO <http://www.wipo.int/about-ip/en/trademarks.html>.

[268] "A trademark is a distinctive sign which identifies certain goods or services as those produced or provided by a specific person or enterprise." WIPO, "Trademarks," online: WIPO <http://www.wipo.int/about-ip/en/trademarks.html>.

As WIPO has pointed out:

> In a larger sense, trademarks promote initiative and enterprise worldwide by rewarding the owners of trademarks with recognition and financial profit. Trademark protection also hinders the efforts of unfair competitors, such as counterfeiters, to use similar distinctive signs to market inferior or different products or services. The system enables people with skill and enterprise to produce and market goods and services in the fairest possible conditions, thereby facilitating international trade.[269]

The greatest advantage here is that unlike copyright or industrial design legislation, trademarks can be renewed indefinitely[270] so long as it is shown that the mark is still associated with the relevant business, that the mark is being actively and continuously used, and that the trademark registration is being renewed and defended.

Article 15.1 of TRIPS describes protectable trademark subject matter as follows:

> Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.[271]

Thus trademarks include words, logos, symbols, names, letters, colours, fragrance, holograms, designs, images, audible sounds, shapes or a combination of any of these. It thus appears that anything which is distinctive enough and unique enough to be identified

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[269] WIPO, "What Does a Trademark Do?" online: WIPO <http://www.wipo.int/aboutip/en/about_trademarks.html#what_kind>.

[270] On the trademark term of protection, TRIPS provides at Article 18 that "Initial registration, and each renewal of registration, of a trademark shall be for a term of no less than seven years. The registration of a trademark shall be renewable indefinitely." TRIPS, *supra* note 17.

[271] It is further provided in TRIPS Article 15.2 that "Paragraph 1 shall not be understood to prevent a Member from denying registration of a trademark on other grounds, provided that they do not derogate from the provisions of the Paris Convention (1967)."

with a business could qualify as a registrable trademark, depending on the national legislation. As WIPO has pointed out "The possibilities are almost limitless." [272]

Within the WTO framework, TRIPS Articles 22 to 24 deal with the international protection of geographical indications. Under TRIPS Article 22 for example, "Geographical indications are, for the purposes of this Agreement, indications which identify 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."[273]

A geographical indication does three main things. Firstly, it identifies a product with a locality or region. Secondly, it provides information about the quality or reputation of the product. Thirdly, it helps to protect the characteristics of the product which are linked to its place of production. The maintenance of this link is essential to preserving the value of the product.

Countries have different approaches to geographical indications.[274] Some countries have specific geographical indications laws while others do not.[275] Thus, not every country

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[272] WIPO, "What Kinds of Trademarks Can Be Registered?" online: WIPO <http://www.wipo.int/about-ip/en/about_trademarks.html#what_kind>. See also, WIPO, Standing Committee on the Law of Trademarks, Industrial Designs and Geographical Indications, 17th Sess., *Relation of Established Trademark Principles to New Types of Marks*, SCT/17/3 (2007).

[273] TRIPS, *supra* note 17 at Article 22, online: WTO <http://www.wto.org/english/tratop_e/trips_e/t_agm3_e.htm>.

[274] For some differences in national perspectives, see WTO, WTO NEWS: 1998 NEWS ITEMS, TRIPS Council 1–2 December 1998, "Discussion develops on geographical indication," online: WTO <http://www.wto.org/English/news_e/news98_e/pu_e.htm>.

[275] "Some have specific geographical indications laws. Others use trademark law, consumer protection law, marketing law or common law or combinations of these .... Some have formal lists of registered geographical indications. Others do not, preferring to rely on court case histories (based on criteria such as consumer protection) to identify where problems have arisen and been sorted out. Some only recognize place names. Others accept other names that are associated with a place. As a result, the criteria for providing protection also differ." WTO, WTO NEWS: 1998 News Items, TRIPS Council 1–2 December 1998, "Discussion develops on geographical indication," online: WTO <http://www.wto.org/English/news_e/news98_e/pu_e.htm>.

has a clear demarcation between geographical indications and other areas of intellectual property. Canada and the United States, for example, protect geographical indications as certification marks and trademarks, except for spirits and wines.[276]

There is a lack of uniformity among national laws concerning the protection of certification marks. Some countries adopt a broad definition of certification marks which includes geographical indications. China's trademark law protects geographical indications as certification marks under its trademark legislation. Under Article 3 of the *Trademark Law* of the People's Republic of China, registered trademarks include trademarks, certification marks, collective marks and service marks. [277] Article 3 of China's trademark law defines certification marks as "signs which are controlled by organizations capable of supervising some goods or services and used by entities or individual persons outside the organization for their goods or services to certify the origin, material, mode of manufacture, quality or other characteristics of the goods or services."

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[276] See Agriculture and Agri-food Canada, Agri-Food Trade Policy, "Geographical Indications Questions and Answers," online: Agriculture and Agri-food Canada <http://www.agr.gc.ca/itpd-dpci/english/topics/tripsqsas.htm>. For some differences in national perspectives, see WTO, WTO NEWS: 1998 NEWS ITEMS, TRIPS Council 1–2 December 1998, "Discussion develops on geographical indication," online: WTO <http://www.wto.org/English/news_e/news98_e/pu_e.htm>. In the Czech Republic, for example, Vamberk lace and Bohemia crystal are geographical indications. See WTO, WTO NEWS: 1998 NEWS ITEMS, TRIPS Council 1–2 December 1998, "Discussion develops on geographical indication," online: WTO <http://www. wto.org/English/news_e/news98_e/pu_e.htm>.

[277] Trademark Law of the People's Republic of China, adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on 23 August 1982, revised for the first time according to the Decision on the Amendment of the Trademark Law of the People's Republic of China adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress, on 22 February 1993, and revised for the second time according to the Decision on the Amendment of the Trademark Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001, online: <http://www.chinaiprlaw.com/english/laws/laws11.htm>. The English version is also available on the official website of the Trademark Office of the State Administration for Industry and Commerce, Peoples' Republic of China, online: <http://sbj.saic.gov.cn/english/show.asp?id=47&bm=flfg>. For the Regulations for the implementation of the Trademark law, see, online: <http://sbj.saic.gov.cn/english/show.asp?id=53&bm=flfg>. For further discussion on geographical indications in China, see Wang Xiaobing & Irina Kireeva, "Protection of Geographical Indications in China: Conflicts, Causes and Solutions" (2007) 10:2 J. World I.P. 79.

With respect to the United States, the *Trademark Act*, 15 U.S.C. §1054, provides for the registration of "certification marks, including indications of regional origin." The *Trademark Act*, 15 U.S.C. §1127, defines "certification mark" to mean:

> any word, name, symbol, or device, or any combination thereof—
> (1) used by a person other than its owner, or
> (2) which its owner has a bona fide intention to permit a person other than the owner to use in commerce and files an application to register on the principal register established by this Act,
> to certify regional or other origin, material, mode of manufacture, quality, accuracy, or other characteristics of such person's goods or services or that the work or labor on the goods or services was performed by members of a union or other organization.

Thus, under the United States system, certification marks indicate three things: (1) the origin of the goods and services as being produced in a particular region; (2) that the goods or services meet particular standards such as a particular quality; and (3) the work was performed by a member of a union or other organisation.

Although this section has shown that certification marks are registered under the trademark system, there are two key differences between a certification mark and a trademark. First, a certification mark is not used by its owner. Generally, certification marks are owned by an entity which does not produce the item in question and licenses the use of the mark to the producers of the item. Secondly, the certification mark does not indicate a commercial source. Any individual or organisation whose products meet the requisite quality can request the use of the registered certification mark. Once the request is granted, the certification mark is protected and only those entitled to use it will have the right to use the mark in association with the relevant item.

Consequently, textile manufacturers can obtain a certification mark from an authorised entity indicating that the textile meets a particular quality or standard. For example, the company E.I. DuPont de Nemours & Company has a certification program under which it licenses certification marks for use by manufacturers of products in which a DuPont fiber or other material is used and which meet specified performance quality standards. Thus, for example, the Thermax® certification mark used on thermal underwear made of a special DuPont fiber is registered to DuPont, but is not used by DuPont.[278] DIN CERTO's[279] textile certification distinguishes two levels: (1) basic quality features and mandatory requirements of different countries;[280] and (2) that no harmful substances are in the textile products. Textiles which meet this standard can bear the certification mark "DIN-Geprüft."[281]

Certification marks are advantageous to a textile business in several ways. Firstly, they indicate authenticity. Commercially, a certification mark is invaluable to a business which is based on it. The presence of the mark helps to ensure that no other business, which markets its products without the mark, can deceive the public into thinking that its product is the same as or is associated with the products which carry the mark. Certification marks therefore prevent consumers from being confused or misled as to the quality and origin of the product. Thus the certification mark system has a public policy objective as well.

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[278] See Arthur Price, Allen C. Cohen & Ingrid Johnson, *J.J. Pizutto's Fabric Science*, 7th ed. (New York: Fairchild Publications, 2004) 51.

[279] "DIN CERTCO is the certification organisation of TÜV Rheinland Group and DIN, the German Institute for Standardization." See "About Us," online: DIN CERTCO <http://www.dincertco.de/en/about_us/index.html>.

[280] This information is recorded in a "Certificate of Acceptability."

[281] See "Home Textiles," online: DIN CERTCO <http://www.dincertco.de/en/competencies/products/textiles/home_textiles/index.html>.

In the absence of the certification mark protection, a textile business could suffer in two main ways: (1) by the diversion of its customers to other businesses; and (2) by a lower quality product ruining the reputation of the original producer. The consumer may also suffer harm by purchasing what he or she believes is a genuine product which turns out to be fake. Thus certification marks protect both business and consumer interests. Unlike copyright and industrial design which have limited protection periods, certification marks have indefinite renewal subject to some limitations.

The disadvantage, however, is that they do not prevent people from producing similar goods. Thus, for example, DuPont's certification mark does not prevent other companies from producing imitation fibers that look like the DuPont fiber. The certification mark only indicates that those who use it are using DuPont's fibres and their product meets a particular standard. Therefore, a textile producer licensed to use a certification mark cannot prevent others from producing similar wares.

Generally, trademark protection is limited to the country in which the protection is granted. Unlike copyright, trademarks must be registered in order to be protected under trademark law. The trademark is registered once it is ascertained that the proper requirements have been met and that the mark has not already been registered by another business.[282] However, trademark protection can go beyond national boundaries where there are regional trademarks offices. Countries or regions, where applicable, maintain a register of trademarks. However, WIPO has also established a system for the international registration of trademarks governed by the *Madrid Agreement Concerning the*

[282] This can be ascertained by a search in the registry or by opposition by third-parties.

International Registration of Marks[283] and the *Madrid Protocol*.[284] Persons or businesses with a link to a country which is a party to either of these two treaties, may upon application to their national or regional registry as the case may be, obtain an international registration which would be effective in some or all of the other members of the Madrid Union.[285] Collective marks[286] and certification marks can also be registered under the regional trademark system in so far as they exist under the respective national system.[287]

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[283] *Madrid Agreement Concerning the International Registration of Marks* of 14 April 1891, as revised at Brussels on December 14, 1900, at Washington on June 2, 1911, at The Hague on November 6, 1925, at London on June 2, 1934, at Nice on June 15, 1957, and at Stockholm on July 14, 1967, and as amended on September 28, 1979. Entry into force (of the 1979 amendments): October 23, 1983, online: WIPO <http://www.wipo.org/madrid/en/index.html>. On 27 October 2006 WIPO registered its 900,000 mark under the International Trademark System. See WIPO, Press Release 466, "WIPO Registers 900,000th Mark Under the International Trademark System" (27 October 2006), online: WIPO <http://www.wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_466.html>. This Press Release also states:

> At the current rate of growth, it is anticipated that the one millionth mark under the Madrid system will be reached in 2009. The 900,000 milestone was a trademark registered by a Chinese company seeking protection in ten countries on four continents.
>
> China, which became a member of the Madrid system in 1989, is now the eighth largest user of the system. Some 1,057 international applications were received by WIPO from Chinese users in the first nine months of 2006. China is also the most designated country in international trademark applications, with more than 40% of the applications designating China.

WIPO, Press Release 466, "WIPO Registers 900,000th Mark Under the International Trademark System" (27 October 2006), online: WIPO <http://www.wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_466.html>. "The largest share of the 33,565 international trademark applications received by WIPO in 2005 was filed by users in Germany (17.3% of the total), followed by users in France (10.4%), the United States of America (8.5%), Benelux (7.2%), Italy (7.0%), Switzerland (6.7%), the European Community (5.5%) and China (4.0%). These figures relate to international applications filed through the trademark offices of the members concerned. Applications from developing countries increased by 30.6% over 2004, with China topping the list of users. WIPO, Press Release 466, "WIPO Registers 900,000th Mark Under the International Trademark System" (27 October 2006), online: WIPO <http://www.wipo.int/edocs/prdocs/en/2006/wipo_pr_2006_466.html>.

[284] *Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks* (as signed at Madrid on June 28, 1989), online: WIPO <http://www.wipo.org/madrid/en/index.html>.

[285] The Madrid Union comprises the states which are parties to the Madrid Agreement and the Contracting Parties to the Madrid Protocol, see "Members of the Madrid Union," online: WIPO <http://www.wipo.int treaties/en/documents/pdf/madrid_marks.pdf>. For the members of the Madrid Union as at 15 April 2006, see "Members of the Madrid Union," online: WIPO <http://www.wipo.int/treaties/en/ documents/pdf/ madrid_marks.pdf>.

[286] These are marks that are used by members of associations such as engineers or accountants to identify them with a level of quality and other association requirements. See WIPO, "What kinds of trademarks can be registered?" online: WIPO <http://www.wipo.int/about-ip/en/about_trademarks.html#how_extensive>.

[287] See *e.g.* WIPO, "Madrid Agreement and Protocol Concerning the International Registration of Marks, Collective and Certification Marks: China," *Information Notice No. 7/2005* (21 March 2005)," online: WIPO <http://www.wipo.int/edocs/madrdocs/en/2005/madrid_2005_7.pdf>.

Despite these attempts, it must be stressed that trademarks are still largely territorial in nature and that there is currently no international system that will make the trademark effective in every country in the world.

3.4: JUSTIFICATORY THEORIES OF INTELLECTUAL PROPERTY IN THE COMMON LAW WORLD

This section examines the justificatory theories for intellectual property rights in textiles. It analyzes the usefulness of the theories to explain intellectual property rights in textiles.

In countries with a long tradition of intellectual property protection, it seems to be generally accepted that intellectual property law is here to stay. Intellectual property law appears to be an integral part of society and it is sometimes impossible to envisage a world or a society without it. However, and as was seen in the previous section, not every country has an established intellectual property law tradition. The TRIPS Agreement is "forcing" some countries, especially developing countries, to implement intellectual property laws. The rationale for this extension of intellectual property laws to countries where they had hitherto not existed is that these countries will reap the benefits flowing from a strong intellectual property system. This derives from the view that an intellectual property law system is a good or desirable thing. From this perspective, the justificatory theories may not be useful in explaining the existence of intellectual property in those countries.

Intellectual property justifications fall into two broad categories. The first category is based on moral and ethical considerations, while the second is based on instrumentalism

or utilitarianism.[288] There are four main theories seeking to justify the rationale for the intellectual property law system. Several variations have been given to these theories. William Fisher, for example, refers to them as utilitarianism, labor, personality and social planning theories.[289] Although there are also law and economics analyses on the justifications of intellectual property,[290] this section focuses on the three theories known as the natural rights theory, the reward theory and the encouragement of invention theory.

An analysis of the justificatory theories is a broad one because textiles are not just restricted to one intellectual property law category. Consequently, a comprehensive consideration of the justification for granting intellectual property law protection to textiles would be an amalgamation of the theories justifying the protection of works by copyright, industrial designs and trademarks. There is surprisingly little consideration of philosophical foundations for industrial design protection in the literature and even fewer works on industrial design protection of textile designs.[291] This appears to be based on a general assumption that the justifications for patents and copyright law apply equally to

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[288] Utilitarianism is linked to the writings of Jeremy Bentham and John Stuart Mill and aims at the maximization of the good to society.

[289] William Fisher, "Theories of Intellectual Property" in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property* (New York: Cambridge University Press, 2001) 168 at 169.

[290] See *e.g.*, William M. Landes & Richard A. Posner, "An Economic Analysis of Copyright Law" (1989) 18 J. Legal Stud. 325; Peter S. Menell, "Intellectual Property: General Theories" in *Encyclopedia of Law and Economics*, ch. 1600 at 155, online: <http://encyclo.findlaw.com/1600book.pdf>; Stanley Besen & Leo Raskind, "An Introduction to the Law and Economics of Intellectual Property" (1991) 5 J. Econ. Perspectives 3. See generally, Michael J. Trebilcock "An Introduction to Law and Economics" (1997) 23:1 Monash U. L. Rev. 124.

[291] For instance, William Fisher in discussing the theories of intellectual property mentions patents, trademarks, copyright and trade-secrets, but hardly mentions industrial designs. William Fisher "Theories of Intellectual Property" in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property* (New York: Cambridge University Press, 2001) 168. Lionel Bently & Brad Sherman, make a brief mention of the justifications for granting protection to designs. Lionel Bently & Brad Sherman, *Intellectual Property Law*, 2d ed. (Oxford: Oxford University Press, 2004) at 594.

designs.[292] This discussion focuses on the justificatory theories for copyright as the dominant intellectual property category for textile designs.

3.4.1: THE NATURAL RIGHTS THEORIES

The natural right theories state that a person has a natural right to the product of his or her labour. There are two categories of natural rights theories based in part on the writings of John Locke on the one hand and on those of Kant and Hegel on the other. These two schools are applied in different ways to justify intellectual property.

John Locke's theory of property as a justification for intellectual property continues to be a topic of debate as there are many interpretations and variations of this theory.[293] According to John Locke, the earth is created by God and the resources in it exist in common. A person has property in his or her body and uses labour to produce ideas. As much of the resources that a person is able to mix his or her labour with belongs to the person. Ideas belong to a common and an individual "appropriating" an idea from this common does not significantly devalue the common.

However, Locke attached two conditions to this appropriation: first, he was concerned that people leave enough for others and second, that people took only what they could use. Interpreted differently, the second condition meant that people were not to waste

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[292] See Lionel Bently & Brad Sherman, *Intellectual Property Law*, *ibid.* at 594.

[293] These variations include the labour theory of property, the "Value-Added labour theory" also known as the labour-desert theory, the instrumental interpretation (that we must provide rewards for labour) and the normative interpretation (that labour should be protected). See Justin Hughes "The Philosophy of Intellectual Property" (1988) 77 Geo. L.J. 287.

resources.[294] Thus applying John Locke's theory to textiles would mean that the author of a textile design has a natural right to any benefits flowing from the textile design and is granted intellectual property protection because the author expended labour in creating the design. For example, copyright laws are thus instruments recognising this obvious right.

Scholarly opinion is divided about justifying intellectual property through John Locke's theory of labour. William Fisher points out that there are difficulties in applying this to intellectual property that spring partly from ambiguities in John Locke's formulation of the labour theory as a rationale for property rights.[295] Edwin C. Hettinger argues that "even if the labor theory shows that the laborer has a natural right to the fruits of labor, this does not establish a natural right to receive the full market value of the

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[294] This is known as the "non-waste" principle. John Locke wrote:

> Whether we consider natural *reason*, which tells us, that men, being once born, have a right to their preservation, and consequently to meat and drink, and such other things as nature affords to their subsistence; or *revelation* ...it is very clear, that God ...*has given the earth to the children of men*; given it to mankind in common...God, who has given the world to men in common, hath also given them reason to make use of it to the best advantage of life and convenience. The earth, and all that is therein, is given to men for the support and comfort of their being. ... Though the earth, and all inferior creatures, be common to all men, yet every man has a *property* in his own *person*; this no body has any right to but himself. The *labour* of his body, and the *work* of his hands, we may say, are properly his. Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his *labour* with, and joined to it something that is his own, and thereby makes it his *property*. It being by him removed from the common state nature hath placed it in, it hath by this *labour* something annexed to it, that excludes the common right of other men: for this *labour* being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to at least where there is enough, and as good, left in common for others.

John Locke, *Second Treatise of Government*, C.B. Macpherson, ed. (Indianapolis, Ind.: Hackett Publishing Company, 1980) Ch. 5. Of Property ss. 25-27. Critics question the relevance of the non-waste condition in John Locke's theory to intellectual property works in terms of leaving as much for others. On this point, see for example William Fisher "Theories of Intellectual Property" in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property* (New York: Cambridge University Press, 2001). He also comments on some problems associated with the "sufficiency proviso." Basically, he questions how the requirement that a labourer "leave "as much and as good" for others" applies to intellectual property. William Fisher, (*ibid.* at 188).

[295] William Fisher, "Theories of Intellectual Property," *ibid.* at 184. "Whether Locke's theory provides support for *any* intellectual-property rights is thus uncertain. It depends on which aspects of Locke's original theory are dominant." William Fisher, (*ibid.* at 185).

resulting product." [296] Hettinger argues further that a person's natural right to possess and use the fruits of the person's labour are different from the rights provided under the intellectual property law system such as under copyright and patents. This is because there is a difference between a creator's right to use the creator's invention and the right to profit by selling it in the market or to receive the market value for it.[297] While Adam Moore supports a Lockean justification of intellectual property and rejects justifications based on utility,[298] Justin Hughes adopts the view that either of the two interpretations of John Locke's theory can be used to justify intellectual property perhaps even more efficiently than if the theory were applied to physical property.[299] Hughes argues further that both Locke and Hegel's personality theory can be used to justify intellectual property.

The personality theory based on the writings of Kant[300] and Hegel[301] is particularly popular in some European civil law jurisdictions such as France and Germany. The theory sees property as an expression of self and the products of the intellect as possessions that

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[296] Edwin C. Hettinger, "Justifying Intellectual Property" (1989) 18 Phil. & Publ. Affairs 31 at 39-40.

[297] Edwin C. Hettinger, "Justifying Intellectual Property," *ibid.* at 40. See also Seana Valentine Shiffrin. "Lockean Arguments for Private Intellectual Property" in Stephen Munzer, ed., *New Essays in the Legal and Political Theory of Property* (New York: Cambridge University Press, 2001) 138.

[298] Adam D. Moore, *Intellectual Property & Information Control: Philosophic Foundations and Contemporary Issues* (New Brunswick, NJ.: Transaction Publishers, 2004).

[299] See Justin Hughes "The Philosophy of Intellectual Property" (1988) 77 Geo. L.J. 287 at 296-297.

[300] See for example, Immanuel Kant, "Of the Injustice in Counterfeiting Books," in *Essays and Treatises on Moral, Political and Various Philosophical Subjects*, trans. by W. Richardson (1798) 226 at 229-30.

[301] See Georg W.F. Hegel, *Hegel's Philosophy of Right*, trans. by T.M. Knox (London: Oxford University Press, 1967). Hegel wrote:

> Mental aptitudes, erudition, artistic skill, even things ecclesiastical (like sermons, masses, prayers, consecration of votive objects), inventions, and so forth, become subjects of a contract, brought on to a parity, through being bought and sold, with things recognized as things. It may be asked whether the artist, scholar, &c., is from the legal point of view in possession of his art, erudition, ability to preach a sermon, sing a mass, &c., that is, whether such attainments are "things." We may hesitate to call such abilities, attainments, aptitudes, &c., "things," for while possession of these may be the subject of business dealings and contracts, as if they were things, there is also something inward and mental about it, and for this reason the Understanding may be in perplexity about how to describe such possession in legal terms. . . .

Georg W.F. Hegel, *Hegel's Philosophy of Right*, trans. by T.M. Knox (London: Oxford University Press, 1967) at 49. For a critique of Hegel's philosophy, see Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan. L. Rev 957.

should be protected. The theory states that what a person produces by the use of the person's intellect is an extension of the person.[302] Thus on the application of this theory, copyright protection of a textile design is justified because protecting the design is equated with protecting a part of the individual's persona and identity.

Again, there is a divided view on the efficacy of the personality theory to justify intellectual property. Problems identified with justifying intellectual property from a Hegelian perspective include the fact that "A property system protecting personality will have difficulty finding reliable indicia for when people do and do not have a 'personality stake' in particular objects."[303] The argument continues that there would, for example, be problems with using a personality justification for copyrightable computer software because the latter embodies a utilitarian solution for a specific need. Thus, one tends to think of it more as the manifestation of "a raw, almost generic insight" as opposed to that of personality.[304]

This argument appears to be flawed for the following reasons. The personality theory is not based on being able to identify which part of a person's personality is present in a creation. There is no rule that a third party should be able to see a reflection of the author in the textile design. Neither is there a requirement that one should try to ascertain how much personality can exist in a textile pattern or copyrightable computer software for either of these items to merit protection. If this were the case, then it would be difficult to determine how much personality of the individual authors exists in a work of joint

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[302] Margaret Jane Radin has described this as the "personhood perspective." See Margaret Jane Radin, "Property and Personhood," *ibid.*
[303] Justin Hughes "The Philosophy of Intellectual Property" (1988) 77 Geo. L.J. 287 at 339.
[304] *Ibid.* at 341.

authorship such as a book or a textile design. Thus, for example, jointly authored works should be regarded as an expression of a combination of personalities.

The combined effect of these two natural rights theories is that an author of a textile design has a natural right to the fruits of the person's creativity whether it is by virtue of expending labour (as stated by John Locke's theory) or by virtue of the product of creativity being part of a person's identity. From this perspective, this is a right that transcends man-made laws. Man-made laws just give effect to this already existing right. However persuasive these theories are and despite their merits as a form of justifying intellectual property, there are certainly problems with their application. For this reason, some critics reject natural rights theories in relation to copyright altogether.[305] One main limitation of natural rights theories is that by stating that an author has an inherent right to the protection of his or her creation, the theories imply that there should not be a limitation of the creator's use and enjoyment of the creation. However, copyright law is a statutory creation with limitations such as the duration period. This weakens the natural rights argument as a justification to protect any work, including a textile design.

Apart from the fact that the theories do not satisfactorily explain why we grant intellectual property rights, they are not equally applicable to the different intellectual property categories. Some theories may be more category specific as they may better explain why we should grant intellectual property rights for certain types of works.

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[305] For further discussion, see Lionel Bently & Brad Sherman, *Intellectual Property Law*, 2d ed. (Oxford: Oxford University Press, 2004) at 34.

Bently and Sherman note that only rarely has the natural rights theory been applied to the legal protection of designs:

> [H]istorically, only rarely has the legal protection of designs been justified by reference to the natural-rights of individual designers in their creations. This reflects a commonly held assumption that designs are less creative than artistic works because designing is subject to a number of inevitable constraints. For example, the potential scope for the design of a table is constrained by our existing idea of a table, the functions it must perform, the need for it to be comfortable, cost and the possibilities presented by available materials.[306]

The rare application of the natural rights theories to design protection appears to be questionable and short-sighted, especially with respect to textile designs. First, natural rights theories, if they are to be truly effective, should be applicable to all categories and to all aspects of creativity. They should not be subjected to an evaluation of degrees of creativity and whether one work involves more creativity than another. That would defeat the theory's whole purpose of a person having an inherent right to intellectual property protection. Second, copyright and industrial design protection are very similar in the case of textile designs. This is clearly apparent in situations where for the same design an author has to choose whether to register it under copyright or under industrial designs, based partly on how many copies will be made and whether the design will be produced industrially. Under those circumstances, it is illogical that an artistic work as so defined under the relevant copyright legislation could come under natural rights justifications when less than a particular number is produced, but "lose" those natural rights justifications when it is mass produced. It is, after all, the same design. From this perspective, it seems reasonable to conclude that if natural rights theories apply to copyright, they should justify

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[306] *Ibid.* at 594 [footnotes omitted]. On designs, see also R. Denicola, "Applied Art and Industrial Design" (1983) Minnesota Law Review 707 at 741-743; J. Reichman, "Design Protection in Domestic and Foreign Copyright Law" (1983) Duke L.J. 1143 at 1160, 1220-1, 1235.

textile design protection whether the designs fall under copyright or under industrial design legislation. These and the other weaknesses just discussed, make the natural rights theories unreliable for fully explaining intellectual property rights in textile designs.

3.4.2: THE REWARD THEORY

This theory, based on instrumental justifications,[307] views the intellectual property law system as a way of rewarding inventors for their creativity. One interpretation of John Locke's labour theory, the "Value-Added" Labour theory, is linked to the reward theory and has been used to justify intellectual property. According to the "Value-Added" Labour theory, creators add value to society and should be rewarded for this addition.[308]

The reward theory has been quite popular in copyright circles and has a long history. In the landmark 1769 English case of *Millar v. Taylor*, Willes J. states:

> It is wise in any state, to encourage letters, and the painful researches of learned men. The easiest and most equal way of doing it, is, by securing to them the property of their own works....He who engages in a laborious work, (such, for instance, as Johnson's Dictionary,) which may employ his whole life, will do it with more spirit, if, besides his own glory, he thinks it may be a provision for his family.[309]

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[307] Lionel Bently & Brad Sherman note:

> [C]ommentators often rely upon instrumental justifications that focus on the fact that intellectual property induces or encourages desirable activities....Instrumental arguments are typically premised on the position that without intellectual property protection there would be under-production of intellectual products. This is because while such products might be costly to create, once made available to the public they can often be readily copied. This means that (in the absence of rights giving exclusivity) a creator is like to be undercut by competitors who have not incurred the costs of creation. The inability of the market to guarantee that an investor in research could recoup its investment is sometimes called 'market failure.'

Lionel Bently & Brad Sherman, *Intellectual Property Law*, 2d ed. (Oxford: Oxford University Press, 2004) at 4-5.

[308] On this point, see *e.g.* Justin Hughes, "The Philosophy of Intellectual Property" (1988) 77 Geo. L.J. 287 at 305.

[309] *Millar v. Taylor* (1769), 4 Burr. 2303, 98 E.R. 201, per Willes J., at 218.

As Justice Binnie stated in the 2002 Supreme Court of Canada case, *Théberge v. Galerie d'Art du Petit Champlain Inc.*:

> The Copyright Act is usually presented as a balance between promoting the public interest in the encouragement and dissemination of works of the arts and intellect and obtaining a just reward for the creator (or, more accurately, to prevent someone other than the creator from appropriating whatever benefits may be generated).[310]

The theory presumes that there is the need for such a reward or, even if there is no need, then it is desirable that inventors be rewarded for creating. Therefore, intellectual property protection is justified because inventors must be rewarded for creating. Thus, society grants an author copyright or industrial design protection in appreciation for the author having created the textile design. The main merit of the reward theory is that it seeks to explain why people should be rewarded for creating. However, it does not explain why people create in the first place.

This theory has some shortcomings and leaves some questions unanswered. The theory does not answer questions such as whether there would be any creativity without a reward, be it legal or otherwise. It is undeniable that there would because creativity is not an invention of intellectual property law. It also does not answer the question of whether the intellectual property law system is the best way to reward creators of textile designs. Further, in terms of reward, it might even be thought of as being discriminatory since there are other sectors of society engaged in creative activity which may not have a reward system similar to that provided by the intellectual property law system. As William Fisher has observed, even if society decides that creators should be rewarded for their creations,

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[310] *Théberge v. Galerie d'Art du Petit Champlain Inc* [2002] S.C.R. 336 per Binnie J. at paragraph 30.

many questions would remain such as whether the intellectual property law system is the best way of providing that reward.[311]

There are additional gaps. It is almost impossible to estimate the impact that the copyright system has on people's willingness to create. Further, it is difficult to evaluate the percentage of textile designs that result from their creator being "promised" a reward by the industrial design law system. The inventive and creative process may sometimes be motivated by other considerations which have not been fully ascertained. Not every person who seeks an intellectual property right does so because the person feels he or she should be rewarded. People who create are not always motivated by the reward theory and in fact many of them may not even be aware of the existence of a legal right to reward. In my view, most people who seek an intellectual property right to protect their designs are motivated by the fact that they want to prevent others from creating that type of work or exploiting it.

The intellectual property law system is one which rewards creators whether or not their creativity is motivated by the promise of a reward.

3.4.3: THE ENCOURAGEMENT THEORY

This theory which is also based on instrumentalist justifications states that intellectual property encourages people to create for the ultimate public or common good.

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[311] William Fisher "Theories of Intellectual Property" in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (New York: Cambridge University Press, 2001) 168 at 181. Fisher questions "Is an intellectual-property system the best way of providing that reward or might it be better, as Steven Shavell and Tanguy van Ypersele have recently suggested, for a government agency to estimate the social value of each innovation and pay the innovators that sum out of tax revenues? If the former, how far should creators' entitlements extend? Should they include the right to prepare 'derivative works'?" [footnote omitted]. William Fisher, (*ibid.* at 181). After examining some more complications, he concludes that there is general agreement that all the information required to assess this is not available. William Fisher, (*ibid.* at 181).

Society's best interests being its main preoccupation, the theory presupposes that the dissemination of the creation is necessary for human advancement. For example, copyright protection for a textile design is justified because it will encourage the author to create and disseminate the textile design since the author has a measure of guarantee against unauthorised copying of the design. In the absence of copyright protection, the textile design may remain a secret and the public may be deprived of its enjoyment. Thus to what extent does copyright protection encourage creativity?

The degree to which copyright law is needed to stimulate creativity is debatable. As with the other theories, it is difficult to assess how much creation is due to the copyright law and how much is not. Clearly there was creation before the intellectual property law came into being and there would be creation whether or not the system existed.

While this theory has some merit in that some people may disseminate their creations only because they know they will be protected, there are other questions that this theory leaves unanswered. For example, it fails to answer the question of whether there would be any dissemination without this system.

A final comment is that it is difficult to estimate how many people disseminate their creations only because of the existence of intellectual property law. It is also impossible to evaluate how many people undertake to create textile designs in the first place because there is a promise of protection under copyright law.

3.5: OTHER CONSIDERATIONS

Presently the international human rights framework buttresses the protection of intellectual creations as a human right. The protection of intellectual creations is currently found in several human rights instruments. Some international documents, such as the *Universal Declaration of Human Rights* of 1948[312] and the *International Covenant on Economic, Social and Cultural Rights*,[313] recognise rights in intellectual creations as a human right.[314] For instance, Article 27 of the UDHR provides that:

> 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.

Similarly, Article 15(1) of the ICESCR states:

> 1. The States Parties to the present Covenant recognize the right of everyone:
>
> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. [315]

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[312] *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc.A/810 (1948) 71, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/ udhr/lang/eng.htm> [UDHR].

[313] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR], online: OHCHR <http://www.unhchr.ch/html/ menu3/b/a_cescr.htm>.

[314] For further discussion, see *e.g.* Peter K. Yu, " Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) 40 U.C. Davis L. Rev. 1039 at 1042; Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40 U.C. Davis L. Rev. 971; Rosemary J. Coombe, "Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6 Ind. J. Global Leg. Stud. 59; Ruth L. Okediji, "The Limits of Development Strategies at the Intersection of Intellectual Property and Human Rights" in Daniel J. Gervais, ed., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007) 355; E.S. Nwuache, "The Protection of Expressions of Folklore Through the Bill of Rights in South Africa" (2005) 2:2 Script-ed 223 at 232 (asserting that article 15(1)(b) and 15(1)(c) "constitute the right to intellectual property").

[315] The full Article 15 of the ICESCR states:

> 1. The States Parties to the present Covenant recognize the right of everyone:
> (a) To take part in cultural life;
> (b) To enjoy the benefits of scientific progress and its applications;

These two Articles are almost identical and both recognise that the interests of authors in their creations should be protected. The wording in these Articles echoes the types of protected works listed in international intellectual property agreements such as the Berne Convention[316] or the Convention establishing the WIPO.[317] Those two conventions mention protecting scientific, artistic and literary works.

Despite these similarities, the recent *General Comment Number 17*[318] makes it categorically clear that the right mentioned in Article 15(1)(c) is distinct from the one mentioned in intellectual property agreements.[319] *General Comment Number 17* provides:

> 1. The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author is a human right, which derives from the inherent dignity and worth of all persons. This fact distinguishes article 15, paragraph 1 (c), and other human rights from most legal entitlements recognized in intellectual property systems. Human rights are fundamental, inalienable and universal entitlements belonging to individuals and, under certain circumstances, groups of individuals and communities. Human rights are fundamental as they are inherent to the human person as such, whereas intellectual property rights are first and foremost means by which States seek to provide incentives for inventiveness and creativity, encourage the dissemination of creative and innovative productions, as well as the

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> (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.
> 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.
> 3. The States Parties to the present Covenant undertake to respect the freedom indispensable for scientific research and creative activity.
> 4. The States Parties to the present Covenant recognize the benefits to be derived from the encouragement and development of international contacts and co-operation in the scientific and cultural fields.

[316] See *e.g.* the Preamble to the Berne Convention.

[317] See Article 2(viii), defining intellectual property, and Article 3, stating the objectives of WIPO, in the *Convention Establishing the World Intellectual Property Organization*, online: WIPO <http://www.wipo.int/treaties/en/convention/trtdocs_wo029.html#article_1>.

[318] UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 17: The Right of Everyone to Benefit from the Protection of the Moral and Material Interests Resulting from any Scientific, Literary or Artistic Production of Which He or She is the Author (Art. 15, Para. 1 (c) of the Covenant)*, 12 January 2006. E/C.12/GC/17, online: UNHCR Refworld <http://www.unhcr.org/refworld/docid/441543594.html>. For further discussion on *General Comment No. 17*, see Hans Morten Haugen, "General Comment No. 17 on 'Authors' Rights" (2007) 10 J. World I. P. 53.

[319] *General Comment No. 17*, *ibid.* especially at paragraphs 1-5.

> development of cultural identities, and preserve the integrity of scientific, literary and artistic productions for the benefit of society as a whole.

This means that although one can say that rights in intellectual creations are a human right, one cannot say that rights in intellectual property law are human rights. *General Comment No. 17* also emphasizes the need for a balance to be struck between the private interests of authors and the public interest, for instance, in ensuring the public has access to the former's creations.[320] In addition, it emphasizes that those private rights are subject to limitations and must be balanced with other rights recognised in the ICESCR.[321]

Arguably, the recognition of the protection of intellectual creations as a human right appears to have eclipsed the weight of the justificatory theories, at least henceforth, for explaining the creation of new recognised rights in intellectual creations. This is because there is no higher recognition or reason for protecting intellectual creations other than their recognition as a human right in international instruments. However, *General Comment No. 17*, because it clearly distinguishes rights in intellectual creations from those existing in intellectual property law, cannot be relied upon to explain the framing of intellectual property law. Thus, it does not eliminate the gaps that exist with the justificatory theories.

Notwithstanding all of the philosophical justifications for intellectual property rights, there is the underlying fact that intellectual property rights influence international trade, international relations and national policies. Intellectual property rights are regarded as a means of promoting economic growth. A look at history reveals that copyright has been used as a tool to secure trade advantages. For instance, Goldstein points out that the

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[320] *Ibid.* at paragraph 35.
[321] *Ibid.* at paragraph 22.

United States was opposed to protecting the works of foreign authors when it was a net importer of books, especially from England;[322] however, it became more in favour of protecting the works of foreign authors when it began to export more copyrighted materials.[323] Similarly, it is significant that France became more committed to protecting authors' rights when the international piracy of the works of French authors was beginning to flourish.[324] Thus, obtaining respect for French works was a way of protecting the economic interests of France.

Similarly, the different protection periods for categories may be explained better by national objectives than by the justificatory theories. For example, in discussing the *Calico Printers' Act*, 1787, Ronan Deazley states:

> And yet the question remains as to why, in principle, those who designed and printed calicos should be treated any differently from those claiming protection under the *Engravers Acts* or indeed under the *Statute of Anne*? One printer, Augustus Applegarth, put this very point to the *Select Committee on Copyright in Designs*[325] in 1840:
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> > "My own idea is that the copyright of a pattern ought to be the same as the copyright of a book; I cannot see any difference between the two things. If I was to produce a beautiful engraving, and publish it as a print, I should have a long term of copyright; but if I print it on cloth, I only get three months' copyright.... I cannot see why thought is to be protected in one case and not in the other."[326]

The *Report from the Select Committee on Copyright in Designs*, published in 1840, revealed the Select Committee's concern about the effect an extension period would have

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[322] Paul Goldstein, *Copyright's Highway*: *From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1996) at 180 and 182. For further information on the United States' position, see generally Aubert J. Clark, *The Movement for International Copyright in Nineteenth Century America* (Westport, Conn.: Greenwood Press, 1960).

[323] See *e.g.* Paul Goldstein, *Copyright's Highway*: *From Gutenberg to the Celestial Jukebox*, *ibid.* at 180 and 185.

[324] See *e.g.* Paul Goldstein, *ibid.* at 179.

[325] *Select Committee on Copyright in Designs* [Select Committee].

[326] Quoted in Ronan Deazley, (2008) "Commentary on the *Calico Printers' Act* 1787," in *Primary Sources on Copyright (1450-1900)*, L. Bently & M. Kretschmer, eds., online: <www.copyrighthistory.org>.

on the textile industry. In the early 1800s, 60% of the British export market was based on textiles with the figure rising to over 70% in the 1840s. Deazley continues:

> That the legislature regarded calico printing as an industry of mass production, and one that was germane to the economic health of the nation, may then explain why the artists and engravers who made the designs for the fabrics were accorded a much lesser form of copyright protection than those who produced paper based prints. Calls for protection within a mass market required a market specific response.[327]

The discussion in this section shows that intellectual property rights are not only about designers and authors, but also about national and international trade interests. Arguably, in some cases it is more about national and international interests than about the authors themselves. Apart from those countries or colonies that had intellectual property laws imposed on them, it appears that countries that voluntarily first adopted intellectual property laws did so as a policy measure based on what was viewed to be in the public's interest.

Nevertheless, there is still a place for these justificatory theories in the intellectual property arena. They will probably continue to be used as arguments by lobbyists to justify the expansion of intellectual property rights to other areas. As Bently & Sherman rightly note, despite the differences between the natural rights, reward and incentive-based theories, lobbyists tend to use them together when arguing for an intellectual property protection of hitherto unprotected works or an expansion of legal protection to such works.[328] However, as discussed above, intellectual property laws are based on and shaped by more influences than just the justificatory theories.

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[327] Ronan Deazley, *ibid.*
[328] Lionel Bently & Brad Sherman, *Intellectual Property Law*, 2d. (Oxford University Press, 2004) 37.

3.6: CONCLUSION

This chapter explored the Western concept of property rights for textiles in relation to the categories of intellectual property rights and the philosophies of intellectual property. In this light, it examined the key intellectual property categories on textiles and critiqued the justificatory theories of intellectual property in relation to textiles. It found that intellectual property rights are a Western concept. The examination of the Berne Convention and the TRIPS Agreement showed that these international agreements establish minimum standards thus giving countries considerable latitude in implementing these agreements. Although another main feature is certainty of the creator of a work and of a clearly definable work with a limited duration period, in cases like anonymous and pseudonymous works it is not possible to establish certainty about the creator of the work.

Chapter 3 also showed that the intellectual property law system is not as certain and distinct as first meets the eye. In the first place, some categories such as trademarks and geographical indications have the potential of perpetual duration because one cannot determine at the outset how long the item will actually be protected. There is also some overlap between some of the categories such as copyright and industrial design meaning that that they are not as distinct as one would think and this makes room for other categories to be created.

In examining the justifications for textiles, the chapter described how some theories are category specific and are not equally applicable to copyright, industrial designs and certification marks. Further, although the intellectual property system is driven by the need to reward creation, this view does not paint an entirely accurate picture because not all the theories are about rewarding creativity. For example, certification marks can be used to

show authenticity and maintain production standards, reputation and goodwill. Thus, Chapter 3 showed that the intellectual property law system is not as firm as one would presume and also that its future is sometimes uncertain.

The next chapter examines concerns about cultural appropriation and the extent to which international conventions can effectively tackle this issue.

CHAPTER 4

4: CULTURAL APPROPRIATION, TEXTILES AND THE INTERNATIONAL PROTECTION OF CULTURAL PROPERTY

4.1: INTRODUCTION

Indigenous and traditional communities are increasingly asserting that their culture should be respected and protected.[329] They are expressing discontent about threats to the preservation of their traditions. With respect to traditional textiles, these threats take many forms such as using designs in ways that are offensive to the relevant source community. Indigenous communities are also witnessing the use of their designs by foreigners to market foreign goods. For those communities trying to prevent their traditional practices from being lost, the protection of their culture is in effect a fight for cultural survival. The main issue this chapter addresses is the recourse a community can have if its traditional textiles are taken or stolen from a community or the traditional designs are copied.

Building on the discussions in Chapters 2 and 3 on the significance of traditional textiles and the philosophies of intellectual property rights in textiles respectively, this chapter examines the extent to which traditional textiles are protected under key international instruments. The chapter also analyzes the importance of preserving cultural property. This is a complex multi-faceted subject covering issues such as human rights; the expression of voice and whether one culture has the right to express another culture's voice; identity, cultural survival and repatriation of stolen cultural property. At the heart of

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[329] See *e.g.* WIPO, *Intellectual Property Needs and Expectations*, *supra* note 30.

debates on the protection of cultural property are the issues of who owns culture and the nature that cultural property protection should take.

This chapter is structured as follows. The next section examines the contribution made by indigenous and traditional textile designs to international trade. Section three discusses cultural appropriation while section four addresses its effect on the preservation of cultural heritage. Cultural property protection is one way to arrest cultural appropriation. Consequently, section five discusses some international instruments on cultural property protection. The chapter argues that the international framework for the protection of cultural property is inadequate. In examining the framework for protecting traditional textile heritage, the chapter's central point is that the international agreements studied in the chapter rarely address cultural objects and intangible cultural heritage in one agreement. They are still largely treated as two distinct areas with more protection being provided for movable cultural objects than the intangible ones. The chapter therefore concludes that there is the need for a better balance to be struck between the two.

4.2: THE TEXTILE INDUSTRY, INDIGENOUS TEXTILE DESIGNS AND INTERNATIONAL TRADE

This section situates traditional textiles in the global marketplace and assesses the contribution they make to the international global market. It uses figures on the textile trade. However, it complements this with data on the cultural industries. By presenting the monetary contribution of textiles to the international global market, it reveals why some people find it beneficial to commodify and market other peoples' culture, legitimately or otherwise. This section thus provides a trade perspective for the discussion on cultural

appropriation. It discusses the contribution textiles make to a number of economies in terms of gross domestic product, employment and trade.

In Scotland, the Scottish Enterprise National Textile Team directed ECOTEC Research and Consulting Limited to assess the potential gains of having a National Register of Tartans and the tartan industry's economic importance. The 2007 report found that Scotland's tartan industry contributes substantially to its national textiles sector with an estimated 200 tartan-related enterprises operating in Scotland, about half of which represent kiltmakers. Scotland's tartan industry's direct contribution to employment is about 4,000 jobs. Its total economic contribution, including induced and indirect employment effects, is estimated at approaching 7,000 jobs. Overall, tartans contribute approximately £350 million per annum to Scotland's GDP.[330]

Indonesia is well known for its textiles.[331] The textiles and garment industry constitutes one of Indonesia's major exports. From the early 1980s, it became Indonesia's major non-oil export and generated millions of dollars in revenue and provided employment for at least 1.5 million people.[332] Notwithstanding quotas imposed by importers, including the European Union countries and the United States, the value of

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[330] ECOTEC, "The Economic Impact Assessment of Tartan Industry in Scotland - A Report submitted to Scottish Enterprise National Textiles Team, C3365 / May 2007," online: Scottish Enterprise <http://www.scottish-enterprise.com/publications/ecotec_tartan_final_report.doc>. See also, The Scottish Government, News Release, "National Tartan Register to be set up" (9 July 2007), online: The Scottish Government <http://www.scotland.gov.uk/News/Releases/2007/07/09113114>; John Ross, "Tartans register 'is only a cosmetic exercise'" *The Scotsman* (24 July 2007), online: The Scotsman <http://news.scotsman.com/topics.cfm?tid=867&id=1150842007>.

[331] For further information on Indonesia and its traditional arts, see generally Robyn Christine Roper, *Traditional Arts, Contemporary Artists: A Study of Influence and Change in Irian Jaya, Indonesia* (M.A. Thesis, University of Victoria, 1999) [unpublished].

[332] Rita A. Widiadana, Features, "RI Textile, Fashion Face Stiff Competition" *The Jakarta Post* (9 June 2005), online: The Jakarta Post <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20050609.Q01>.

Indonesian textile exports rose from US$7.1 billion in 2003 to US$7.7 billion in 2004.[333] A September 2008 report issued by the Indonesian Trade Ministry's director of industrial and mining product exports showed that textile products accounted for 22 percent of the country's non-oil and non-gas exports and 14 percent of its industrial exports.[334]

Since this is a relatively new area, there is little data on the commercial value of traditional knowledge internationally and few studies on the relationship between TCES and economic growth.[335] Indeed part of the impetus for studies on traditional knowledge and economic growth has come from research on the relationship between traditional knowledge and intellectual property. A study by Kamil Idris, WIPO's former Director-General, states, "Until quite recently, TK assets have been largely overlooked in the IP community and in this sense, they are traditional but new intellectual assets...."[336] Most of the literature on traditional knowledge concerns the genetic, medical, agricultural and scientific aspects of traditional knowledge than it does TCES. However, it can be predicted that there will be more studies on TCES especially as a result of globalization and the internet.[337]

Nevertheless, available figures reveal that the global cultural trade is a significant one. For example, "The National Aboriginal and Torres Strait Islander Cultural Industry

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[333] Rita A. Widiadana, Features, "RI Textile, Fashion Face Stiff Competition" *The Jakarta Post* (9 June 2005).
[334] Dewi Savitri Reni, "We Must Copyright Our Batik Designs" *The Jakarta Post* (20 November 2008), online: The Jakarta Post <http://www.thejakartapost.com/news/2008/11/20/we-must-copyright-our-batikdesigns.html>.
[335] On this point, see *e.g.* Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (Geneva, Switzerland: World Intellectual Property Organization, 2002), online: WIPO <http://www.wipo.int/about-wipo/en/dgo/wipo_pub_888/index_wipo_pub_888.html> at 248 (stating that although TK in the cultural industries is concentrated in areas like arts and crafts, there is little economic data on the commercial value of TK to the cultural industries. Further, much of the available information is on Australia, the US, Canada and New Zealand).
[336] Kamil Idris, *ibid.* at 238.
[337] See *e.g.* Kamil Idris, *ibid.* at 53 and 238.

Strategy estimated the indigenous arts and crafts market to be worth almost US$200 million per year."[338]

TCES' potential for contributing to the economic growth of countries, especially developing countries, is a mixed one. From the interest in TCES in foreign countries as well as incidents of the unauthorised commercialisation of TCES in foreign countries, for example by the production of traditional designs on t-shirts, it is undeniable that TCES can boost the economic growth of source communities. It has been asserted that:

> Tradition-based innovations and creations, including expressions of folklore, which are important parts of a community's heritage and cultural patrimony, can act as inputs into other markets, such as entertainment, art, tourism, architecture, and fashion.
>
> For developing countries especially, commercialization of tradition-based innovations and creations, if so desired by the relevant communities, can bring economic benefits, play a part in creating new trading opportunities, and contribute to sustainable economic development. For countries rich in traditional knowledge, the protection, promotion, and development of such knowledge can add to their competitive advantage. The long-term sustainable development of indigenous and local communities depends, at least to some degree, on the communities' abilities to harness their traditional and local technologies....[339]

This is particularly relevant to textiles and designs which can be used in the fashion and art industries. However, and as the above quote states, the contribution traditional knowledge can make to economic development depends on "if [it is] so desired by the relevant communities."

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[338] Quoted in Kamil Idris, *Intellectual Property: A Power Tool for Economic Growth* (Geneva, Switzerland: World Intellectual Property Organization, 2002), online: WIPO <http://www.wipo.int/aboutwipo/en/dgo/wipo _pub_888/index_wipo_pub_888.html> at 250. "The market for indigenous Australian arts and crafts was estimated at US$200 million in 1999...." Betsy J. Fowler, "Preventing Counterfeit Craft Designs" in J. Michael Finger & Philip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004) 113 at 116.

[339] Kamil Idris, *ibid.* at 240.

It has also been asserted that the long-term economic development of the concerned communities is a function of their ability to "harness their traditional knowledge for their economic benefit....Hence, protection of TK at national and international levels may be seen as a potentially powerful tool for advancing the integration of developing and least developed countries into the global economy."[340]

The effect that strong cultural heritage protection has on trade and economic development is therefore difficult to predict. Some TCES, due to their symbolism and role in society, are not items for trade.[341] Others are also designed for use by a specific community; consequently, cultural heritage protection laws will not necessarily translate into increased production of a cultural item nor change the status of the items from non-marketable ones to marketable ones. This puts a limitation on their trade potential. However, that is for the relevant community to decide. Nevertheless, cultural heritage protection should help to prevent the unauthorised commercialisation of textiles and other TCES.

4.3: CONCEPTS AND MECHANISMS OF CULTURAL APPROPRIATION

The issue of cultural appropriation can be likened to a tangled web one tries to unravel. This is because there are different issues involved in cultural appropriation: discussions ranging from minority versus majority struggles, domination, power, the commodification of a culture, economic growth, monetary rewards, the expression of

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[340] *Ibid.* at 244.
[341] This was one of the findings in Chapter 2, above.

societal voice, the theft of native stories,[342] whether culture should be able to move freely from one society to another and, at its most basic level, a determination of what cultural appropriation really is.

Although there are various studies on cultural appropriation, there is no settled definition for it. For instance, one definition of cultural appropriation is "the taking—from a culture that is not one's own—of intellectual property, cultural expressions or artifacts, history and ways of knowledge."[343] However, as Ziff and Rao point out, that definition is not clear on issues like what "taking" means and what values are taken.[344]

There are also conflicting opinions on the existence of cultural appropriation and, if it does exist, whether it produces positive or negative effects. Debates on appropriation cover many areas such as music, art, and the scientific and technical aspects of the traditional knowledge of indigenous and traditional communities. Some scholars regard the idea of cultural appropriation as nothing more than a vehicle to champion minority rights.[345]

On the other hand, scholars like Ziff and Rao have provided a useful analysis of appropriation and its components. They describe it as comprising three main points: "(1)

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[342] See *e.g.* Lenore Keeshig-Tobias, 'Stop Stealing Native Stories' in Bruce Ziff and Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 71 at 71-73.

[343] Quoted by Bruce Ziff & Pratima V. Rao, "Introduction to Cultural Appropriation: A Framework for Analysis" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) at 1.

[344] Bruce Ziff & Pratima V. Rao, "Introduction to Cultural Appropriation: A Framework for Analysis," *ibid.* at 1.

[345] Robert Fulford for example wrote that "The word 'appropriation' ... has lately become a rhetorical weapon in the hands of intellectuals claiming to speak for minority rights. Its power derives, oddly, from its very irrationality. In my experience, people hearing of it for the first time cannot believe that anyone would put forward so ludicrous an idea: even the most modern education in cultural history teaches us that art of all kinds has depended on the mixing of cultures." Quoted by Bruce Ziff & Pratima V. Rao, "Introduction to Cultural Appropriation: A Framework for Analysis" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 1 at 8. Rosemary J. Coombe also cites examples of statements that some scholars have made questioning and ridiculing the notion of cultural appropriation. See Rosemary J. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 74 at 76.

appropriation concerns relationships among people; (2) there is [a] wide range of modes through which it occurs; and (3) it is widely practi[s]ed."[346] They continue by describing cultural appropriation and cultural assimilation as forms of cultural transmission. They assert that although appropriation is regarded as having occurred when a dominant culture takes from a subordinate culture, appropriation or cultural borrowing is multidirectional. In their view, cultural appropriation can be distinguished from cultural assimilation in that the latter is a complementary opposite of cultural appropriation.[347]

Scafidi distinguishes cultural appropriation from cultural appreciation.[348] Scafidi also refers to "permissive appropriation"[349] meaning, for example, that the mere appearance of an indigenous design on a T-shirt or a book cover does not *prima facie* establish that an act of unlawful appropriation has occurred.

Expanding on Scafidi's idea of permissive appropriation, it thus appears that the mere act of appropriation does not on its own determine whether the act is lawful or a theft. Several factors determine whether it is right or wrong, such as whether the consent of the "owners" of the culture was obtained if there was an obligation to obtain the consent and, whether the consent having been obtained, the cultural component was used in accordance with the terms of the consent. A third factor is a determination of the relationship between the parties, whether one group is dominant and the other a minority and whether one group exercises some control over the other. In cases where there is no obligation to obtain

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[346] Bruce Ziff & Pratima V. Rao, "Introduction to Cultural Appropriation: A Framework for Analysis" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 1 at 3.
[347] Bruce Ziff & Pratima V. Rao, "Introduction to Cultural Appropriation: A Framework for Analysis," *ibid.* at 5.
[348] Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law*, *supra* note10 at 6.
[349] Susan Scafidi, *ibid.* at 115.

consent, then no unauthorised use of culture has occurred if no prior consent is obtained before the cultural object is used.

Cultural appropriation does not always involve one dominant group taking from a minority, since appropriation can occur in the other direction. Further, from Scafidi's distinction between permissible and impermissible appropriation, the importance of considering whether consent is required for the use is underlined. There are, however, other writings on this subject which, in using the term appropriation, do not make a distinction between permissible or impermissible, scholarly articles in which the term is used to depict inequitable treatment especially of traditional knowledge.[350] For the purposes of this work, the use of the term cultural appropriation does not include "permissive appropriation."

At the basic level, cultural appropriation refers to using an element of another's culture. It involves the movement of cultural products from one culture to another, how this movement is regarded and the effect of this movement. It involves relationships between peoples and cultures sometimes from a political perspective in relation to subordinate and dominant cultures and sometimes from a power perspective. As Rosemary J. Coombe analyzes in relation to First Nations people in Canada:

> Native peoples discuss the issue of cultural appropriation in a manner that links issues of cultural representation with a history of political powerlessness; a history of having Indian identity continually defined and determined by forces committed to its eradication. Alienated from their own historical traditions, first by government and now by commerce, they find their "culture" valued while their peoples and their political struggles continue to be ignored. The experience of everywhere being seen, but never being heard, of constantly being represented, but never listened to, of being treated like artifacts rather than as peoples, is central to the issue of cultural

[350] See *e.g.* Naomi-Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 255.

> appropriation. The Canadian public seems intensely interested in things Indian but seem to have less interest in hearing Native peoples speak on their own behalf.[351]

Cultural appropriation occurs due to many practices such as: (1) taking and using a component of culture developed by and belonging to a community or ethnic group without obtaining the consent of the community, where such consent is required; for example, printing traditional designs on shirts or other textiles without consent having first been obtained;[352] (2) selling counterfeit copies of traditional art as originals; (3) taking and using a traditional design in a manner that the community has not endorsed; (4) taking and using a textile or textile design without acknowledging its source; and (5) using traditional textiles and traditional textile designs in a manner that contaminates or devalues them. The use of the term appropriation in this work covers the unauthorised taking and removing of cultural objects and textiles. It also covers using and taking a community's textile designs. It thus refers to the physical textile and the intangible designs.

The next section examines four climates of cultural appropriation, namely: (1) colonialism; (2) wars; (3) appropriation in times of peace; and (4) the role played by the international art trade, museums and galleries.

4.3.1: COLONIALISM

There are still prevailing views that part of the reason why indigenous people have struggled and are still struggling to have their cultural property and traditional knowledge

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[351] Rosemary J. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 74 at 88.

[352] See *e.g.* Betsy J. Fowler, "Preventing Counterfeit Craft Designs" in J. Michael Finger & Philip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004) 113-131.

respected is due to colonialism. This section thus examines colonialism's role in the appropriation of culture and traditional textiles.

Regardless of the reasons for colonialism, colonialism is about foreign domination and control of another. One perspective the colonisers adopted during the colonial period was that the native inhabitants of the colonies were uncivilised and in need of redemption. The culture of such peoples was not valued.[353] Their land was regarded as *terra nullius* and their culture as well. Colonialism is linked to the idea of culture being the common heritage of mankind.[354] In the case of Africa, the scramble and partition of Africa was formalised by European countries at the Berlin Conference from 1884-1885 and the signing of the Berlin Act on 20 February 1885 by the European powers strengthened even further the European position there.

The colonial era put the colonisers in a position of power over the colonies and witnessed not only the taking of the land of the colonised, but also the movement of cultural property and heritage from the colonies to the coloniser countries. As Jan Pronk, the Dutch Minister for Development Cooperation, stated in a speech in 1994, "Two centuries ago, the river Niger and the lands through which it flowed were practically unknown to the rest of the world. But once the West had discovered the 'forgotten continent' and explorers had blazed the first trails, a veritable army of archaeologists moved in and took whatever they wanted."[355]

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[353] For further discussion, see *e.g.* Rosemary J. Coombe, "Authorial Cartographies: Mapping Proprietary Borders in a Less-Than-Brave New World" (1996) 48 Stan. L. Rev. 1357.

[354] For further discussion on the common heritage of mankind, see section 4.5., below. See also Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 255.

[355] Jan Pronk, "Fighting Poverty is Important For the Safeguarding of Cultural Heritage" in Harrie Leyten, ed., *Illicit Traffic in Cultural Property: Museums Against Pillage* (Amsterdam: Royal Tropical Institute, 1995) 8 at 9. See also George H. Okello Abungu, "Africa and Its Museums: Changing of Pathways?" in

Colonialism's main contribution to cultural appropriation was to provide a vehicle for appropriation. It ignored the value of the colonies' culture. In addition, it legitimised the taking and using of the culture of the colonised without compensation while ignoring or silencing the voice of the colonies. Further, some cultural objects taken from the colonies were housed in museums in the coloniser countries.

Harrie Leyten, the former Secretary of the International Committee of the Museums of Ethnography, observes that while European powers were increasingly recognising the importance of protecting their own national heritage and nineteenth-century Europe was passing some national legislation to protect their national heritage, European powers appeared to be blind to the right of other countries to do likewise. Leyten notes further that it is astounding to realise that European expeditions felt at liberty to take back treasures from Asia, Africa and Latin American countries for examination at universities or relegation to colonial museums while, "Apparently, the question of property rights was not brought up. No doubt, the fact that the territories from which the treasures were removed were regarded as the 'property' of the European country largely accounted for this double standard."[356]

Colonialism's effects still linger in this post-colonial era, giving the protection of indigenous traditions an added significance. Having lost lands during the colonial period, indigenous peoples regard preserving their cultural traditions as indispensable to their survival and to their ability to transmit their heritage to future generations. Some former

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Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 386 at 388 (asserting that many of the people who came to Africa during colonialism such as white settlers, missionaries and administrators were also involved in collecting African heritage).

[356] Harrie Leyten, "Illicit Traffic and the Collections of Western Museums of Ethnography" in Harrie Leyten, ed., *Illicit Traffic in Cultural Property: Museums against Pillage* (Amsterdam: Royal Tropical Institute, 1995) 14 at 15.

colonies see the theft of their traditional art as a continuation of colonialism. In the Americas, Pre-Columbian art is highly prized and stolen on a wide scale. For example, the theft of some Aymara textiles reminded the Aymara, who had lost a great deal during the colonial period, of the injustices of that time.[357]

4.3.2: WARS

This section discusses the role that wars play in cultural appropriation and how this applies to traditional designs. The key question here is the nature of the relationship between wars and cultural appropriation.

From an analysis of the past, it appears that this subject may be more relevant to the movement or physical destruction of cultural property or to TCES in some material form, than to intangible TCES. This view is supported by the fact that international agreements and instruments in this area have tended to focus on the effect of wars on tangible cultural property as opposed to intangible cultural property. In fact, until relatively recently most of the international deliberations in this area did not address intangible cultural property.

Since the earliest times, it has been the practice for conquering nations to take the treasures of nations defeated in war. The general view was that in a war the vanquisher was entitled to the loser's "spoils." However, while commenting that historically the international community did not protect defeated nations from being plundered by the conquerors, some scholars have questioned the effects of this situation as follows:

> What about the interest of future generations in their nation's cultural property? Should they be deprived of their national artistic heritage merely because their country was once defeated in war? The protection of national patrimony from plunder has ramifications beyond the preservation of

[357] This is discussed in section 4.5.1., below.

> cultural heritage for future generations. A conquering country's retention of another's artistic patrimony can lead to conflict many years after the initial plunder.[358]

However, the international community increasingly recognised the value of cultural property with some instruments on the protection of cultural property even in war times. Some early signs of the shift in attitudes include the writings of Emmerich de Vattel, the United States' attempts in 1863 to incorporate some guidelines in the Lieber Code, the Conference of Brussels in 1874 and the Hague Conventions in 1899[359] and 1907.[360] The 1907 Hague Convention provided *inter alia* that private property and religious practices should be respected and private property could not be confiscated.[361] It also forbade pillage,[362] protected objects of cultural significance such as works of art and science and historic monuments,[363] and provided further that any seizure or wilful damage done to institutions of this nature "should be made the subject of legal proceedings."[364]

Provisions like these were significant in affording cultural objects some protection. They also bound nations to show respect for each other's cultural heritage even in times of war. The "spoils of war" were supposedly no longer free for the victor's taking. These provisions meant that in war time traditional textiles could fall within the range of protected cultural heritage because as cultural objects and works of art, they were protected

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[358] Leonard D. DuBoff, Sherri Burr & Michael D. Murray, *Art law: Cases and Materials* (Buffalo, N.Y.: W.S. Hein, 2004) 32.

[359] *Convention (II) with Respect to the Laws and Customs of War on Land*, with Annex, 29 July 1899, in force 4 September 1900, UKTS 1 (1901). See also, The Avalon Project – Documents in Law, History and Diplomacy, "Laws of War: Laws and Customs of War on Land (Hague II); July 29, 1899," online: Avalon <http://avalon.law.yale.edu/19th_ century/ hague02.asp>.

[360] *Convention (IV) Respecting the Laws and Customs of War on Land,* and Annex, 18 October 1907, in force 26 January 1910, UKTS 9(1910) [1907 Hague Convention]. Article 47 of the Annex to this Convention forbids pillage. See also, The Avalon Project – Documents in Law, History and Diplomacy, "Laws of War: Laws and Customs of War on Land (Hague IV); October 18, 1907," online: Avalon <http://avalon.law.yale.edu/20th_century/hague04. asp>.

[361] Article 46, Annex to the 1907 Hague Convention.

[362] Article 28 and 47, Annex to the 1907 Hague Convention.

[363] Article 27 and 56, Annex to the 1907 Hague Convention.

[364] Article 56, Annex to the 1907 Hague Convention.

from destruction in war time. However, although the textile objects could be protected from seizure or destruction, these provisions did not protect textile designs from being copied.

Examples of intangible cultural heritage such as designs do not fit fully into this model of the protection of cultural property in war time because the latter deals mainly with the destruction or movement of physical property. Intangible cultural property is different because it can be copied without having to be physically moved and, therefore, requires provisions to prevent copying or remedies for unauthorised copying. Therefore, the exclusion of intangible cultural property from these war conventions might not be a serious omission, since it is unlikely that in war time the combatants would adopt a campaign of copying their opponent's textile designs. Further, at the time these early war conventions were made, technology had not advanced to the stage it is now; the computer had not been invented and there was no threat to the integrity of intangible works as big as that which the digital revolution, which facilitates large-scale copying, has since ushered in. Nevertheless, the fact still remains that these conventions do not prevent the reproduction of intangible cultural designs.

Moreover, prior to the end of the Second World War and the 1954 Hague *Convention for the Protection of Cultural Property in the Event of Armed Conflict*,[365] it appears that Europe did not apply this principle of protecting cultural heritage in time of war when it came to non-Europeans for despite these international provisions, European museums did collect, acquire, house and display cultural materials that European countries obtained during military expeditions to non-European countries. As Ana Filipa Vrdoljak points out

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[365] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, in force 7 August 1956, 249 U.N.T.S. 240, online: UNESCO <http://www.unesco.org/culture/laws/hague/html_eng/page1.shtml>.

"[t]his disparity was both convenient and far from being an oversight. International Law principles relating to cultural objects, if they were applied at all, were applied differently to non-European peoples."[366]

4.3.3: APPROPRIATION IN TIMES OF PEACE

Even in times of peace, there are many challenges to the protection of art and culture. Various issues plague the international art trade such as regulation, non-regulation, pillage, theft and looting of art works. Other questions concern issues of restitution and return of art in peace time, whether obtained during past wars or otherwise. These issues are not confined to one section of the world, but are international issues.

The first activity that relates to appropriation in times of peace is theft of cultural objects. In the EU, for example, Italy has concerns about how to protect its treasures and artifacts from continued theft.[367] In the Americas, Pre-Columbian art is highly prized and stolen on a wide scale.

The second method deals with the copying of traditional textiles and the production and marketing of imitations without the prior consent of the original producers of the textiles. Indigenous peoples and cultural communities have concerns in the design and textiles area about how to prevent their traditional designs embodied in their hand-made textiles, garments and weavings from being imitated and marketed by non-indigenous peoples.[368] It is during times of peace that the Inuit in Canada had and continue to have

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[366] Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (New York: Cambridge University Press, 2006) at 67.

[367] See *e.g.* Manus Brinkman, "Reflexions on the Causes of Illicit Traffic in Cultural Property and Some Potential Cures" in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 64 at 65.

[368] A WIPO document lists concerns about the unauthorised commercialisation of traditional designs, weavings and garments, including saris in South Asia, the wari woven tapestries and textile bands from Peru,

ongoing concerns about protecting their traditional designs especially the amauti.[369] The question these examples raise and which is the topic of ongoing debate, since it involves issues of ownership of culture and sovereignty, is whether prior consent is required and, if so, from whom.

In addition, the collection, documentation and museum display of this cultural heritage, whether it consists of traditional textiles or sculptures, raises other issues which are examined in the next section.

4.3.4: INTERNATIONAL ART TRADE, MUSEUMS AND GALLERIES

The origins of museums are traced to the West where they started as individual collector's hobbies and grew to be houses of collections. In Europe in particular, the items stored in museums were initially items that just reflected the trends of the time. However, with time, museums housed items considered to be rare and the unique heritage of mankind, items which represented "ours" as well as the "others'" and collections which came to be regarded as untouchable.[370] Museums play an important role in society by being a place where art is shown to the public. They serve not only as a means of entertainment and relaxation, but also as a means of collecting, instructing, safeguarding and protecting art and cultural heritage.

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and the "tie and dye" cloth in Nigeria and Mali. See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 4th Sess., WIPO/GRTKF/IC/4/3 (2002), *Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore*, online: WIPO <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_4/wipo_grtkf_ic_4_3.pdf>

[369] This is discussed in greater detail in Chapter 5, below.

[370] See George H. Okello Abungu, *supra* note 355.

However, the work and operation of museums are sometimes embroiled in controversy and disputes.[371] Museums add another dimension to the debate on the ownership of culture, raising issues about whether displaying a cultural object from another country can be regarded as owning another's culture or even whether one country should display an object belonging to another country's cultural heritage in the former's museums. Many museums had and still have collections of cultural objects and items taken from the colonies during the colonial period.[372]

Items of cultural heritage are often stolen and become a part of the illicit international trade in art, subsequently housed in foreign museums and sometimes displayed in "major exhibits with elaborate and glossy catalogues aiming to legitimize their appropriation. The issue of holding heritage on behalf of those with inadequate security and inappropriate facilities is still a common excuse for the powerful to hold on to the others' heritage, irrespective of its provenance and how it was acquired."[373] The issue is complicated further by the fact that some of the people whose cultural heritage the relevant objects belong to sacrifice community interests for their personal well-being by facilitating or participating

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[371] As Gerald R. Singer states:

> Museum cultural collections have been an arena of contention. Museums assembled and continue to assemble and preserve these repositories as the cultural heritage of mankind, whereas, many indigenous peoples have often considered the collections to be the product of conquest and subjugation, resulting in a loss of tangible objects and artifacts of their unique creation that are interdependent with their rituals and traditions, and in the creation of archives, a loss of privacy for secret or closed rituals and traditions. Use of the collections and archives for research, education, and exhibition has also traditionally proceeded without consultation with the indigenous people represented. Those traditions are changing.

Gerald R. Singer, "Unfolding Intangible Cultural Heritage Rights in Tangible Museum Collections: Developing Standards of Stewardship" in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 413.

[372] For further discussion, see Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006) at 9.

[373] George H. Okello Abungu, *supra* note 355 at 387. For more information on the illegal art trade, see Paul M. Bator, *The International Trade in Art* (Chicago: University of Chicago Press, 1983).

in the looting, theft and sale of cultural heritage items.[374] Museums contribute to the appropriation of cultural heritage by purchasing, housing and displaying cultural objects from other countries or from within their home country which may have been unlawfully obtained.

This creates the challenge of whether countries whose cultural objects are housed in foreign museums, either because they were taken during the colonial period or may have been stolen, can have these items returned to their countries of origin. For instance, the Bust of Nefertiti has been on public display in Berlin since 1923 and is currently on display in Berlin's Egyptian museum, while the Rosetta stone has been in a British museum since 1802. In 2003, Egypt unsuccessfully tried to have its antiquities returned to it for an exhibition. Egypt was also outraged about an art work showing the Bust of Nefertiti with a scantily clad woman's body and subsequent jokes in the German press about prudish Egypt.[375] The presence of the Bust of Nefertiti in Berlin caused some further tension between Egypt and Germany when the German government refused Egypt's request in 2007 to loan the Bust of Nefertiti to Egypt. Germany maintained that the Bust of Nefertiti is German property.[376] The German claim to this cultural object is that it was unearthed by Ludwig Borchardt, a German archaeologist, in Egypt in 1912 and brought to Germany under a 1913 agreement. Egypt's claim to the Bust of Nefertiti is based on the fact that Nefertiti was a former Egyptian queen. Incidents like this raise questions about the legality, morality and ethics of one country displaying in a museum objects which are part

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[374] An example is the theft of the Aymara textiles discussed in section 4.5.1., below.

[375] See Leonard D. DuBoff, Sherri Burr & Michael D. Murray, *Art law: Cases and Materials* (Buffalo, N.Y.: W.S. Hein, 2004) at 100.

[376] For further information, see Tristana Moore, "Row over Nefertiti Bust Continues" *BBC News*, Berlin (7 May 2007), online: BBC <http://news.bbc.co.uk/1/hi/world/europe/6632021.stm>. For general information on Nefertiti and Egypt, see Joann Fletcher, *The Search for Nefertiti: The True Story of an Amazing Discovery* (London: Hodder & Stoughton, 2004).

of the cultural heritage of another country. It raises additional challenges concerning the recovery and repatriation of cultural relics displayed in foreign museums.

However, the idea of the untouchable museum is gradually changing and a new concept of the museum's role is evolving partly due to the work of the United Nations. Further, there is the emerging view that museums must be guided by ethics and pay greater attention to the source of the items they collect. The International Council of Museums,[377] established in 1946,[378] is an international non-governmental organisation of museum professionals, committed to preserving heritage and combating the illicit trade in cultural property. A cornerstone of ICOM is its ICOM Code of Ethics for Museums, which lays down ethical rules and minimum standards for museums especially on the acquisition and transfer of collections. [379] For example, the principle underlying section 6 of the Code of Ethics is that:

> Museum collections reflect the cultural and natural heritage of the communities from which they have been derived. As such they have a character beyond that of ordinary property which may include strong affinities with national, regional, local, ethnic, religious or political identity. It is important therefore that museum policy is responsive to this possibility.[380]

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[377] The International Council of Museums [ICOM].

[378] ICOM maintains formal relations with UNESCO and has a consultative status with the United Nations' Economic and Social Council. It conducts part of UNESCO's programme for museums. For ICOM's mission see, online: ICOM <http://icom.museum/mission.html>.

[379] In 1971, ICOM was cooperating with UNESCO to publish a first document on "The Ethics of Acquisition." However, on 4 November 1986, ICOM's 15th General Assembly in Buenos Aires (Argentina) unanimously adopted the ICOM Code of Professional Ethics [ICOM Code of Ethics]. This was amended and retitled ICOM Code of Ethics for Museums on 6 July 2001 by the 20th General Assembly in Barcelona (Spain) and was revised on 8 October 2004 at Seoul (Republic of Korea) by the 21st General Assembly. The full code is available, online: ICOM <http://icom.museum/ethics.html>. Of relevance is section 4.4., on the removal of objects from public display, which states that "Requests for removal from public display of human remains or material of sacred significance from the originating communities must be addressed expeditiously with respect and sensitivity. Requests for the return of such material should be addressed similarly. Museum policies should clearly define the process for responding to such requests."

[380] See section 6 of the ICOM Code of Ethics. For further information on ICOM, see Elisabeth des Portes, "The Fight Against Illicit Traffic in Cultural Property: A Priority for Museum Professionals" in Harrie Leyten, ed., *Illicit Traffic in Cultural Property: Museums Against Pillage* (Amsterdam: Royal Tropical Institute, 1995) 34. For more on museums and cultural heritage, see Harrie Leyten, ed., *Illicit Traffic in*

The section also covers the return of cultural property and restitution.[381]

These provisions and initiatives show that a museum is no longer untouchable. Further, they demonstrate that the ties between a community and a cultural heritage object do not cease just because the latter is housed in a foreign museum. In addition, they signal hope for respect for cultural objects and the return of such objects to their countries of origin if that is determined to be the best policy.

Wendland cautions that the preservation of culture through museums may in itself trigger concerns about the violation of the intellectual property rights of the holders of TCES. WIPO is engaged in developing intellectual property related information to guide various institutions including museums, folklorists, collectors and archives.[382]

Clearly museums play an important societal role. As a record of history, they enable countries and cultures to learn about each other. A world in which countries could not display cultural objects from another country might set back education and international cooperation. It is, however, a matter of degree to determine which objects should be displayed in another country's museums and the extent to which one country is willing to let another continue to display the former's cultural objects when it is unclear whether those cultural objects left the country of origin under dubious circumstances. In some cases

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Cultural Property: Museums Against Pillage (Amsterdam: Royal Tropical Institute, 1995); Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006); John Henry Merryman, ed., *Imperialism, Art and Restitution* (New York: Cambridge University Press, 2006); Paul M. Bator, *The International Trade in Art* (Chicago: University of Chicago Press, 1983). For a study on the Canadian situation, see Pamela Rae Krueger, *Counterfeit Cultures: Cultural Appropriation, Art by Native Artists and Canadian Art Galleries* (MA, Laurentian University of Sudbury, 1998) [unpublished].

[381] See section 6 of the ICOM Code of Ethics.

[382] Wend B. Wendland, "Intellectual Property and the Protection of Traditional Knowledge and Cultural Expressions" in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 327 at 330.

the deciding factor in not recovering tangible cultural heritage displayed in foreign museums may be to maintain peace and good international relations.

These developments in the international art trade and the museum field are significant for communities and the protection of traditional textiles. The role of museums has changed, so museums increasingly refrain from collecting and displaying foreign cultural property or even that of communities in their own country without concern for the circumstances under which such objects were obtained. Now, museums have to be sensitive to the cultural heritage of other countries and source communities and thus play an important role in cultural heritage preservation. These developments create the likelihood that in the display of cultural items, museums will respect the concerns of the source community and the nation of origin of the cultural heritage. The increased cooperation between museums in developed and developing countries,[383] largely due to ICOM's work, means that communities have some measure of security that their traditional textiles will not be stolen and displayed without their consent. Further, if the textiles are stolen and displayed in museums without their consent, they would have a greater chance of recovering their textiles from the museums than they would have had in the past. This is especially so as a result of international agreements like the UNESCO

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[383] As Leyten noted in 1995:

> Until recently cultural institutions and museums in many Western countries were reluctant to collaborate with museums and cultural institutions in developing countries to curb the illicit traffic in cultural property. Any discussion about the possible return of cultural or archaeological objects, even human remains, to their countries of origin was taboo. Times are changing, however. There is a growing awareness both among museums in developing countries, especially in Africa, as well as in Europe, the USA and Canada, that only by joining forces and coordinating their efforts can a nation's cultural heritage be safeguarded for future generations.

Harrie Leyten, "Foreword" in Harrie Leyten, ed., *Illicit Traffic in Cultural Property: Museums Against Pillage* (Amsterdam: Royal Tropical Institute, 1995) 5 at 6.

1970 Convention which is discussed later in the chapter.[384] However, and as the tension between Egypt and Great Britain shows, there are limitations as to which items countries can recover from foreign museums.

4.4: EFFECT OF CULTURAL APPROPRIATION

This section expands on the earlier discussion in this chapter by examining the effect of cultural appropriation. As the previous discussion described, one factor which has facilitated the cultural appropriation of TCES is the lack of international regulation since the conventions on the protection of cultural heritage in times of war do not cover intangible cultural heritage such as traditional textile designs.

Although protection of TCES in times of war is not as significant as that of movable cultural heritage, the protection of TCES is important in international conventions because of the four main effects of cultural appropriation of TCES. When cultural heritage is not protected from appropriation, it can result in serious consequences for the source community or nation. It can lead to cultural harm both to the community in question and to the value of the item where the item is used in an inappropriate manner. For example, the swastika symbol is one of the oldest religious symbols in the world, "appearing on Paleolothic carvings on mammoth ivory from the Ukraine, dated ca. 10,000 b.c. Swastikas figure on the oldest coinage in India....Sanskrit *swastika* meant 'so be it' or 'amen.'"[385] It was a symbol associated with goodwill. However, Hitler's adoption of it as the symbol of the Nazi Party caused that symbol to be associated with purposes the source community

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[384] See section 4.5.1., below.
[385] Malcolm Quinn, *The Swastika: Constructing the Symbol* 1st ed. (London: Routledge, 1994) at 11 [footnote omitted].

did not intend. Thereafter the swastika had racist connotations and was practically useless concerning its original purpose of symbolising goodwill.

Ghana is becoming increasingly concerned about another kind of appropriation, namely, the unauthorised commercialisation of its traditional textiles. One Ghanaian copyright official stated that "Works of Ghanaian folk such as the "Kente" and the "adinkra" designs are illicitly exploited on commercial basis across the globe particularly in Asia and the United States."[386] Imitations of these textiles and designs tend to be mass produced in factories and readily available in foreign markets such as in the United States, whereas the original and authentic Ghanaian kente is locally handmade, more expensive, and of a superior quality. Ghana also has to deal with regional compliance since it appears other African countries are also producing and marketing imitations. The cultural appropriation of the kente cloth could be injurious to Ghanaian culture in several ways. The people making unauthorised reproductions of the cloth outside Ghana are depriving Ghanaians in Ghana of a means of livelihood by tapping into a market to which they are not entitled. There is also the danger of these textiles being exported to Ghana and competing with Ghana's local industry. Furthermore, this cloth is prestigious and symbolic in Ghana, and is worn on special occasions. Worn and used out of its cultural setting, there is the danger that this cloth will be devalued and become commonplace. Moreover, the cloth may be inappropriately used because the wearer does not attach as much meaning to

[386] WIPO, "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana," at 10, online: WIPO <http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/ghana.pdf>. Boateng writes of a conversation she had with a vendor in Champaign, Illinois, who was surprised that adinkra symbols have legislative protection in Ghana. The vendor informed her that when the vendor inquired about the copyright implications of using adinkra symbols in her business card in the early 1990s, United States officials informed her that adinkra symbols were part of folklore which was public domain. This was despite the fact that at the time Ghana's copyright provisions of folklore had been in existence for five to six years. Boatema Boateng, "African Textiles and the Politics of Diasporic Identity-Making" in Jean Allman, ed., *Fashioning Africa: Power and the Politics of Dress* (Bloomington: Indiana University Press, 2004) 212 at 224.

it as does the Ghanaian. In addition, the absence of the regulation of the uses of imitations of kente could also adversely affect the value of the original kente.[387]

In addition, when some revenue is obtained from the production of these objects, the appropriation can result in a loss of revenue for the source community. For instance, Bhutan stated in a WIPO study that the unauthorised copying and use of their traditional designs and patterns on machine-made fabrics dilutes the intrinsic value of their textile designs and stifles the local weaving practices, mostly prevalent among women in the villages. The imitation of their traditional textile designs threatens to destroy their traditional textile and weaving crafts.[388]

Further, a misrepresentation of the community of origin's voice can occur when the cultural design or object is associated with an activity that is not consonant with the community's values and worldview. Finally, it can cause a loss of culture when sacred and irreplaceable textiles that have been used in the communities for generations in rituals and for spiritual events are stolen and smuggled to foreign countries.

The protection of cultural objects and intangible cultural heritage have different challenges and considerations. The significance of folklore and cultural heritage necessitates that cultural appropriation not be readily dismissed because concerns about cultural appropriation are sometimes linked to cultural survival. It is therefore necessary to assess what international legal protection is available for tangible and intangible cultural

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[387] See further, Josephine Asmah, "Historical Threads: Intellectual Property Protection of Traditional Textile Designs: The Ghanaian Experience and African Perspectives" *supra* note 148; Boatema Boateng, "African Textiles and the Politics of Diasporic Identity-Making" in Jean Allman ed., *Fashioning Africa: Power and the Politics of Dress* (Bloomington: Indiana University Press, 2004) 212 at 220-221 (commenting on how the use of imitations of kente for items like beach balls, furnishings and umbrella is considered to degrade a cloth usually reserved for ceremonial purposes).

[388] See Bhutan Response to WIPO Survey, *supra* note 104 at 5.

heritage in conventions other than those on intellectual property. Such an assessment is offered in the next section.

4.5: INTERNATIONAL FRAMEWORK FOR THE PROTECTION OF CULTURAL PROPERTY

The framework for the protection of cultural property is a combination of national, regional and international instruments involving different organisations, agreements, conventions and multiple players.

Great strides have been made towards the recognition of the importance of protecting culture because international instruments affirm the right to culture. For instance, Article 27(1) of the *Universal Declaration of Human Rights* of 1948 provides that "Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."[389] The combined effect of the *United Nations Declaration on the Rights of Indigenous Peoples*[390] the UDHR, the ICESCR[391] and the ICCPR[392] is to buttress the importance of protecting culture. This analysis of the cultural property framework focuses on some UNESCO and UNIDROIT conventions which are most relevant to traditional textiles.

UNESCO has been involved for a while with cultural heritage and cultural property issues as evidenced by several instruments like the 1954 UNESCO *Convention for the*

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[389] *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217A (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc.A/810 (1948) 71, online: Office of the High Commissioner for Human Rights <http://www.unhchr.ch/ udhr/lang/eng.htm> [UDHR].

[390] *Supra* note 13.

[391] *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3, 6 I.L.M. 360 (entered into force 3 January 1976) [ICESCR], online: OHCHR <http://www.unhchr.ch/html/menu3/b/a_cescr.htm>.

[392] *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976). For an analysis of this covenant in relation to traditional knowledge, see *e.g.* Hans Morten Haugen, "Traditional Knowledge and Human Rights" (2005) 8 J. World I.P. 663-678.

Protection of Cultural Property in the Event of Armed Conflict which entered into force in 1956[393] and the 1972 *Convention for the Protection of the World Cultural and Natural Heritage.*[394] UNESCO divides cultural heritage into several categories including natural cultural heritage, tangible cultural heritage and intangible cultural heritage.[395] However, UNESCO's policy on cultural heritage protection can be termed a "study of contrast" because some of its policies are not congruent. On the one hand there are initiatives to protect TCES such as the UNESCO—WIPO *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action,* 1982,[396] while on the other hand a number of instruments classify TCES as part of the common heritage of mankind. [397]

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[393] *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, in force 7 August 1956, 249 U.N.T.S. 240, online: UNESCO <http://www.unesco.org/culture/laws/hague/html_eng/page1.shtml>.

[394] *Convention for the Protection of the World Cultural and Natural Heritage*, 16 November 1972, 40 U.N.T.S. 151, 27 U.S.T. 37.

[395] See UNESCO, "The Different Types of Cultural Heritage" The UNESCO list, online: UNESCO <http://portal.unesco.org/culture/en/ev.php-URL_ID=1907&URL_DO=DO_TOPIC&URL_SECTION=201.html>.

[396] *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action,* 1982, see *supra* note 65.

[397] *Convention Concerning the Protection of the World Cultural and Natural Heritage*, 16 November 1972, 27 U.S.T. 37, 40 U.N.T.S. 151, online: UNESCO <http://whc.unesco.org/en/conventiontext/>; *Recommendation on the Safeguarding of Traditional Culture and Folklore*, 15 November 1989, online: UNESCO <http://www. unesco.org/culture/laws/paris/html_eng/page1.shtml>; and the *Universal Declaration on Cultural Diversity*, 2 November 2001, online: UNESCO <http://unesdoc.unesco.org/images/0012/001271/127160m.pdf>. See also Wend B. Wendland, *supra* note 382 at 328, note 6.

4.5.1: The UNESCO *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*[398]

The 1970 UNESCO Convention is one of the most important international conventions tackling the problem of the illicit movement of cultural heritage. It was adopted in Paris on 14 November 1970, entered into force on 24 April 1972, in accordance with Article 21,[399] and was registered at the United Nations on 9 May 1972.[400] There are several conditions which must exist before a requesting state can have recourse to the 1970 UNESCO Convention, including the fact that both the requesting state and the holding state must be parties to the 1970 UNESCO Convention.

There are however some limitations on the application of the 1970 UNESCO Convention. Although the 1970 UNESCO Convention both defines cultural property and lists categories in Article 1,[401] it is not enough that the cultural object in question falls

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[398] *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, 14 November 1970, in force 24 April 1972, 823 U.N.T.S. 231, online: UNESCO <http://portal. unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html>[1970 UNESCO Convention].

[399] 1970 UNESCO Convention, at Article 21 provides that "This Convention shall enter into force three months after the date of the deposit of the third instrument of ratification, acceptance or accession, but only with respect to those States which have deposited their respective instruments on or before that date. It shall enter into force with respect to any other State three months after the deposit of its instrument of ratification, acceptance or accession."

[400] Its United Nation registration is No. 11806.

[401] 1970 UNESCO Convention, at Article 1 provides:

> For the purposes of this Convention, the term 'cultural property' means property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, literature, art or science and which belongs to the following categories:
> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artist[s] and to events of national importance;
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries ;
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
> (f) objects of ethnological interest;

within the definition of cultural property in Article 1 because Article 1 also provides that the cultural property should be "specifically designated by each State as being of importance for archaeology, prehistory, literature, art or science." Thus, a state must have inventoried the particular cultural object in order to have recourse to the provisions in Articles 3 and 7.[402]

Another limitation is that it excludes from protection "industrial designs and manu-factured articles decorated by hand."[403] The 1970 UNESCO Convention does not define industrial designs and manu-factured articles decorated by hand. This suggests that national legislation might be used to define the scope of this limitation. Based on the discussion on industrial design in this dissertation, it might refer to artworks reproduced at least 50 times. This implies that the 1970 UNESCO Convention is concerned with rare items which have not been reproduced on a large scale. Thus, although it covers textiles, it would not apply to those reproduced in large quantities.

The 1970 UNESCO Convention recognises that cultural heritage can result from individual or community genius,[404] making it clear that this Convention recognises community heritage and group rights. However, the 1970 UNESCO Convention only applies prospectively from the time it enters into force in a country. Consequently, a state

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(g) property of artistic interest, such as:
(i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manu-factured articles decorated by hand);
(ii) original works of statuary art and sculpture in any material;
(iii) original engravings, prints and lithographs ;
(iv) original artistic assemblages and montages in any material;
(h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
(i) postage, revenue and similar stamps, singly or in collections;
(j) archives, including sound, photographic and cinematographic archives;
(k) articles of furniture more than one hundred years old and old musical instruments.

[402] Article 7 enjoins States at the request of the State of origin to take the necessary measures to return cultural heritage unlawfully imported after the States became members of the Convention.
[403] 1970 UNESCO Convention, at Article 1(g)(i).
[404] 1970 UNESCO Convention, at Article 4 (a).

cannot use the UNESCO 1970 Convention to recover textile cultural heritage items which were illegally exported before it joined the Convention. Further, the Convention applies to movable or physical cultural heritage thus excluding intangibles. This is one similarity between it and the previously discussed conventions on war.[405]

This discussion now analyzes further the operation of the 1970 UNESCO Convention using the example of the stolen sacred Coroma textiles. Although the focus is on the Coroma community of Bolivia, other communities and countries have similar concerns and the lessons from this example will be beneficial to them as they develop cultural heritage policy on traditional textiles.

Example: Bolivia and the Sacred Coroma Textiles

Over the past few decades, the Coroma community has been increasingly concerned about the preservation of its culture. The Coroma community is located high in the Bolivian Andes and is inhabited by the Aymara Indians. The Aymara make up about 25% of Bolivia's population of roughly 8.4. million. Due to its location, Coroma has been relatively isolated. This has helped the people to maintain many of their traditions and traditional lifestyle.[406] Like other indigenous communities, the art of weaving textiles and the woven textiles themselves play an important role in the community.

The textiles play an important role in Coroma. They are regarded as sacred and are revered by the people of Coroma. The people of Coroma worship their ancestors and

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[405] See section 4.3.2., above.

[406] See Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) Cultural Survival Quarterly 40 (commenting that Coroma's isolation has helped it to maintain its traditional social organization and to preserve the importance of its ancient sacred garments).

believe that these sacred textiles embody the souls or spirits of their ancestors. Consequently, the weavings serve as a link between the people of Coroma and their ancestors. Apart from the religious significance, the textiles have additional value to the community and are consulted for guidance on community life and on important occasions.[407] Cristina Bubba, a Bolivian anthropologist and adviser to the Bolivian Institute of Culture, stated "The ancestors answer in the way candles burn, and coca leaves fall."[408] These textiles are also a record of the history of the people since they contain messages about community events and concerns.[409] The textiles have been kept in bundles known as *q'epis*[410] and are publicly removed from the *q'epis*[411] once a year in November. These sacred textiles are invaluable to the continuity of community life in Coroma.

It was therefore alarming when it was discovered in the 1970s that some of the sacred textiles were missing. The only conclusion that the community could arrive at was that the textiles had been stolen:

> From the community's perspective, as well as under Bolivian law, which recognizes communal ownership, no individual has the moral or legal right to alienate, through payment, that which has ongoing historical, traditional and cultural importance. The sacred weavings are communally owned; if they are not in the community, they have, by definition, been stolen.[412]

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[407] Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) Cultural Survival Quarterly 40 (commenting that the *q'epis* are consulted on issues including when to plant and harvest); Sarah Booth Conroy, "Sacred Textiles Returned to Bolivia" *Washington Post* (25 September 1992), online: <http://culturalheritage.state.gov/aymara.html> at 2 (stating that they are consulted on marriages).

[408] Quoted in Sarah Booth Conroy, "Sacred Textiles Returned to Bolivia" Washington Post (25 September 1992), online: <http://culturalheritage.state.gov/aymara.html>.

[409] See United States Information Agency, Cultural Property Advisory Commission, "Bolivia-U.S. Protection of Aymara Textiles," online: United States Information Agency <http://dosfan.lib.uic.edu/usia/E-USIA/education/culprop/blfact.html>.

[410] See Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) Cultural Survival Quarterly 40.

[411] *Ibid.* at 41.

[412] *Ibid.* at 41.

The theft of the textiles was injurious to Coroma in several ways. The people of Coroma equated the theft of these textiles with the kidnapping of the souls of their ancestors.[413] Therefore, the loss of the textiles meant the loss of an integral part of the community. Other effects included a breakdown of religion, a loss of Coroma's history, a loss of communal identity and an erosion of the boundaries separating Coroma from other ethnic groups.[414] The theft of the textiles continued into the 1980s. The Coroma community's quest to arrest this situation and have the stolen textiles returned to them spanned several years.

The textiles' disappearance was linked to visits by North American ethnic art and antiquities dealers in the 1970s. It was discovered that some of these dealers had bribed and hired Bolivian intermediaries to steal the textiles.[415] These textiles were then illegally exported and some of these textiles became part of the illicit international trade in art and antiquities.[416]

At the time the textiles disappeared, Bolivia already had a strong legal policy on the importance and status of these textiles and on cultural heritage protection. The export of the textiles was in contravention of Bolivian laws because the textiles were part of

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[413] See Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) Cultural Survival Quarterly 40 at 41.
[414] *Ibid.* at 41.
[415] There is sometimes a link between poverty and the disappearance of cultural heritage. As the former Netherlands Minister for Development Cooperation questioned in 1994, "Development is about poverty, cooperation means fair trade, the opposite of theft. It is evident that poverty does create the opportunity for illicit traders to strike and buy up art treasures for very low prices. After all, if you were poor and someone offered you a year's salary for every object you found, would you not pick up a spade and start digging?" Jan Pronk, "Fighting Poverty is Important for the Safeguarding of Cultural Heritage" (Speech delivered on 18 February 1994 in the Rijksmuseum voor Volkenkunde, Leiden, the Netherlands), reproduced in Harrie Leyten, ed., *Illicit Traffic in Cultural Property: Museums against Pillage* (Amsterdam: Royal Tropical Institute, 1995) 9 at 10.
[416] See Sarah Booth Conroy, "Sacred Textiles Returned to Bolivia" *Washington Post*, (25 September 1992), online: <http://exchanges.state.gov/culprop/aymara.html> at 1.

Bolivia's cultural heritage. As early as 1961, Bolivia had outlawed the export of these textiles due to the great interest foreign collectors had shown in them. Bolivia's constitution prohibited the export of Bolivian cultural property.[417] The United States and Bolivia had both signed the 1970 UNESCO Convention;[418] however, the United States was "a major market for these textiles – a market that stimulated the illicit taking and export of nearly half of Coroma's antique textiles."[419]

Some of these textiles were recovered in a joint effort by the Bolivian and United States governments and other groups. Working with the government of Bolivia, United States Customs confiscated several hundred Coroma textiles in the United States. At the request of the Bolivian government, in 1988, the United States placed a 5-year import restriction on the importation of these textiles into the United States which took effect

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[417] Bolivia's 1961 Constitution and 1967 Constitution both protected cultural heritage. For example, see Article 191 of Bolivia's 1967 Constitution. The 1967 Constitution is available online. See Georgetown University, Political Database of the Americas, *Constitución Política de la República de Bolivia 1967/ Republic of Bolivia 1967 Constitution*, online: Georgetown University <http://pdba.georgetown.edu/ Constitutions/Bolivia/ bolivia1967.html>. For example, Article 191 of Bolivia's 1967 Constitution stated:

> *Los monumentos y objetos arqueológicos son de propiedad del Estado. La riqueza artística colonial, la arqueológica, la histórica y documental, así como la procedente del culto religioso son tesoro cultural de la Nación, están bajo el amparo del Estado y no pueden ser exportadas.*
> *El Estado organizará un registro de la riqueza artística histórica, religiosa y documental, proveerá a su custodia y atenderá a su conservación.*
> *El Estado protegerá los edificios y objetos que sean declarados de valor histórico o artístico.*

The English translation of this is that monuments and archaeological objects are the property of the State. The colonial artistic, archaeological, historical and documentary goods and objects related to religious worship are the nation's cultural treasure. They are protected by the State and they cannot be exported. The State will organise a registry of the artistic, historical, religious and documentary goods and will guard and conserve them. The State will protect the buildings and objects that are declared to be of historical or artistic value (trans. by Monica Escamilla and author).

[418] The United States accepted the Convention on 2 September 1983. This acceptance of the 1970 UNESCO Convention was codified into United States law as the "Convention on Cultural Property Implementation Act" (Pub. L. 97-446, 19 U.S.C. 2601 et seq.). For further information, see the 14 March 1989, *Federal Register Notice* on Bolivia, online: <http://dosfan.lib.uic.edu/usia/E-USIA/education/culprop/bl89fr01.html>. Bolivia ratified the 1970 UNESCO Convention on 4 October 1976. For the Parties to the 1970 UNESCO Convention, see "State Parties," online: UNESCO <http://portal.unesco.org/la/convention.asp?KO= 13039&language= E&order=alpha>.

[419] See United States Information Agency, Cultural Property Advisory Commission, "Bolivia-U.S. Protection of Aymara Textiles," online: United States Information Agency <http://dosfan.lib.uic.edu/usia/E-USIA/education/culprop/blfact.html> at 1.

between 14 March 1989 and 5 May 1996. The United States placed the ban in response to a request the Bolivian government made under Article 9 of the 1970 UNESCO Convention[420] and also published a descriptive list of the textiles in the 14 March 1989 *Federal Register Notice.*

The 1970 UNESCO Convention provides at Article 9 that:

> Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected. The States Parties to this Convention undertake, in these circumstances, to participate in a concerted international effort to determine and to carry out the necessary concrete measures, including the control of exports and imports and international commerce in the specific materials concerned. Pending agreement each State concerned shall take provisional measures to the extent feasible to prevent irremediable injury to the cultural heritage of the requesting State.

The Bolivian government's request under Article 9 succeeded because it was able to show that by the continuous theft of the Coroma textiles, cultural patrimony was in danger from pillage of archaeological and ethnological material.[421]

Efforts to recover the garments were not restricted to the United States. The Canadian government also confiscated some illegally exported Coroma textiles.[422] The

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[420] See United States Information Agency, Cultural Property Advisory Commission, "Bolivia-U.S. Protection of Aymara Textiles," online: United States Information Agency <http://dosfan.lib.uic.edu/usia/EUSIA/education/culprop/blfact.html>.

[421] As is stated in records on the incident:

> In reviewing Bolivia's request for protection of the textiles, the Cultural Property Advisory Committee found the record of the Aymara culture to be in jeopardy due to the dispersal and fragmentation of Coroma's antique textiles which were subjected to systematic fraudulent removal from their bundles in Coroma and exported illicitly from Bolivia. Consistent with the Committee's recommendation, the U.S. Information Agency determined that an emergency import restriction be imposed on the antique Aymara textiles.

United States Information Agency, Cultural Property Advisory Commission, "Bolivia-U.S. Protection of Aymara Textiles," online: United States Information Agency <http://dosfan.lib.uic.edu/usia/EUSIA/education/culprop/blfact.html>.

Bolivian government succeeded in having the located textiles repatriated. By 1992, at least 40 of these textiles had been returned to the Bolivian government, which prosecuted Coroma residents and intermediaries who were involved in these thefts.

There are several significant points which stand out from the Coroma incident. First, the indigenous community played an active role in seeking the protection of their property. It was also very helpful for Coroma that the Bolivian government recognised communal ownership and was equally committed to protecting Coroma's cultural heritage. The outcome might have been different if the Coroma community was a very small minority in a country that did not recognise their system of communal ownership or had no clear policy on protecting indigenous peoples' heritage. It would clearly have been much more difficult for them to recover the stolen items. Fortunately, in this case there was not a clash of two concepts of property ownership within Bolivia. The cooperation of foreign governments who were also State Parties to the 1970 UNESCO Convention was a key factor in the textiles' recovery. This shows the importance of international cooperation in this area.[423]

Another issue the Coroma incident reveals is the fact that sometimes members of ethnic groups may aid others in appropriating the former's culture for monetary reward. That should not be regarded as an indication of the lawfulness of the sale of the cultural object because people break laws all the time. Rather, and as happened with the Coroma

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[422] See Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival < http://209.200.101.189/publications/csq/csq-article.cfm?id=923> at 43 and 46.

[423] In fact, the Preamble to the 1970 UNESCO Convention highlights the importance of international cooperation by stating that it considers "that the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation."

case, it is important to consult the concerned community and the country's laws and accepted practices.

The Coroma issue is a prime example of how much interest there is in indigenous peoples' cultural heritage, especially art works. Such items are regarded as rare, valuable and ethnic and there is a great demand for these antiquities in places such as the United States and Europe. With this incident, it was as though colonialism's tentacles were reaching out from the past, with the West robbing the South. As Susan Lobo points out, "The Coroma case also struck a sensitive cord for the Bolivian state, replaying a long history of "conquest," "pillage," and a general sense of theft of riches and resources throughout its colonial relationship with Europe and its neocolonial relationship with the United States, currently dramatized by Bolivia's crushing international debt."[424]

Several acts of cultural appropriation occurred in this incident. The theft of the textiles constituted an unauthorised removal of the items from their cultural setting. In addition, the consumers of the stolen items had no cultural or other link to the Coroma community. They were foreigners who did not have Coroma's attachment to the textiles. No respect was shown for the cultural significance and the role of the textiles in Coroma. Although some of the people who subsequently purchased these textiles may have been unaware of their origin, others such as art museums and individuals may have conveniently ignored how these items were obtained.[425]

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[424] Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival < http://209.200.101.189/publications/csq/csq-article.cfm?id=923> at 44.

[425] Susan Lobo, "The Fabric of Life: Repatriating the Sacred Coroma Textiles" (1991) 15:3 Cultural Survival Quarterly 40, online: Cultural Survival < http://209.200.101.189/publications/csq/csq-article.cfm?id=923> at 42. In fact, it was estimated at one point that about 200 of the textiles were sold to international art and artifacts market.

Since then, the Aymara Indians of Coroma have planned several initiatives to protect their textiles such as documenting their textiles, making an award winning movie on the incident, which was shown in the United States and in Bolivia, and building a local museum as a "ritual place." The Bolivian Government has also passed more legislation to strengthen the position of the textiles. [426]

The success of this example shows the importance of being a party to the 1970 UNESCO Convention and shows that stolen and illegally exported textiles can be recovered so far as there is compliance with the provisions of this convention. However, the UNESCO Convention does not have a strong enforcement mechanism and does not protect intangible cultural heritage such as textile designs.

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[426] See United States Information Agency, Cultural Property Advisory Commission, "Bolivia-U.S. Protection of Aymara Textiles," online: United States Information Agency <http://dosfan.lib.uic.edu/usia/E-USIA/education/culprop/blfact.html>. For additional information and an update on the Coroma textiles case, United States and Bolivia relations, see Sarah Booth Conroy, "Sacred Textiles Returned to Bolivia" *Washington Post*, (25 September 1992), online: <http://exchanges.state.gov/culprop/aymara.html>; Elizabeth Torres, "Chronological Overview of Developments in Bolivian and Latin American Cultural Heritage Legislation with a Special Emphasis on the Protection of Indigenous Culture" in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 124.

4.5.2: THE *UNIDROIT CONVENTION ON STOLEN OR ILLEGALLY EXPORTED CULTURAL OBJECTS*[427]

The UNIDROIT Convention was adopted at Rome on 24 June 1995 and is intended to complement the 1970 UNESCO Convention.[428] It came into force on 1 July 1998 and was formed due to the inadequate enforcement provisions of the 1970 UNESCO Convention. It also has a wider scope than the 1970 UNESCO Convention and the war conventions mentioned above, since it applies to both war and peacetime. It "provides a mechanism in private international law for the restitution of stolen or illegally exported cultural objects during peacetime or war."[429] Article 1 of the UNIDROIT Convention distinguishes between the return of illegally exported cultural heritage and the restitution of stolen cultural heritage.[430]

Article 1 provides:

> This Convention applies to claims of an international character for:
> (a) the restitution of stolen cultural objects;
> (b) the return of cultural objects removed from the territory of a Contracting State contrary to its law regulating the export of cultural objects for the purpose of protecting its cultural heritage....[431]

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[427] The *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects*, adopted at Rome, 24 June 1995, in force 1 July 1998, (1995) 34 I.L.M. 1322, online: UNIDROIT <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm> [UNIDROIT Convention]. UNIDROIT is the International Institute for the Unification of Private Law. For the status of signatures, ratifications and accessions, see, online: UNIDROIT <http://www.unidroit.org/english/implement/i-95.pdf>. Prior to the UNIDROIT Convention, there were four options for recovering cultural property. These were through litigation in foreign courts, the 1970 UNESCO Convention, the UNESCO Intergovernmental Committee and bilateral agreements. See Folarin Shyllon, "The Nigerian and African Experience on Looting and Trafficking in Cultural Objects" in Barbara T. Hoffman ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 137 at 139-141. For a commentary on the UNIDROIT Convention, see Lyndel V. Prott, *Biens Culturels Volés ou Illicitement Exportés: Commentaire Relatif à la Convention d'Unidroit (1995)* (Paris: Éditions Unesco, 2000).

[428] See *e.g.* the UNIDROIT Convention at the Preamble's ninth recital.

[429] Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006) 273.

[430] See the UNIDROIT Convention at Article 1 generally, Chapter III on illegally exported cultural heritage and Chapter II on the restitution of stolen cultural heritage.

[431] It refers to those objects as "illegally exported cultural objects" at the end of Article 1. See Ana Filipa Vrdoljak, *International Law, Museums and the Return of Cultural Objects* (Cambridge: Cambridge University Press, 2006) at 274 (suggesting that by applying to international transactions as opposed to those

The UNIDROIT Convention is similar to the 1970 UNESCO Convention in several respects. First, they have a similar definition of cultural heritage and the UNIDROIT Convention also repeats the list of cultural heritage in the 1970 UNESCO Convention.[432] Thus, UNIDROIT would also protect cultural textile heritage. In fact, cultural heritage which is able to meet the requirements under the 1970 UNESCO Convention would also fall within the requirements of the UNIDROIT Convention. However, unlike the 1970 UNESCO Convention, the UNIDROIT Convention does not require that the heritage should have been designated by the State.[433] The advantage of this, with respect to traditional textiles for example, is that a state can recover traditional textiles whose existence it was hitherto unaware of.

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within States, the UNIDROIT Convention may be significantly limiting indigenous peoples since the "centralising and assimilating policies of States and their museums are as disruptive and destructive to indigenous cultures as those pursued by metropolitan powers.").

[432] Article 2 of the UNIDROIT Convention states that "For the purposes of this Convention, cultural objects are those which, on religious or secular grounds, are of importance for archaeology, prehistory, history, literature, art or science and belong to one of the categories listed in the Annex to this Convention." The categories listed in the Annex of the UNIDROIT Convention are:

> (a) Rare collections and specimens of fauna, flora, minerals and anatomy, and objects of palaeontological interest;
> (b) property relating to history, including the history of science and technology and military and social history, to the life of national leaders, thinkers, scientists and artists and to events of national importance;
> (c) products of archaeological excavations (including regular and clandestine) or of archaeological discoveries;
> (d) elements of artistic or historical monuments or archaeological sites which have been dismembered;
> (e) antiquities more than one hundred years old, such as inscriptions, coins and engraved seals;
> (f) objects of ethnological interest;
> (g) property of artistic interest, such as:
> (i) pictures, paintings and drawings produced entirely by hand on any support and in any material (excluding industrial designs and manufactured articles decorated by hand);
> (ii) original works of statuary art and sculpture in any material;
> (iii) original engravings, prints and lithographs;
> (iv) original artistic assemblages and montages in any material;
> (h) rare manuscripts and incunabula, old books, documents and publications of special interest (historical, artistic, scientific, literary, etc.) singly or in collections;
> (i) postage, revenue and similar stamps, singly or in collections;
> (j) archives, including sound, photographic and cinematographic archives;
> (k) articles of furniture more than one hundred years old and old musical instruments.

[433] See *e.g.* Article 2 and the Annex of the UNIDROIT Convention.

Like the 1970 UNESCO Convention, the UNIDROIT Convention applies prospectively, from the time it enters into force in a country. However, this prospective application does not prevent states from seeking other measures to recover property that was stolen or illegally exported before the UNIDROIT Convention.[434]

One significant feature of the UNIDROIT Convention is its specific provisions on indigenous peoples and tribal communities.[435] For instance, the Preamble recognises the harm that the illicit trade in cultural objects causes to the objects and to cultural heritage. Further, in specifying the time limits for the restitution of stolen objects, the UNIDROIT Convention specifically mentions claims for the restitution "of a sacred or communally important cultural object belonging to and used by a tribal or indigenous community in a Contracting State as part of that community's traditional or ritual use."[436] This makes it very clear that the UNIDROIT Convention applies to communities' cultural heritage. Thus, textile heritage of the Coroma type is clearly covered here. Further with respect to who can lodge a claim, an individual, community or a state party may lodge a claim for the return of a stolen cultural object,[437] while only a state party may lodge a claim concerning illicitly exported cultural objects.[438] Thus the UNIDROIT Convention is especially relevant to indigenous and traditional communities because they may be able to bring a claim on their

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[434] See the sixth recital of the Preamble, Article 10(3) and Article 9(1) of the UNIDROIT Convention.
[435] See *e.g.* the Preamble of the UNIDROIT Convention which states that the State Parties are "DEEPLY CONCERNED by the illicit trade in cultural objects and the irreparable damage frequently caused by it, both to these objects themselves and to the cultural heritage of national, tribal, indigenous or other communities, and also to the heritage of all peoples, and in particular by the pillage of archaeological sites and the resulting loss of irreplaceable archaeological, historical and scientific information." See also Article 3(8), Article 5(3) and Article 7(2).
[436] UNIDROIT Convention at Article 3(8).
[437] Article 3(3) states that "Any claim for restitution shall be brought within a period of three years from the time when the claimant knew the location of the cultural object and the identity of its possessor, and in any case within a period of fifty years from the time of the theft." This Article does not restrict the meaning of the term "claimant" to a State Party, while Article 3(5) specifically mentions a Contracting State.
[438] See Article 7.

own right for the return of stolen cultural objects, without necessarily requiring their state's assistance.[439] This provision thus reduces potential clashes between a state and its communities if the former is unwilling to help the latter. However, indigenous communities might be hampered in their efforts to lodge a claim if they lack the resources to pursue it alone. It is therefore suggested that the state be involved as much as possible. However, in order for the UNIDROIT Convention to apply in a state, the state must have ratified the UNIDROIT Convention.

Concerning the return of illegally exported cultural heritage, Article 5 of the UNIDROIT Convention provides that a contracting State "may request the court or other competent authority of another Contracting State to order the return of a cultural object illegally exported from the territory of the requesting State." However, before the object can be returned the requesting state would have to meet one or more of the criteria in Article 5(3).[440] The Coroma textiles case might very likely have been able to meet all the criteria in Article 5(3).

The main difference between the UNIDROIT and the UNESCO 1970 Conventions is that the former has more enforcement mechanisms and offers specific legal action. Further, by seeking to harmonise the domestic laws of state parties, the UNIDROIT

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[439] For further discussion, see *e.g.* Agnès Lucas-Schloetter, "Folklore" in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004) 259 at 325; Terri Janke, "Our Culture: Our Future, Report on Australian Indigenous Cultural and Intellectual Property Rights" (1998), online: <http://www.frankellawyers.com.au/media/report/culture.pdf> at point 8.4 (commenting on the then Draft UNIDROIT Convention and the fact that if adopted it would allow individuals and indigenous peoples to bring claims).

[440] Article 5(3) states:

> The court or other competent authority of the State addressed shall order the return of an illegally exported cultural object if the requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests:
> (a) the physical Preservation of the object or of its context;
> (b) the integrity of a complex object;
> (c) the preservation of information of, for example, a scientific or historical character;
> (d) the traditional or ritual use of the object by a tribal or indigenous community,
> or establishe[s] that the object is of significant cultural importance for the requesting State.

Convention makes it easier for one country to seek the recovery of an item in foreign courts. It has however been suggested that the cost of prosecuting in a foreign court may make it difficult for developing countries to do so.[441] The rights in the UNIDROIT Convention are additional to existing ones, meaning that if a state finds the means of redress in the UNIDROIT Convention insufficient, it can still apply those available under other agreements.[442]

However, the efficacy of the UNIDROIT Convention is hampered by the fact that it has fewer ratifications as compared with the UNESCO 1970 Convention. This limits the number of countries against which a country, indigenous group or individual could invoke the UNIDROIT Convention since the UNIDROIT Convention can only be invoked against other signatories. There appears to be a reluctance by many states, particularly market states, to become a party to the UNIDROIT Convention.[443]

Several observations on the 1970 UNESCO Convention and the UNIDROIT Convention are as follows. They show that the time at which a state becomes a party to the Conventions is a crucial determinant of whether or not it will be able to recover illegally exported cultural heritage. Using the Coroma textiles as an example, although the textiles qualify as cultural heritage under both UNIDROIT and the UNESCO 1970 Convention, the UNIDROIT Convention did not exist at the time Bolivia started to pursue the repatriation of the textiles. It was the 1970 UNESCO Convention Bolivia was able to rely on. However, the existence of the two conventions gives state parties and indigenous

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[441] See John Gribble and Craig Forrest, "Underwater Cultural Heritage at Risk: The Case of the *Dodington* Coins" in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 313 at 321; Folarin Shyllon, *supra* note 427 at 140 (making a similar comment on the 1970 UNESCO Convention with respect to African countries).

[442] UNIDROIT Convention at Article 9.

[443] See *e.g.* John Gribble and Craig Forrest, *supra* note 441 at 321 (commenting on the United Kingdom's objections to the UNIDROIT Convention).

peoples greater options for the repatriation of illegally exported cultural textile heritage. It is therefore suggested that states consider being parties to both conventions.

Nevertheless, the two Conventions have similar limitations with respect to traditional textiles. First, they deal with movable cultural heritage. Thus, they are applicable if an indigenous community seeks to recover textiles, as was the case with Bolivia and the Coroma textiles. However, the Conventions will not apply to situations where the illegal exportation or theft occurred prior to the time the requesting state and the holding state became parties to the Conventions.[444] The Conventions are also unsuited to situations where a community is requesting not the repatriation of textiles, but the prevention of unauthorised copying of traditional designs.

[444] This occurred in the case of *R. v. Heller* (1983) 27 Alta. L.R. (2d) 346 where the Canadian Government unsuccessfully prosecuted a New York dealer who had imported into Canada a Nok terracotta sculpture which was allegedly illegally exported from Nigeria. Nigeria and Canada were both parties to the 1970 UNESCO Convention. Although it was clear that the artwork in question was from Nigeria, the Alberta Provincial Court found that there was no evidence to prove that the art in question was illegally exported from Nigeria. See also the judgement of Moore J. in *R. v. Heller* (1983) 30 Alta. L.R. (2d) 130 on an application for a certiorari order by the Crown to quash the previous Alberta Provincial Court decision discharging the three accused persons and to direct that the case be remitted back to the Provincial Court to conduct a second preliminary inquiry or in the alternative that the case be remitted back to the Provincial Judge for reconsideration of the motion for committal in accordance with the opinion of the court as to the true construction of section 31(2) of the *Cultural Property Export and Import Act of Canada*, S.C. 1974-75-76, c. 50. Moore J. stated at paragraphs 19-23 that no information was provided at the preliminary hearing to the effect that the statue had been exported from Nigeria after 28 June 1978 (the date Canada became a party to the 1970 UNESCO Convention). Nigeria became a party to the Convention on 24 April 1972. There was however evidence that the statue had been examined for authenticity in Paris in 1977. Although Moore J. granted the application, Moore J. also found at paragraph 38 that there was insufficient evidence concerning the expropriation of the statue from Nigeria.

4.5.3: *CONVENTION FOR THE SAFEGUARDING OF INTANGIBLE CULTURAL HERITAGE*

The *Convention for the Safeguarding of Intangible Cultural Heritage*[445] is one of the few multilateral conventions to tackle the interconnectedness of intangible cultural heritage and tangible cultural and natural heritage.[446] To an extent this approach validates the indigenous view of treating culture as a whole as opposed to dividing it into categories. This is particularly relevant for textiles which have tangible and intangible elements. The convention was adopted at Paris on 17 October 2003. It entered into force on 20 April 2006 for the thirty states which had ratified it on or before 20 January 2006.[447] For the others, it enters into force three months after they deposit their instrument of ratification, acceptance, approval or accession.[448]

This section focuses on how this Convention's subject matter relates to traditional textiles and whether it includes communities and indigenous communities. The Convention's purpose is clearly stated in Article 1:

> (a) to safeguard the intangible cultural heritage;
> (b) to ensure respect for the intangible cultural heritage of the communities, groups and individuals concerned;

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[445] *Supra* note 14. Article 5 of the Convention provides for the establishment of an Intergovernmental Committee for Safeguarding Intangible Cultural Heritage. The Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage held its second meeting on Odaiba Island in Tokyo Bay from 3 to 7 September 2007. For information on the session, see online: UNESCO <http://www.unesco.org/culture/ich/index.php?pg=00110>. The first session was held in Algiers, on November 18 and 19 November 2006.The United States abstained from voting on the *Convention for the Safeguarding of Intangible Cultural Heritage* and has not implemented the recommendations of this Convention. See further, Erin K. Slattery, "Preserving the United States' Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law" (2006) 16 DePaul-L.C.A J. Art & Ent. L. 201 at 223 and 224.

[446] See the *Convention for the Safeguarding of Intangible Cultural Heritage, ibid.* at the Preamble.

[447] See "The State Parties to the Convention for the Safeguarding of the Intangible Cultural Heritage (2003) online: UNESCO <http://www. unesco.org/culture/ich_convention/index.php?pg=00024>.

[448] For the Convention's parties, see, online: UNESCO <http://portal.unesco.org/la/convention.asp?KO= 17116&language=E&order=alpha>. As at 14 September 2006, 63 States had deposited their instrument of ratification, approval or acceptance. See "Convention for the Safeguarding of the Intangible Cultural Heritage" online: UNESCO <http://www.unesco.org/culture/ich_convention/ index.php>.

> (c) to raise awareness at the local, national and international levels of the importance of the intangible cultural heritage, and of ensuring mutual appreciation thereof;
> (d) to provide for international cooperation and assistance.

Article 1(d)'s reference to providing for international cooperation is similar to the wording in the 1970 UNESCO Convention, which recognised the importance of international cooperation.[449]

The Convention does not expressly mention textiles or textile designs. However, this silence does not mean that they are excluded from its scope. After reading Article 2, one can conclude that this Convention covers traditional textile heritage. Intangible cultural heritage is defined in Article 2(1) as follows:

> The 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity. For the purposes of this Convention, consideration will be given solely to such intangible cultural heritage as is compatible with existing international human rights instruments, as well as with the requirements of mutual respect among communities, groups and individuals, and of sustainable development.[450]

The Convention adopts a broad definition of intangible cultural heritage which appears to cross over into the realm of tangibility. This observation is made based on the words "as well as the instruments, objects, artefacts and cultural spaces associated therewith" in the above definition. Clearly, an instrument, object or artefact is a tangible object. It therefore seems reasonable to infer that intangible cultural heritage covers not

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[449] See the discussion on the 1970 UNESCO Convention in section 4.5.1., above.
[450] *Supra* note 14 at Article 2(1).

just the textile design, but also the textile on which the design is fixed in so far as the communities, groups or individuals recognise that as part of their cultural heritage. Thus, from the perspective of looking at tangible aspects as well, there is some similarity between this definition and the WIPO IGC definition of traditional cultural expressions.[451] Nevertheless, the Convention's main focus is on intangible cultural heritage.

Further, textile designs could clearly fall within the "practices, representations, expressions, knowledge, skills" part of the definition. However, it is not enough that the textile designs fall within the category because Article 2(1) also requires that "communities, groups and, in some cases, individuals recognize [those representations or items] as part of their cultural heritage." In addition to traditional textiles fitting within the definition of intangible heritage in Article 2(1), traditional textiles would also conceivably fall within the traditional craftsmanship category stated in Article 2(2)(e).[452] The use of the expression *inter alia* in Article 2(2) shows that the listed categories are not exhaustive.

The Convention affirms the importance of communities and groups in several parts. The Preamble to the Convention, for example, recognises the important role "that communities, in particular indigenous communities, groups and, in some cases, individuals, play…in the production, safeguarding, maintenance and recreation of the intangible cultural heritage, thus helping to enrich cultural diversity and human creativity." The Preamble notes further that there is no binding multilateral agreement on safeguarding

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[451] See above, at section 2.2.1.

[452] *Supra* note 14 at Article 2(2) which states:

> The "intangible cultural heritage", as defined in paragraph 1 above, is manifested inter alia in the following domains:
> (a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;
> (b) performing arts;
> (c) social practices, rituals and festive events;
> (d) knowledge and practices concerning nature and the universe;
> (e) traditional craftsmanship.

intangible cultural heritage. In discussing the role of states, it also mentions that cultural heritage should be identified with the "participation of communities, groups and relevant nongovernmental organizations."[453] This shows the Convention's inclusive policy. Further, it is one of the few conventions that specifically mentions the transmission of heritage,[454] a subject which is very important to indigenous and traditional communities.

The emphasis on the word "safeguarding" in this Convention is significant because it illustrates a difference between the framing of the main intellectual property agreements, such as the Berne Convention or TRIPS where the focus is on protecting works, and here where it is on safeguarding heritage. Although the *Convention for the Safeguarding of Intangible Cultural Heritage* uses the word "safeguarding" more times than it does "protect," this should in no way diminish the force of the Convention for in defining "safeguarding" the Convention clearly states in Article 2(3) that safeguarding also includes protection.[455] Safeguarding thus has a broad scope since protection is a subset of safeguarding. However, the aim of safeguarding is to ensure the viability of intangible cultural heritage.[456]

Ultimately, the usefulness of this Convention will depend on how the state parties to the Convention implement it. The Convention gives state parties flexibility in determining their cultural heritage and in implementing the Convention nationally.[457] It applies to state parties and territories and proposes several measures to protect cultural

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[453] *Ibid.* at Article 11(b).
[454] *Ibid.* at the Preamble and Article 15.
[455] See *ibid.* at Article 2(3) which defines "safeguarding" as follows: 'Safeguarding' means measures aimed at ensuring the viability of the intangible cultural heritage, including the identification, documentation, research, preservation, protection, promotion, enhancement, transmission, particularly through formal and nonformal education, as well as the revitalization of the various aspects of such heritage.
[456] *Ibid.* at Article 2(3).
[457] *Ibid.* at Section III, Article 11.

heritage[458] including that states keep inventories of their cultural heritage.[459] It also mentions safeguarding at the international level and international cooperation while recognising the importance of national legislation and customary law.[460] Furthermore, it establishes a fund to safeguard intangible cultural heritage.[461] Unlike the UNIDROIT Convention and the 1970 UNESCO Convention, this Convention does not address repatriation or restitution. Its focus appears to be more on what states and communities can do nationally.

The *Convention for the Safeguarding of Intangible Cultural Heritage*'s significance to the protection of intangible cultural heritage is undeniable since it is the first UNESCO agreement in force to focus on intangible cultural heritage, a clear departure from the past when intangible cultural heritage was ignored. In addition, it shows sensitivity to indigenous people's concerns through the provisions on national policies to safeguard

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[458] *Ibid.* at Section III, Article 13.

[459] *Ibid.* at Section III, Article 12. However, there are several criticisms of the *Convention for the Safeguarding of Intangible Cultural Heritage*, one of which is its use of the inventory system and the difficulty of documenting cultural objects. For example, it has been recognised that there is the danger of groups being excluded or minority groups being marginalised if their cultural heritage is ignored in the compilation of inventories. A related danger deals with gender inequality. UNESCO is trying to address this issue by studying gender and intangible cultural heritage. For additional criticisms, see also Erin K. Slattery, "Preserving the United States' Intangible Cultural Heritage: An Evaluation of the 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage as a Means to Overcome the Problems Posed by Intellectual Property Law" (2006) 16 DePaul-L.C.A J. Art & Ent. L. 201 at 244-245 (stating that some groups might not want the inventory system for privacy reasons). See also Michael F. Brown, "Safeguarding the Intangible" November 2003, Cultural Comment, online: Cultural Commons - The Meeting Place for Culture and Policy <http://www.culturalcommons.org/comment-print.cfm?ID=12>. Michael Brown has commented on the enormous amount of work and resources and how difficult it would be to document intangible cultural heritage of places like China or Canada. As he questions, "How does one turn the complexity of even a single culture into a list?" Michael F. Brown, "Safeguarding the Intangible" November 2003, Cultural Comment, online: Cultural Commons - The Meeting Place for Culture and Policy <http://www.culturalcommons.org/comment-print.cfm?ID=12>. See also Richard Kurin's response to Michael F. Brown's piece, Richard Kurin, "Tangible Progress" (A response to "Safeguarding the Intangible," a Cultural Comment essay by Michael F. Brown) December 2003, online: Cultural Commons - The Meeting Place for Culture and Policy <http://www.culturalcommons.org/kurin.htm>.

[460] The *Convention for the Safeguarding of Intangible Cultural Heritage*, *ibid.* Section V at Article 19 (2):

> Without prejudice to the provisions of their national legislation and customary law and practices, the States Parties recognize that the safeguarding of intangible cultural heritage is of general interest to humanity, and to that end undertake to cooperate at the bilateral, subregional, regional and international levels.

[461] *Ibid.* at Section VI.

intangible cultural heritage. National and multilateral recognition of the importance of safeguarding intangible cultural heritage should help in reducing cultural appropriation. However, the Convention does not create a multilateral mechanism for safeguarding intangible cultural heritage nor does it have enforcement proceedings as does the UNIDROIT Convention. These factors might hamper its efficacy.

4.5.4: *CONVENTION ON THE PROTECTION AND PROMOTION OF THE DIVERSITY OF CULTURAL EXPRESSIONS*[462]

One hundred and forty-eight UNESCO nations approved this Convention in Paris on 20 October 2005,[463] and it entered into force on 18 March 2007. This Convention adopts a universal approach to cultural expressions, by not focusing on indigenous and traditional communities or the western world. It puts indigenous and non-indigenous worlds on an even playing field by recognising the importance of all cultures. Some notable values in the Preamble include the following: it affirms cultural diversity as a part of the common heritage of humanity to be cherished and "preserved for the benefit of all." Further, there is a development angle to the Convention since it mentions the need to

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[462] *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, online: UNESCO <http://portal.unesco.org/en/ev.php-URL_ID=31038&URL_DO=DO_TOPIC&URL_SECTION=201.html>. Canada was the first country to ratify the convention which has now been signed by 75 states and by the European Community. For the parties to the convention, see, online: UNESCO <http://portal.unesco.org/la/convention.asp?KO=31038&language =E&order=alpha>. The Convention in Article 23 establishes an Intergovernmental Committee. The Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions held its first session in Ottawa (Canada) from 10 to 13 December 2007. See "Canada will host first session of Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions," online: UNESCO <http://portal.unesco.org/en/ev.php-URL_ID=41416&URL_DO=DO_ TOPIC&URL_SECTION=201.html>. See also Canadian Heritage, "UNESCO Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions," online: Canadian Heritage <http://www.pch.gc.ca/progs/aiia/comite_UNESCO_committee_ e.cfm>. For the decisions, see UNESCO, Diversity of Cultural Expressions, Intergovernmental Committee for the Protection and Promotion of the Diversity of Cultural Expressions, First Session Ottawa, Canada, 10-13 December 2007, Decisions, CE/07/1.IGC/Dec., Paris, 13 December 2007, online: UNESCO <http://www. unesco.org/culture/culturaldiversity/december07/igc1_decisions_en prov.pdf>.

[463] The United States and Israel were the only two countries which voted against it.

incorporate culture in national and international development policies and international development cooperation. In addition, it includes human rights considerations. Finally, it refers to UNESCO's promotion of other cultural diversity protection instruments especially the *Universal Declaration on Cultural Diversity* of 2001.[464] The Convention has eight guiding principles.[465] The three features of this Convention's objectives which are most relevant to this research are protecting and preserving cultural diversity, promoting development and the sovereignty of states.[466]

The Convention makes no express mention of designs or traditional textiles. However, a number of its provisions are relevant to those topics. The Convention mentions "traditional cultural expressions" twice although both references are only in the Preamble.[467] The Convention treats "traditional cultural expressions" as a subset of cultural expressions and defines the latter as "those expressions that result from the creativity of individuals, groups and societies, and that have cultural content."[468] One can therefore presume that traditional textile designs, being the creativity of groups and societies and having a cultural content, are covered by this Convention. In addition, and unlike the *Convention for the Safeguarding of Intangible Cultural Heritage*, this Convention does not

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[464] *Universal Declaration on Cultural Diversity*, adopted at Paris, 2 November 2001, online: UNESCO <http://unesdoc.unesco.org/images/0012/ 001271/127160m.pdf>.

[465] These are respect for human rights and fundamental freedoms (Article 2.1), sovereignty (Article 2.2), Principle of equal dignity of and respect for all cultures (Article 2.3), Principle of international solidarity and cooperation (Article 2.4.), Principle of the complementarity of economic and cultural aspects of development (Article 2.5.), Principle of sustainable development (Article 2.6.), Principle of equitable access (Article 2.7.), and Principle of openness and balance (Article 2.8.).

[466] See *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, *supra* note 462 at I. Objectives and guiding principles, Article 1 – Objectives.

[467] See *ibid.* at the Preamble which states:

> *Recognizing* that the diversity of cultural expressions, including traditional cultural expressions, is an important factor that allows individuals and peoples to express and to share with others their ideas and values...*Taking into account* the importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development

[468] *Ibid.* at Article 4.3.

specify whether cultural expressions refer to tangible or intangible expressions. In fact, the word intangible is only mentioned once in this Convention, in the Preamble dealing with traditional knowledge,[469] while tangible does not appear in the Convention.

The Convention specifically mentions indigenous peoples[470] and minorities.[471] For instance, the Preamble to this Convention takes into account the "importance of the vitality of cultures, including for persons belonging to minorities and indigenous peoples, as manifested in their freedom to create, disseminate and distribute their traditional cultural expressions and to have access thereto, so as to benefit them for their own development." Although the Convention looks at cultural expressions as a whole, provisions like these recognise the importance of culture to indigenous peoples. Two other provisions in the Preamble which are relevant to indigenous peoples are the recognition that cultural activities and services convey identities and values and should not be treated as having solely a commercial function[472] and the recognition of the benefits and harm that globalization can cause to cultural preservation.[473]

Parties to the Convention are obliged to take measures to promote cultural expressions under Article 7,[474] while Article 8 enjoins them to take measures to protect

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[469] The *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* states at the Preamble that it recognises "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."

[470] "Indigenous peoples" is mentioned four times in this Convention: twice in the Preamble, once in Article 2 on Guiding Principles and, finally, in Article 7 on Measures to promote cultural expressions.

[471] Minorities is mentioned thrice and on each occasion in the phrase "minorities and indigenous peoples:" once in the Preamble, in Article 2 and Article 7.

[472] *Ibid.* the Preamble at paragraph 18.

[473] *Ibid.* the Preamble at paragraph 19.

[474] *Ibid.* at Article 7 on "Measures to promote cultural expressions" provides:

> 1. Parties shall endeavour to create in their territory an environment which encourages individuals and social groups:
> (a) to create, produce, disseminate, distribute and have access to their own cultural expressions, paying due attention to the special circumstances and needs of women as well as various social groups, including persons belonging

cultural expressions.[475] "'Protection' means the adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions."[476] Like the *Convention for the Safeguarding of Intangible Cultural Heritage*, it mentions both safeguarding and protecting. The Convention states the importance of the parties fulfilling their obligations under treaties they are a party to without subordinating their obligations under this convention.[477] It is also one of the few conventions that link culture and intellectual property, for the Preamble recognises "the importance of intellectual property rights in sustaining those involved in cultural creativity."[478]

It is too soon to determine conclusively the consequences of this Convention. While on the one hand, it has been hailed as a landmark convention for making a distinction between "regular" goods and cultural ones,[479] it does have some controversial elements which may be summarised as follows: firstly, various indigenous and traditional

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to minorities and indigenous peoples;
(b) to have access to diverse cultural expressions from within their territory as well as from other countries of the world.
2. Parties shall also 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.

[475] *Ibid.* at Article 8 – Measures to protect cultural expressions:
1. Without prejudice to the provisions of Articles 5 and 6, a Party may determine the existence of special situations where cultural expressions on its territory are at risk of extinction, under serious threat, or otherwise in need of urgent safeguarding.
2. Parties may take all appropriate measures to protect and preserve cultural expressions in situations referred to in paragraph 1 in a manner consistent with the provisions of this Convention.
3. Parties shall report to the Intergovernmental Committee referred to in Article 23 all measures taken to meet the exigencies of the situation, and the Committee may make appropriate recommendations.

[476] *Ibid.* at Article 4.7.

[477] *Ibid.* at Article 20.

[478] *Ibid.* the Preamble at paragraph 17.

[479] Pierre Curzi, co-chair for the Canadian Coalition for Cultural Diversity. See Coalition For Cultural Diversity (Canada), Press Release, "Canada's Cultural Organizations Hail Successful Conclusion of UNESCO Negotiations for Treaty on Cultural Diversity, Urge Its Adoption at October General Conference" (8 June 2005), online: Coalition For Cultural Diversity <http://www.cdc-ccd.org/Anglais/Liensenanglais/nouveautes_eng/CDC_ News_Release_ ENG_ 08_ 06_05.pdf>. See also Alex Khachaturian, "The New Cultural Diversity Convention and its Implications on the WTO International Trade Regime: A Critical Comparative Analysis", Comment (2006) 42 Tex. Int'l L.J. 191.

communities take exception to the reference to culture as the common heritage of mankind and might be opposed to this provision.[480] However, it depends on whether common heritage is used in the Convention in the sense of being part of the world's culture, which the convention appears to do. That interpretation of common heritage of mankind does not negate a community's ownership of its culture. Secondly, the relation between the convention and TRIPS is yet to be ascertained. In fact, the Convention advocates restricting imports of competing cultural goods and services from other countries. However, TRIPS aims at trade liberalization and ensuring that border controls do not become impediments to free trade.[481] A third and related point is that the Convention gives considerable latitude to countries to take measures they deem fit to protect their cultural goods and services.

However, the Convention is relevant to traditional textiles in that it can cover both the designs and the textiles. Although it has provisions on how disputes can be resolved, the Convention does not deal with repatriation or restitution. Therefore, it cannot solve cases involving stolen traditional textiles for example, nor can it provide remedies for unauthorised copying of a traditional textiles design. Thus, the Convention does not go far enough. However, it is undoubtedly important for indigenous peoples and traditional communities as a measure to promote the protection of cultural diversity.

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[480] For controversy on the use of the term "common heritage of mankind" see *e.g.* Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation*, (New Brunswick, N.J.: Rutgers University Press, 1997) 255.

[481] However, in examining the relationship between the Convention and GATT, Alex Khachaturian concludes that using the "principle of 'evolutive interpretation' along with prior DSB [WTO Dispute Settlement Body] jurisprudence, offers hope to champions of the Convention who wish to protect and promote cultural diversity while remaining in good standing with the WTO." Alex Khachaturian, "The New Cultural Diversity Convention and its Implications on the WTO International Trade Regime: A Critical Comparative Analysis", Comment (2006) 42 Tex. Int'l L.J. 191 at 193.

4.6: CONCLUSION

The initial question this chapter investigated was whether the international framework for the protection of cultural heritage addressed and provided solutions to the appropriation of traditional textiles. The above discussion analyzed the concept of cultural appropriation in relation to traditional textiles. It also discussed some cultural appropriation mechanisms and the extent to which the existing international agreements outside of intellectual property framework protect cultural property.

Textiles make a substantial contribution to international trade; however, there are many organisations involved in TCES policy-making, which can make this a confusing area. Among the conventions discussed, there was none which dealt effectively with cultural appropriation in cultural heritage as a whole, including both the tangible and intangible expressions, which is particularly important to this area of traditional textiles and to communities. Although the focus on protecting cultural heritage used to be on protecting cultural objects and monumental heritage, the protection of intangible cultural heritage and cultural expressions has been receiving growing attention internationally, though the balance is still tilted more in favour of tangible and monumental heritage. Under a number of these conventions, an indigenous community can have a remedy if a traditional textile is stolen. These conventions do recognise group rights. However, the absence of a convention which ensures protection against the unauthorised production of copies and imitations of textiles constitutes another gap in the international framework for protecting cultural heritage. Therefore, the non-intellectual property framework does not provide the full answer for the protection of traditional textiles. Consequently, the

intellectual property system may assist in the protection of cultural heritage, TCES and traditional textiles.

Chapter 5 examines intellectual property and the protection of TCES. It assesses the extent to which traditional textiles qualify as intellectual property and how the intellectual property system can deal with cultural appropriation and protect traditional textiles.

CHAPTER 5

CHAPTER 5: TEXTILE DESIGNS, FOLKLORE, CULTURAL PROPERTY AND INTELLECTUAL PROPERTY

5.1: INTRODUCTION

The relationship between intellectual property and TCES is a controversial one and the subject of ongoing debate.[482] While some scholars view intellectual property protection as a tool to protect TCES and organizations like WIPO are exploring this angle, other scholars argue that the intellectual property law system is not a good tool to protect culture. The formulation of the current intellectual property system coincided with the colonial period, an era that elevated Western property values above those of the colonies. This translated into the formulation of the intellectual property system where the colonies and indigenous people were not represented at the intellectual property negotiating table. As one scholar has questioned, "But what exactly is the relationship between IP and the 'protection' of traditional knowledge and cultural materials? Is IP part of the problem or is it part of the solution?"[483] Intellectual property's role as a mechanism for the appropriation of TCES, especially in the art and textile design area, has not been studied as widely as appropriation in scientific traditional knowledge, such as the use of the patent system to appropriate the technical and medical knowledge of indigenous peoples. The debate can be

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[482] Many legal scholars have examined the nature of the relationship between intellectual property, TCES and traditional knowledge. See *e.g.* Daniel J. Gervais, "The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New," *supra* note 31; Christine Haight Farley, *supra* note 24; Rosemary J. Coombe, "Intellectual Property, Human Rights & Sovereignty: New Dilemmas in International Law Posed by the Recognition of Indigenous Knowledge and the Conservation of Biodiversity" (1998) 6 Ind. J. Global Leg. Stud. 59; Michael F. Brown, "Can Culture be Copyrighted?" (1998) 39 Current Anthropology 193.

[483] Wend B. Wendland, *supra* note 382 at 327.

framed as to whether the intellectual property law system excludes TCES from protection, thus facilitating and contributing to cultural appropriation, or whether it protects TCES.

The aim of this chapter is to examine the extent to which traditional textile designs are protected as intellectual property under intellectual property categories. It argues that these categories do not give comprehensive protection in view of the needs and expectations of indigenous and traditional communities, their holistic world view and the relationship between TCES and traditional knowledge. Fitting traditional textiles and traditional textiles designs protection into intellectual property would require considerably widening the latter's categories.

The chapter commences by examining challenges to the protection of textile designs in the intellectual property system. It focuses on some key eligibility criteria for works to have intellectual property protection, such as an identifiable author and originality. It also considers the duration of protection and the concept of the public domain. Section three follows with a discussion on whether the needs of traditional communities may be met either through the existing intellectual property categories alone or through the intellectual property system coupled with the application of other legal concepts. It examines international provisions and draws on national examples of how countries and indigenous and traditional communities are using the intellectual property system to protect traditional textile designs and motifs. In doing so, it brings out the limitations of the categories. Section four analyzes complementary legal concepts. The discussion considers moral rights and contracts. The last section examines policy arguments for and against applying the existing intellectual property law system to textiles protection.

5.2: CHALLENGES TO FOLKLORE PROTECTION UNDER INTELLECTUAL PROPERTY LAW

The use of the term "protection," in relation to the protection of textiles, is both complex and multi-layered. WIPO has identified two meanings of protection: (1) defensive protection, where indigenous and traditional communities use measures to prevent others from using their expressions of folklore without their permission and to ensure others do not obtain intellectual property rights in existing traditional knowledge; and (2) positive protection which gives traditional knowledge holders positive rights in their traditional knowledge and involves traditional communities using existing legal mechanisms such as contract and intellectual property to protect their traditional knowledge.[484]

Another angle is whether protection is being examined in terms of giving the owner of the item in question an exclusive property right or a limited property right. The intellectual property system does not always provide an exclusive property right since within intellectual property law there are mechanisms which allow others to benefit from the use of the protected item within reasonable limits. These include limitations and exceptions on the terms and scope of protection and compulsory licensing. Wendland has noted that some indigenous communities have expressed that they are not looking for an exclusive property right.[485] However, any future developments in this area are dependent on the extent to which traditional textiles qualifies as intellectual property.

The intellectual property law system is popular as a tool to protect traditional textiles; however, it poses several challenges to traditional textiles protection.[486] Although

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[484] See *e.g.* WIPO "Traditional Knowledge," online: WIPO <http://www.wipo.int/tk/en/tk/>; Wend. B. Wendland, *ibid.* at 330.
[485] Wend B. Wendland, *ibid.* at 329.
[486] Many scholars have researched into the intellectual property law system's capability as well as its shortcomings in the folklore protection field. See *e.g.* Richard A. Guest "Intellectual Property Rights and

there are a myriad of issues to be resolved in this area, the key question in this section is as follows: whether traditional textiles or traditional cultural expressions can pass the intellectual property law system's eligibility criteria test and other identifying characteristics of intellectual property. The debate is whether the intellectual property law system, which is widely acknowledged to be based on Western notions of property and authorship, can be reconciled with traditional and indigenous notions of property where works tend to be a product of community efforts and are community owned.

One important issue is whether traditional textiles can surmount the eligibility criteria for works to qualify as intellectual property works. The argument here is that traditional textile designs would not be able to satisfy the eligibility criteria for intellectual property protection for "works." Traditional textile designs would not be able to satisfy criteria such as an identifiable author or the originality requirement. The next section discusses the following intellectual property criteria: (1) identifiable author; (2) duration of protection; (3) public domain; and (4) original work.

5.2.1: IDENTIFIABLE AUTHOR

Who is an author? An identifiable author is the first step to establish "authorship."[487] There is no uniform definition of authorship in the intellectual property

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Native Indian Tribes" (1996) 20 Am. Indian L. Rev. 111; Lucy Moran, "Intellectual Property Law Protection for Traditional and Sacred 'Folklife Expressions' – Will Remedies Become Available to Cultural Authors and Communities?" (1998) 6 U. Balt. Intell. Prop.L.J. 99; David R. Downes, "How Intellectual Property Could be Tool to Protect Traditional Knowledge" (2000) 25 Colum. J. Envtl. L. 253.

[487] As James Boyle states:

> The author concept stands as a gate through which one must pass in order to acquire intellectual property rights. At the moment, this is a gate that tends disproportionately to favor the developed countries' contributions to world science and culture. Curare, batik, myths and the dance "lambada" flow out of developing countries, unprotected by intellectual property rights, while Prozac, Levis, Grisham, and the movie *Lambada*! flow in-protected by a suite of intellectual property laws, which in turn are backed by the threat of trade sanctions.

field. An author in the intellectual property sphere is often depicted as a solitary individual engaged in the creative process. Authorship is generally discussed in relation to two scenarios: (1) the romantic author who creates without reliance on already created works;[488] and (2) the "other" author whose creations build on existing works created by others. One critique of the romantic author is that all creative works are inspired by others.[489]

The intellectual property law system establishes who should have intellectual property rights in the work based on an identifiable individual author.[490] For example, the South African *Copyright Act of 1978* as amended in 2002 provides copyright protection to *inter alia* original literary works and artistic works. Under that legislation, an author in relation to "a literary, musical or artistic work, means the person who first makes or creates the work."[491]

James Boyle, *Shamans, Software, and Spleens: Law and the Construction of the Information Society* (Cambridge, Mass.: Harvard University Press, 1997) 125.

[488] On this point, see *e.g.* Jessica Litman "The Public Domain" (1990) 39 Emory L.J. 965; Angela Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities" (2000) 18 Cardozo Arts & Ent. L.J. 175. For an in-depth analysis of authorship, see Martha Woodmansee, "On the Author Effect: Recovering Collectivity" (1992) 10 Cardozo Arts & Ent. L.J. 279; Peter Jaszi, "On the Author Effect: Contemporary Copyright and Collective Creativity" (1992) 10 Cardozo Arts & Ent. L.J. 293.

[489] See *e.g.* Angela Riley, "Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities" (2000) 18 Cardozo Arts & Ent. L. J. 175 at 182 (deconstructing the idea of the romantic author).

[490] The author could also be a legal entity which qualifies as an author.

[491] *Copyright Act* No. 98 of 1978 as amended in 2002, online: UNESCO <http://portal.unesco.org/culture/en/ev.php-URL_ID=15486&URL_DO=DO_TOPIC&URL_SECTION=201.html> at the Definitions section. Section 3 of this *Copyright Act* also recognizes joint authorship subject to certain specified conditions. The Definitions section defines "work of joint authorship" as "a work produced by the collaboration of two or more authors in which the contribution of each author is not separable from the contribution of the other author or authors."

Intellectual property rights are awarded to individuals as opposed to groups. One scholar comments on the difference between authorship in western and indigenous society and how this creates protection problems under copyright as follows:

> Western notions of property, based on the premise of individual, rather than group rights, are incompatible with indigenous customs and traditions. In indigenous society, the work is produced for the benefit of the group and the group owns and controls it. There may not be an adequate analog in the western world, but consider this: giving rights to one individual author in the indigenous community may be akin to letting one individual control the use of the Star of David or the image of Jesus on the cross.[492]

The authorship challenge for traditional textiles lies in the assumption that there should be an individual author. This means that an indigenous community should be able to clearly state who the originator of the work was and clearly identify the work that person did. The main argument, therefore, is that it is difficult to protect traditional textiles and traditional textile designs under copyright since it might be impossible in the traditional and indigenous group setting to identify who exactly created the work or when the work was created.

Because TCES belong to a community and are not based on individual creation, as is the case with copyright or industrial design, it would be almost impossible for an indigenous group to single out an individual as the author of a traditional textile and his or her contribution to the work in question. However, the fact that traditional textiles are group owned does not negate the possibility of there having been at some point, or even presently, an individual contribution to the work. Further, it does not negate the possibility of there being identifiable individuals who have contributed to the ongoing evolution of the

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[492] Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" (1997) 30 Conn. L. Rev. 1 at 31.

design. It is not impossible for individuals to be singled out for their exceptional talent or to be recognised as creators.[493] However, the community or collective creation of TCES excludes them from copyright protection because this shared knowledge that is transmitted from one generation to another does not have identifiable individual authors.

In *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd.*,[494] Mr. Bulun Bulun sued R & T Textiles Pty Ltd. for copyright infringement for importing into and selling in Australia clothing fabric that was painted with a design from Mr. Bulun Bulun's painting. Mr. Bulun Bulun and Mr. Milpurruru were from the same indigenous group, the Ganalbingu. Mr. Milpurrurru also brought a claim against the company in his capacity as a representative of the Ganalbingu. Mr. Bulun Bulun's artwork incorporated imagery that was sacred and important to his clan group, the Ganalbingu people. Mr. Bulun Bulun painted the design in accordance with Ganalbingu traditional laws and with the consent of the Ganalbingu elders. Mr. Bulun Bulun claimed that the unauthorised reproduction threatened the stability of the society and interfered with the relationship between the people, their creative ancestors and the land.

Three important issues before the courts were (1) whether Mr. Bulun Bulun held copyright in the painting on trust for the Ganalbingu people; (2) whether the artwork was one of joint authorship; in other words, was it authored jointly by Mr. Bulun Bulun and the Ganalbingu community; and (3) whether the Australian *Copyright Act* 1968 recognised

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[493] See David R. Downes, "How Intellectual Property Could Be a Tool to Protect Traditional Knowledge" 2000) 25 Colum. J. Envtl. L. 253 at 258-259. In considering the Australian position under the Copyright Act 1968, Puri concludes on this point that it is not impossible for there to be an identifiable author, an author who "can be readily identified for the purposes of protection under the copyright system. However, the problem remains that the underlying folklore, of which individual works are expressions, is not protected under the [Australian] Copyright Act [1968] because it is communally owned, and no author or group of authors can be isolated." Kamal Puri, "Preservation and Conservation of Expressions of Folklore," *supra* note 5 especially at 15-16 (discussing why folklore was not protected under the Australian copyright system).

[494] *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513, [1998] AILR 39, online: AustLII <http://www.austlii.edu.au/au/journals/AILR/1998/39.html>.

communal ownership by members of a group who had rights under customary indigenous law.

On the copyright question, the court held that Mr. Bulun Bulun was the author. Consequently, Mr. Bulun Bulun held copyright in the artwork within the meaning of the *Copyright Act*. Thus, his artwork was protected for his life plus 50 years after his death, notwithstanding the traditional nature of the artwork. Justice Von Doussa held that the *Copyright Act* precluded any notion of group ownership in an artist's work unless it was a work of joint authorship within the meaning of the *Copyright Act*. In the present case, there was no evidence that the artwork was jointly authored by Mr. Bulun Bulun and the Ganalbingu community.

The next issue was whether common law could recognise communal title directly in an artistic work. Justice Von Doussa refused to recognise such a right within the meaning of the *Copyright Act*. However, he noted that while:

> it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so. There seems no reason to doubt that customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788. The Aboriginal peoples did not cease to observe their *sui generis* system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown. [495]

The court finding in favour of Mr. Bulun Bulun held that there was copyright infringement and issued a consent order against R & T Textiles. Mr. Milpurrurru continued his claim, as the most senior representative of the Ganalbingu, that the Ganalbingu had equitable ownership of copyright in Mr. Bulun Bulun's painting. The court dismissed Mr.

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[495] *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd.* per Von Doussa J. at "Why the claim is confined to one for recognition of an equitable interest" (AustLII).

Milpurrurru's claim holding that the community had no equitable interest in the copyright. Mr. Bulun Bulun had a fiduciary trust in his community that he had fulfilled.

My observations on this case are that the court recognised that there could be copyright in an aboriginal work created by an individual by holding that Mr. Bulun Bulun had copyright in the artwork. The case showed the co-existence and simultaneous use of Australian copyright law and customary law and how the courts used evidence of customary law. By granting copyright recognition to an individual, this case is not an example of the recognition of group or communal copyright. It rather emphasized clearly that the Australian *Copyright Act* does not recognise communal authorship of copyright thus showing the supremacy of statute. In addition, while it was clear the artwork was linked to the traditional life of the Ganalbingu people, the case did not state what would happen on the expiration of Mr. Bulun Bulun's copyright. It also left unanswered whether on the expiration of the copyright term anyone could reproduce the artwork and the effect this would have on the Ganalbingu.

Before concluding this section the following points are worth stressing. An identifiable author does not have to be a single person. Under the copyright system, unpublished works of unknown authors can be protected. Although the intellectual property system is not opposed to multiple authors acquiring rights, since it provides for several individuals to have rights in a work as joint authors, joint authorship does not mean community authorship especially in a case where the community cannot identify which contribution each author made to the traditional textiles.

At best, what an indigenous community can maintain is that their ancestor(s) created the traditional textile and the traditional textile designs which have been preserved,

worked on and transmitted to the present generation. For example, the Center for Traditional Textiles of Cusco[496] is trying to preserve the textile traditions of their Inca ancestors. It would be a mammoth and unreasonable task to expect them to be able to name which specific ancestor(s) authored the textiles. On a strict construction of copyright law, that in effect would be the first hurdle they would have to overcome. However, the intellectual property system, especially copyright, does not grant intellectual property rights in a textile design to a community because the community has been able to identify which ancestor(s) created the design. The duration of protection, to be discussed in the following section, is the next hurdle.

5.2.2: DURATION OF PROTECTION

The intellectual property protection period is another challenge to traditional textiles protection. A duration period is a fixture of intellectual property legislation. With copyright, it is a fixed period without the possibility of a renewal, where the protection period is traditionally the life of the author plus fifty years after the author's death, but many jurisdictions have expanded the term to life plus seventy years.[497] The United States, for example, has a copyright period of protection as the life of the author plus seventy years after the death of the author.[498] On the other hand, some countries have even longer

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[496] See *supra* note 4.

[497] The traditional protection period is the life of the author plus fifty years after the author's death. The South African *Copyright Act* No. 98 of 1978 as amended in 2002 still has this duration period, see *Copyright Act* No. 98 of 1978 as amended in 2002, online: UNESCO <http://portal.unesco.org/culture/en/ev.php-URL_ID= 15486&URL_DO=DO_TOPIC&URL_SECTION=201.html> at section 3(2)(a).

[498] *Copyright Law* of the United States and Related Laws, 17 U.S.C. § 302, online: <http://www.copyright.gov/title17/92chap3.html>. In that section, copyright protection for works created by an individual author after 1 January 1978 is the life of the author plus an additional 70 years after the author's death. Generally, copyright duration periods tend to vary depending on the type of work, whether the work was created by an individual or more than one individual, whether the author is known or unknown, whether the work has been published and when the work was created. See also the Australia *Copyright Act 1968*, online:

protection, namely Mexico (life plus 100 years) and Guatemala (life plus 75 years).[499] This shows that traditionally accepted duration periods can be changed.

In trademark, there is a fixed protection period which can be extended subject to certain conditions being met. Thus, the idea of potential perpetual protection exists in the intellectual property law system. If Walt Disney Corporation does not cease to exist and it maintains its logo, and it successfully and successively renews its logo, then that logo may have perpetual protection. However, the logo is not protected absolutely; the protection applies only to the trademark's purpose of signaling source. Therefore, the concept of perpetual protection is not alien to intellectual property law although it is currently framed with the potentiality for perpetual protection.

It appears that one rationale of the limited duration period is to balance the public interest in a work with the author's right to protection.[500] On the expiration of the term of protection the work becomes available to the public to use, be inspired by it and even to develop it further. While this may be the case, it still does not answer the question of why the different intellectual property categories have different protection periods. This question is important because since differences do exist, one can argue that if the international community comes to a consensus on traditional textiles protection under

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Commonwealth of Australia Law <http://www.comlaw.gov.au/comlaw/Legislation/ActCompi lation1.nsf/0/8A3FE9B23658D949CA256FE 700837789/$file/Copyright1968_WD02_Reprint.pdf> at section 33. (where the duration period is the life of the author and seventy years after the author's death) and section 34 (where the duration of copyright in anonymous and pseudonymous works is seventy years after the first publication of the work, unless the author's identity is known or can be ascertained before the end of the duration period).

[499] See History of Copyright, "International Copyright Laws AND Their Effects," online: <http://www.historyof copyright.org/pb/wp_f12e0c69/wp_f12e0c69.html>.

[500] For example, the constitutional provision respecting copyright in the United States found in the United States Constitution, Article I, Section 8 states that "The Congress shall have Power ... To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." United States Constitution, online: The U.S. National Archives and Records Administration <http://www.archives.gov/exhibits/charters/constitution_transcript.html>.

intellectual property, then having a different duration period from other intellectual property works should not be a barrier since the precedent already exists in the intellectual property law system. Overall, duration periods do not generally vary by type of work but rather by intellectual property category.

Another question the limited duration period in intellectual property raises is how the specific periods are chosen. Examining the notion that a person has a moral right to control the product of his or her labour, Downes asserts that there is no clear moral basis for the various forms intellectual property rights have taken under existing regimes: "The precise outlines of an IPR are defined by striking a balance among various social goals." On one hand, an inventor is granted a private right to encourage disclosure while on the other hand, these granted rights are limited by duration periods and subject to exceptions in order to maintain the public domain principle. By analogy, TRIPS provides that WTO member countries protect patents for at least 20 years. However, when this is applied to all WTO members, this protection period may or may not strike the right balance between competing social goals in every case.[501] As Downes argues:

> It would be absurd to argue that this twenty-year limit has a moral basis. No human rights would be violated if a country established a patent term of eighteen years rather than twenty. The duration of a patent merely reflects a balance between competing social interests, aimed at maximizing social welfare. It is impossible to deduce a single fair and equitable IPR system from the general human rights principles available to us. In sum, while categorical moral claims may be essential to the definition of an intellectual property system's core principles, the precise delineation of the parameters of a given type of intellectual property right should be an instrumentalist or utilitarian exercise.[502]

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[501] See David R. Downes, "How Intellectual Property Could Be a Tool to Protect Traditional Knowledge" 2000) 25 Colum. J. Envtl. L. 253 at 262.
[502] *Ibid.* at 262.

In addition, the application of the same protection periods for a specific category in different countries might not produce the same results due to each country's unique characteristics, needs, societal goals, interests, welfare and level of development. Just as intellectual property categories have different protection periods, so in some cases the existing periods have to be carefully examined and assessed to see if they are suitable when applied to a new work.

It is an oversimplification to state that the intellectual property law system is inapplicable to traditional textile designs because the former does not offer perpetual protection. Although the current construction of intellectual property law is largely opposed to perpetual protection, except for the trademark system which already has potential perpetual protection, there is nothing to keep it from going down that road if lawmakers decide that is the route it should take.

TCES require perpetual protection[503] because they play a role in the respective community, one that may not be immediately apparent to an outsider. In some cases traditional textiles are so important that their loss can signal the beginning of a society's disintegration.[504] A limited duration period is inadequate for communal or group owned traditional textiles because of the intergenerational nature of the indigenous community and the fact that heritage is passed on from one generation to the next. Thus in relation to traditional textiles and traditional textile designs, copyright and industrial design protection

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[503] "In the light of the cultural and religious significance of ancestral designs, the term of fifty years after the death of the author is grossly inadequate. For thousands of years prior to colonialism in Australia, ancestral designs, which have imbued individuals with kinship ties, religious beliefs, and land ownership, were passed on and continue to be passed on from one generation to the next." Kamal Puri, "Preservation and Conservation of Expressions of Folklore," *supra* note 5 at 19.

[504] See Chapter 4, above.

might be inadequate because they have an insufficient duration period. The trademark system offers a better example of the protection period.

In sum, the idea of perpetual protection, which indigenous peoples have expressed as being important in protecting traditional textiles, is not alien to the intellectual property system since the potential for perpetual protection already exists. If and when the intellectual property system does adopt perpetual protection, other changes may be required in order to maintain the balance between intellectual property categories.

5.2.3: PUBLIC DOMAIN

Another obstacle when discussing the intellectual property protection of traditional textiles is the public domain. The argument goes as follows: expressions of folklore form a part of the public domain and are excluded from intellectual property protection because the intellectual property system does not protect public domain works. This section assesses the strength of this argument.

The public domain refers to that intellectual space the contents of which belong not to an individual as private property but to everyone.[505] At its simplest form, the public domain refers to that realm of ideas covering three main areas: (1) untapped or undiscovered ideas; (2) works which once had intellectual property protection, but whose

[505] According to Jessica Litman, "The concept of the public domain is another import from the realm of real property. In the intellectual property context, the term describes a true commons comprising elements of intellectual property that are ineligible for private ownership. The contents of the public domain may be mined by any member of the public." Jessica Litman, "The Public Domain" (1990) 39 Emory L.J. 965 at 974 [footnotes omitted].

term of protection has expired; and (3) works which have either not been protected because they are regarded as being too old or which have been deemed unprotectable.[506]

A fourth category which is still relevant today is foreign works which a country specifically excludes from intellectual property protection. This occurred, for example, to a large degree in the past in the United States where foreign works were specifically excluded from copyright protection.[507] Consequently, there is no uniform definition of the public domain.

There is some controversy about the public domain's existence, exact nature and boundaries. In the West, folklore denotes something old and incapable of protection. Thus, from a strictly Western perspective, folklore works belong to the public domain. However, in the South, traditional does not necessarily mean old; rather, it refers to how the work is made. Folklore cannot necessarily be equated with the absence of a new work. The intellectual property law system has been in existence for several centuries and indeed, it

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[506] This includes works which predate the intellectual property system and concepts which are specifically excluded from intellectual property law protection such as ideas and theories.

[507] See Jessica Litman, "The Public Domain" (1990) 39 Emory L.J. 965 at 976. For further discussion on the public domain, see Pamela Samuelson, "Enriching Discourse on Public Domains (2006) 55 Duke L.J. 783; James Boyle, "Foreword: The Opposite of Property?" (2003) 66:1&2 Law and Contemp. Probs. 1; David Lange, "Reimagining the Public Domain" (2003) 66:1&2 Law and Contemp. Probs. 463; Meredith Shaw, "'Nationally Ineligible' Works: Ineligible for Copyright and the Public Domain" (2006) 44 Colum. J. Transnat'l L. 1033. For an analysis of the difference between the public domain and the commons, see Keith Aoki, "Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" (1998) 6 Ind. J. Global Legal Stud. 11. "There is another wrinkle in considering the expanding scope of domestic intellectual property protection and the "public domain." In many ways, our current conception of the public domain is that *nobody* affirmatively owns public domain materials. It is this unowned characterization that is somewhat at odds with a characterization of the public domain of intellectual materials as a commons." Keith Aoki, "Neocolonialism, Anticommons Property, and Biopiracy in the (Not-So-Brave) New World Order of International Intellectual Property Protection" (1998) 6 Ind. J. Global Legal Stud. 11 at 36-37 [footnote omitted]. From a developing country perspective, see James Otieno-Odek "Public Domain in Patentability After the Uruguay Round: A Developing County's Perspective with Specific Reference to Kenya" (1995) 4 Tul. J. Int'l & Comp. L. 15 (commenting that the public domain may help developing countries to develop by making the technology and skill they need available to them at a reasonable cost).

would be almost impossible to conceive that from the inception of the intellectual property law system to the current period there have been no "new" works of folklore.

The Western concept of the public domain is clearly illustrated by an article which examines the protection of the gusset, a triangular piece of fabric inserted in clothing seams which helps to give the wearer of the item freer movement, as a piece of American folklore. Jo Carillo in examining attempts to convert the gusset to private property describes the gusset as more than mere clothing and asserts that because the gusset is already American folklore, and consequently in the public domain, it should not be allowed to become private property. Carillo therefore argues that the gusset be protected to continue to have the status of American folklore and remain in the public domain:

> What makes the gusset part of the public domain is not that we no longer know the identity of its "inventor." What makes it a public domain item, in the sense that folklore is public domain, is that it was not and could not be dropped upon the culture for ready assimilation via the market, primarily because it is not novel in any sense of the word. Public domain items often emerge from cultural movement. They appear, not necessarily through invention, and then they are adopted slowly through a gradual, somewhat unconscious process, like the one described for table implements. Often a public domain item starts out as a cultural irritant, but once the decision is made to adopt it—again in single moments that can span the course of centuries—it slowly, gradually, and unconsciously becomes part of everyday life, sometimes so much so (as with the fork) that its use seems natural, inevitable, and self-explained.[508]

For the United States, folklore is public property: it belongs to the whole world and is incapable of private ownership. When this is contrasted with the nature, importance and community "ownership" of traditional textiles by indigenous communities, it is clear that what is referred to as "folklore" in Western legal thought is different from what "folklore"

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[508] Jo Carillo, "Protecting a Piece of American Folklore: The Example of the Gusset" (1997) 4 J. Intell. Prop. L. 203 at 244.

means when applied to traditional textiles. Arguably, the term "folklore" in indigenous communities might be said to be broader than the Western concept of folklore because there might be some aspects of a community's knowledge and cultural expressions which through time have been used by others and are now widely viewed as a public item; there are, however, others which are still community owned or regarded as national property.

The existence of the public domain serves a useful purpose in the realm of intellectual property. It plays a role in authorship by preserving the space from which authors can draw inspiration and create. As Jessica Litman asserts, "Copyright commentary emphasizes that which is protected more than it discusses that which is not. But a vigorous public domain is a crucial buttress to the copyright system; without the public domain, it might be impossible to tolerate copyright at all."[509] After examining the familiar theoretical justifications for the public domain, Litman concludes that they are somewhat unsatisfactory.[510] In arriving at this conclusion, she considers arguments for and against why facts and ideas should or should not form a part of the public domain. As she states:

> Indeed, the justifications for the public domain become least satisfactory at the most fundamental level. Why is it that copyright does not protect ideas? Some writers have echoed the justification for failing to protect facts by suggesting that ideas have their origin in the public domain. Others have implied that 'mere ideas' may not be worthy of the status of private property. Some authors have suggested that ideas are not protected because of the strictures imposed on copyright by the first amendment. The task of distinguishing ideas from expression in order to explain why private ownership is inappropriate for one but desirable for the other, however, remains elusive.[511]

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[509] Jessica Litman, "The Public Domain" (1990) 39 Emory L.J. 965 at 977.
[510] *Ibid.* at 968, 995-998.
[511] *Ibid.* at 999 [footnotes omitted]. "Meanwhile, the term 'public domain' has fallen out of fashion as a description of unprotectible aspects of copyrighted works. Courts and commentators speak instead of 'uncopyrightable' or 'nonprotectible' material. The distinction is a minor one, but the new vocabulary obscures the positive rationale for denying copyright protection and, instead, draws attention to the negative rationales." Jessica Litman, (*ibid.* at 995) [footnote omitted].

Defining the boundaries of the public domain is controversial since its contents are not settled. It is an unstable and, as history shows, an evolving area. In the United States, for example, some rules on the scope of the public domain have developed over time due to a combination of case law, intellectual property statutes and regulations.[512] Furthermore, the justifications for deciding what to include in it are unclear.

However, the inclusion of TCES in the Western view of folklore as public domain creates obstacles to their protection. For the characteristics of public domain items include the following: (1) such items are public property; (2) they cannot be converted into private property except by legislation; and (3) they may inspire the creation of new works.

In short, traditional textiles need to move outside the public domain by gaining international recognition and protection not as public property, but as private community property. From an indigenous peoples' perspective, the aspect of their culture that is being referred to as folklore is not public domain. It belongs to the community. Community ownership or use is totally different from public domain. The fact that community members may be able to freely use their folklore does not put their folklore in the public domain because not *all* folklore is public domain in the Western sense. Folklore is public to the members of the community, in the sense that they can use it. However, with respect to outsiders, it is considered to be the private property of the community. Outsiders do not have the right to use it freely. These differences in the conception of folklore as capable of private or community ownership create two main hurdles for the protection of indigenous

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[512] For instance, the U.S. *Copyright Act* 17 U.S.C. § 102(b) states that "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work." For an analysis of the historical background of the public domain in the United States, see Jessica Litman, "The Public Domain" (1990) 39 Emory L.J. 965 at 977-995.

textiles and textiles designs: first, for the West to accept that indigenous cultural products labeled as folklore are not public domain works, and second to draft the right legal mechanism to protect such works from unauthorised exploitation. The first factor in particular, is one of the reasons for the reluctance by some Western countries to protect folklore under the intellectual property law system.

It appears that the force of the public domain argument for excluding folklore from intellectual property protection is not as strong as it used to be. This is not only because of efforts by WIPO and other organisations, but also because of indigenous peoples' and national efforts to circumvent this public domain obstacle as the national examples discussed later in the chapter will show.[513] However, the adequacy of these efforts must be kept in mind.

5.2.4: ORIGINAL WORK

The requirement that a work be original creates another obstacle to intellectual property protection of folklore. This section assesses this factor by considering (1) the meaning of originality; (2) how it operates in the intellectual property system; (3) what challenge it poses to folklore protection; and (4) how great an obstacle it is.

To what extent can traditional textile designs be original? Although various intellectual property categories express this requirement differently, for the purposes of this section copyright originality will be discussed. Just as intellectual property legislation are different the world over, the concept of copyright originality may be expressed differently

[513] See section 5. 3., below.

depending on the jurisdiction and methods used to determine what amounts to an original work. Under Canada's *Copyright Act*,[514] for example, copyright protection is granted to "every original literary, dramatic, musical and artistic work" subject to the fulfillment of certain specified conditions. As is the case with many areas of law where the statute does not define the meaning of the terms used, court cases have filled in the gap in the statutory language of the Canadian *Copyright Act*.

In the Supreme Court of Canada case *CCH Canadian Ltd. v. Law Society of Upper Canada*,[515] some publishers of the legal resources in the Law Society of Upper Canada's library collection sued the Law Society of Upper Canada for copyright infringement for providing photocopy services in the library to researchers. This case is important in Canadian copyright law for redefining the threshold for originality. The latter was defined by the Supreme Court as follows:

> For a work to be "original" within the meaning of the Copyright Act, it must be more than a mere copy of another work. At the same time, it need not be creative, in the sense of being novel or unique. What is required to attract copyright protection in the expression of an idea is an exercise of skill and judgment. By skill, I mean the use of one's knowledge, developed aptitude or practised ability in producing the work. By judgment, I mean the use of one's capacity for discernment or ability to form an opinion or evaluation by comparing different possible options in producing the work. This exercise of skill and judgment will necessarily involve intellectual effort. The exercise of skill and judgment required to produce the work must not be so trivial that it could be characterized as a purely mechanical exercise. For example, any skill and judgment that might be involved in simply changing the font of a work to produce "another" work would be too trivial to merit copyright protection as an "original" work.[516]

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[514] *Copyright Act* (R.S., 1985, c. C-42), online: Department of Justice Canada <http://laws.justice.gc.ca/en/showtdm/cs/C-42>.
[515] *CCH Canadian Ltd. v. Law Society of Upper Canada* [2004] 1 S.C.R. 339 [*CCH*].
[516] Per McLachlin C.J., writing for the Court, at paragraph 16.

The Supreme Court thus adopted a "skill" standard which was higher than the "sweat of the brow" threshold that was the former Canadian standard inherited from British tradition.

The "sweat of the brow" threshold was first adopted in the British case of *University of London Press Limited v. University Tutorial Press Limited.*[517] Discussing the originality standard, Peterson J. defined "original" as follows:

> The word "original" does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought, and, in the case of "literary work," with the expression of thought in print or writing. The originality which is required relates to the expression of the thought. But the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work – that it should originate from the author.[518]

Ghana's *Copyright Act*, 2005 (Act 690), which is based on the British tradition, defines a work as original "if it is the product of the independent effort of the author."[519]

As its basic level, a work is considered "original" if it has not been copied from another work. Traditional designs will need to meet the originality standard, which, as demonstrated above, does not depend on when the design was created or the length of time it has been in existence. Depending on the jurisdiction, courts have considered other elements in determining the scope of originality. For example, a number of Australian courts have held that indigenous works can be original within the meaning of the Australian copyright law if they stem from an individual since Australia's *Copyright Act*

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[517] *University of London Press Limited v. University Tutorial Press Limited* [1916] 2 Ch 601.
[518] *Ibid.* at 608-609.
[519] Ghana *Copyright Act*, 2005 (Act 690) at section 1(4).

does not recognise communal copyright.[520] Consequently, the main problem is once again the communal nature of traditional textiles not meeting the originality requirement which is based on originality in works created by individuals.

5.3: INTELLECTUAL PROPERTY FOR FOLKLORE PROTECTION—INTERNATIONAL AND NATIONAL EXAMPLES

The discussions in the preceding sections have described a number of the challenges to intellectual property protection of traditional textile designs. Notwithstanding these challenges, this section examines the use of existing intellectual property categories to accommodate folklore. It starts by analyzing some international initiatives in this area, which includes a discussion of the TRIPS Agreement, and ends with national examples.

5.3.1. WIPO AND THE BERNE CONVENTION

The Berne Convention does not mention ethnic groups or indigenous, traditional textiles, indigenous or other communities or even culture. Neither does it mention community protection of designs. In addition, because it addresses copyright protection it applies only to the intangible expression and not the physical textile. However, nothing prevents an indigenous person from copyrighting that person's own design, provided it is original.

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[520] See *e.g. Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513. This is discussed in section 5.2., above. For discussion on this, see *e.g.* Kamal Puri, "Preservation and Conservation of Expressions of Folklore," *supra* note 5 at 16 (commenting on the courts' recognition of originality in Aboriginal artworks in the Bulun Bulun and Yumbulul cases). "To deny that Aboriginal artists produce 'original works' will be to deny the dynamic nature of the living Aboriginal culture." Kamal Puri, (*ibid.* at 17).

WIPO has been exploring the relationship between intellectual property, traditional knowledge and TCES. The beginning of the international intellectual property law system's relationship with folklore is traced to the Stockholm Conference to revise the Berne Convention.[521] The Paris Act of the Berne Convention revisions in 1971 included Article 15 of the Berne Convention which provides for copyright in works where the author is unknown or using a pseudonym. Article 15(4) states:

> (a) 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.
> (b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

This provision is relevant to this study because the creator of a TCE is usually unknown and thus the provision could arguably apply to folklore. However, the usefulness of this provision is dimmed because it applies to individuals. Therefore, it does not have much relevance for traditional textiles protection because it might be impossible to identify a design's individual author.

One can therefore conclude on traditional textiles that there is currently no international protection under the Berne Convention. In the absence of this international

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[521] For discussion on the Stockholm Conference, see Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works;1886-1986,* (London: University of London, 1987) See also, Michael Blakenly, "Protecting Traditional Cultural Expressions: The International Dimension" paper presented at a 2005 Workshop, online: Birkbeck University of London <http://www.copyright.bbk.ac.uk/contents/ workshops/blakem.pdf>.

protection, indigenous communities would have to rely on any provisions in national or regional copyright laws for the protection of their traditional designs.

The creation of the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore,[522] which first met in April 2001,[523] signaled greater interaction between intellectual property, genetic resources, traditional knowledge and TCES. The WIPO IGC has been working on creating draft provisions in this area and has created two sets against the misappropriation and misuse of traditional knowledge and TCES respectively.[524] Thus, WIPO's role has gone from an exploration of the nature of the relationship between intellectual property and traditional knowledge and TCES to a determination of the extent to which intellectual property and traditional knowledge can be protected together under the same agreement, or under different and in some cases complementary arrangements.

5.3.2. WTO AND TRIPS

The connection between TRIPS and TCES resides in the fact that TRIPS is an intellectual property agreement. The "merger" between intellectual property and trade in the TRIPS Agreement makes the World Trade Organization[525] another player in this field and means that intellectual property, traditional knowledge and TCES discussions cannot ignore the trade dimension. Further, TRIPS does not stand in isolation from the Berne

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[522] WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore [WIPO IGC].
[523] See "Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions/Folklore," online: WIPO <http://www.wipo.int/tk/en/>.
[524] For the draft provisions, see "Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge," online: WIPO <http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html>.
[525] World Trade Organization, online: <http://www.wto.org/> [WTO].

Convention.[526] Consequently, the current debate on TCES, traditional knowledge and intellectual property rights affect and are influenced by TRIPS.

The relationship between TRIPS and traditional textiles is not clear.[527] TRIPS does mention textiles, industrial designs, copyright and certification marks, categories which are relevant to this study,[528] but it has no express provisions on TCES protection. However, this silence should not lead one to conclude that it offers no protection for TCES. Due to the interconnectivity between traditional knowledge and TCES, it is helpful to assess any TRIPS provisions on traditional knowledge from which TRIPS' intent towards TCES in general and indigenous peoples' interests can be deciphered. The closest provision is Article 27.3(b) of TRIPS[529] dealing with plant varieties' protection. Article 27.3(b) does two main things: (1) it permits countries to exclude plants from patenting; and (2) it provides for the development of *sui generis* systems to protect plant varieties. Since this provision concerns patenting and plant varieties, it is not related to traditional textiles protection. Nevertheless, its relevance is its relation to indigenous concerns about the misappropriation of their knowledge. Thus, the following points are significant. First,

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[526] For example TRIPS incorporates Articles 1-21 and the Appendix of the Berne Convention with the exclusion of Article 6*bis* of the Berne Convention. See TRIPS Article 9(1).

[527] See *e.g.* Folarin Shyllon "Conservation, Preservation and the Legal Protection of Folklore in Africa: A General Survey" (1998) 32:4 Copyright Bulletin 37 [footnote omitted], online: UNESCO <http://unesdoc.unesco.org/ images/0011/001162/116222eb.pdf#116202> (noting that "The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) of the World Trade Organization adopts a non-committal attitude towards folklore and neither expressly affirms not expressly excludes its protection.")

[528] See Chapter 3, above.

[529] TRIPS Article 27 is on patentable subject matter. Article 27(2) and 27(3) state what members can exclude from patentability. TRIPS Article 27(3) states:

> Members may also exclude from patentability:
> (a) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;
> (b) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, Members shall provide for the protection of plant varieties either by patents or by an effective *sui generis* system or by any combination thereof. The provisions of this subparagraph shall be reviewed four years after the date of entry into force of the WTO Agreement.

TRIPS signals that developing countries' and indigenous peoples' concerns cannot be ignored. Indigenous peoples have expressed great dissatisfaction about the misappropriation of their traditional knowledge of the use of plants and the need for their knowledge to be protected. Further by providing for *sui generis* systems to protect plant varieties, it suggests that *sui generis* systems might be used to protect traditional knowledge. There is thus the possibility of some future recognition and protection of TCES which might translate into the traditional textiles area. However, even this provision is a controversial one, and there are concerns that it will facilitate the appropriation of traditional knowledge.[530]

Many developing countries are dissatisfied with the operation of TRIPS not only because of the high cost of meeting TRIPS' administrative and enforcement standards,[531] but also because they are not experiencing the promised benefits of having a strong intellectual property regime. These benefits include technology transfer, foreign direct investment, increased research in and the development of local industries.[532] As net importers of technology, many developing countries find that the high cost of complying with TRIPS does not improve their position. A strong intellectual property system alone is no guarantee that a country will experience the supposed benefits of having a strong

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[530] On this point and the views by Venezuela and the African Group in 1999, see Graham Dutfield, "TRIPS-Related Aspects of Traditional Knowledge" (2001) 33 Case W. Res. J. Int'l L. 233 at 271-272.

[531] For more details on the administrative requirements developing countries must deal with, see UNCTAD, *The TRIPS Agreement and Developing Countries*, UNCTAD/ITE/1 (New York: United Nations, 1996) at 15-20.

[532] On this point, see *e.g.* Alan S. Gutterman, "The North-South Debate Regarding the Protection of Intellectual Property Rights" (1993) 28 Wake Forest L. Rev. 89; Keith E. Maskus, "Intellectual Property Rights and Economic Development" (2000) Case W. Res. J. Int'l L. 471.

intellectual property system.[533] In addition, TRIPS does not expressly protect their traditional knowledge and TCES.[534] As Kamal Puri notes:

> It is a great pity that the TRIPS Agreement has been oblivious to the protection of indigenous cultural knowledge and resources. No wonder many Pacific Island nations are not convinced that enactment of their intellectual property laws in conformity with the obligations of the TRIPS Agreement will ensure the protection of their traditional knowledge and popular cultures.[535]

TRIPS was a failed opportunity to put the wealth of developing countries on the same footing as that of the developed countries.

However, the protection of folklore and traditional knowledge has increasingly become an issue that the TRIPS Agreement must address. WTO Members' adoption of a Ministerial Declaration at the fourth Ministerial Conference of WTO Members in Doha, in November 2001, launched a new round of trade negotiations.[536] With the DOHA

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[533] "The conventional reasons for intellectual property rights protection -- to promote investments in research and development (R&D) and technological innovation, and to encourage the disclosure of new information -- are not enough to make an economic case for the adoption of intellectual property rights." Carlos A. P. Braga, "The Economics of Intellectual Property Rights and the GATT: A View From the South" (1989) 22 Vand. J. Transnat'l L. 243 at 254. Several factors play a role in determining the relationship between intellectual property and FDI such as "the overall economic development and the level of economic and technological development of the host country, ...the industries concerned and the nature and extent of their R&D, production and commercial activities; and the different types of IPRs available." United Nations, Transnational Corporations and Management Division-Department of Economic and Social Development, *Intellectual Property Rights and Foreign Direct Investment* (New York: United Nations, 1993) at 5. After examining the relationship between intellectual property rights and foreign direct investment, Keith E. Maskus concludes that "The fundamental message here is that, although there are indications that strengthening IPRs can be an effective means of inducing additional inward FDI, it is only one component of a far broader set of important influences." Keith E. Maskus, "The Role of Intellectual Property Rights in Encouraging Foreign Direct Investment Technology Transfer" in Carsten Fink & Keith E. Maskus, eds., *Intellectual Property and Development: Lessons from Recent Economic Research* (World Bank and Oxford University Press, 2005) 41 at 71.

[534] In the case of Ghana and for the dissatisfaction expressed by Ghana's former Copyright Administrator, Betty Mould-Iddrisu and Ghana's former Minister of Justice, Nana Akuffo-Addo, see Amos Safo "Trade Related Intellectual Property Rights (TRIPS) a Sell Out, Say Experts" *Public Agenda (Accra)* (16 November 2002), online: Global Policy Forum <http://www.globalpolicy.org/socecon/bwi-wto/wto/2002/1116trips.htm>.

[535] Kamal Puri, "Protection of Expressions of Indigenous Cultures in the Pacific," *supra* note 26 at 24.

[536] See World Trade Organization, Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC/1, (2002) 41 I.L.M. 746, online: WTO <http://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_e.

Declaration of 2001[537] and its instruction to the TRIPS Council to consider, *inter alia*, the relationship between TRIPS, the Convention on Biological Diversity, traditional knowledge and folklore, developments in this area might signal some hope for indigenous and traditional communities.[538]

In sum, TRIPS does not expressly protect TCES nor mention traditional textiles and indigenous communities in the intellectual property categories that are most relevant to this study namely, copyright, industrial designs and certification marks. This means that indigenous communities have to look to national or regional agreements to assist them in their aim of protecting their traditional textiles. However, TRIPS' "exclusion" of TCES does not undermine their significance since other international instruments[539] have emphasized the importance of maintaining cultural diversity. Moreover, the DOHA Declaration and its instruction to the TRIPS Council create the strong possibility of folklore being included in TRIPS in the near future or, at least, of TRIPS affirming the importance of protecting TCES. This TRIPS Council's ongoing assignment is a clear attempt to define the relationship between trade, traditional knowledge and TCES. The

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htm>. The Ministerial Conference is the WTO's highest body as established by the Convention establishing the WTO.

[537] *Ibid.* This Declaration states at Paragraph 19:

> We instruct the Council for TRIPS, in pursuing its work programme including under the review of Article 27.3(b), the review of the implementation of the TRIPS Agreement under Article 71.1 and the work foreseen pursuant to paragraph 12 of this declaration, to examine, inter alia, the relationship between the TRIPS Agreement and the Convention on Biological Diversity, the protection of traditional knowledge and folklore, and other relevant new developments raised by members pursuant to Article 71.1. In undertaking this work, the TRIPS Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPS Agreement and shall take fully into account the development dimension.

[538] Gervais, for example, has suggested that one way forward is a declaration on traditional knowledge and trade. Another option is a reopening of TRIPS, incorporating a *sui generis* right, together with revising Article 27.3(b). Daniel Gervais, 'Traditional Knowledge & Intellectual Property: A TRIPs-Compatible Approach' (2005) 1 Mich. State L. Rev. 137 at 160-161.

[539] See *e.g.* the discussion on the 2005 *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* in section 4.5.4., above.

past shows that a definition of the relationship between trade and intellectual property ended in a "merger." It remains to be seen whether the relationship between trade, traditional knowledge and TCES will also be a marriage, and if so, if it will be a marriage of "equals' or "unequals."

5.3.3: NATIONAL EXAMPLES

The previous section examined the international framework for the protection of cultural property. This section analyzes some national experiences in the protection of folklore using Canada and Australia as the main examples.

5.3.3.1: CANADA

Although expressions of folklore in the context of the UNESCO—WIPO Model Provisions do not have explicit protection under Canada's intellectual property legislation,[540] TCES protection is not excluded under Canada's intellectual property framework.[541] Canada's policy has been that the existing intellectual property framework is adequate and should be used to protect the protectable aspects of TCES.

In response to the question in WIPO's questionnaire on national experiences with expressions of folklore on whose "property" expressions of folklore in Canada are, the Canadian response was:

> In one sense, expressions of folklore may be regarded as the 'property' of the country as a whole. However, among Aboriginal peoples in Canada, a

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[540] See "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Response of Canada" online: WIPO <http://www.wipo.int/tk/en/consulatations/questionnaires/ic-2-7/canada.pdf >.

[541] On this point, see e.g. "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Response of Canada," online: WIPO <http://www.wipo.int/tk/en/consulatations/questionnaires/ic-2-7/canada.pdf > at 3.

> sense of 'ownership' of traditional artistic heritage often exists in the concerned communities. Under the Canadian legal system, there are mechanisms available for collectivities (both Aboriginal and non-Aboriginal) to assert legal 'property' rights in expressions of folklore (for example, contract relating to trade secrets, corporations holding copyrights and patents).[542]

Aboriginal people's concerns about unauthorised cultural heritage appropriation[543] have led them to explore the intellectual property law system as a measure to protect their cultural heritage. Although this may be regarded as controversial in view of the challenges against the intellectual property system protecting folklore, Canada's aboriginal people have achieved a measure of success in using the intellectual property system. However, there are still some areas where the exploration of the use of the intellectual property law system is ongoing. This section considers the use of the intellectual property mechanism to protect indigenous images and designs in Canada.

The Inuit amauti

The Inuit are the native people of the Artic. Approximately 41,000 Inuit live in four self-governing regions: Labrador, Nunavik, Nunavut and Western Arctic. The Inuit had their own laws and system of government before the settlers arrived. One indicator of tribal identity to the Inuit is their language, Inuktitut. Oral history plays an important role in Inuit society, since it is through this means that they have passed on their traditions and values from one generation to the next. The Inuit live in one of the most remote parts of Canada. They lived in relative isolation until about 50 years ago when the Canadian government

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[542] See "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Response of Canada," online: WIPO <http://www.wipo.int/tk/en/consulatations/questionnaires/ic-2-7/canada.pdf> at 6.

[543] For a study on cultural appropriation in Canada, see Pamela Rae Krueger, *Counterfeit Cultures: Cultural Appropriation, Art by Native Artists and Canadian Art Galleries* (M.A. Thesis, Laurentian University of Sudbury, 1998) [unpublished].

moved many of them from their traditional nomadic lifestyle to settlements, a move which the Inuit are still trying to recover from.[544] The Inuit in Canada live in small communities spread out over a large geographic area. The creation of Nunavut as a self-governing region in 1999 gave the Canadian Inuit greater success in self-determination than any other aboriginal people in Canada. However, like other indigenous peoples, the Inuit are also trying to protect and preserve their culture from exploitation.

Clothing is an important part of indigenous culture in Canada. Different indigenous communities in Canada can be distinguished by their textiles and traditional dress.[545] Further, even with respect to one item of clothing, individual indigenous communities may have their unique design for that type of clothing. Like other indigenous peoples, the Inuit have their own forms of traditional dress, one of which is the *amauti*.

The protection of the Inuit *amauti* has been a subject of ongoing discussion especially since Donna Karan, a well-known western designer, showed an interest in it. In 1999, Donna Karan sent a representative, Bonnie Young, to the North West Territories of Canada. Glen Wadsworth, the manager of Yellowknife's Northern Images Gallery, who communicated with Ms. Young prior to her visit reported that she told him "she was looking at native images, especially from the Far North, because she thought it was an area

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[544] See "Who Are Inuit?" online: Pauktuutit Inuit Women's Association <http://www.pauktuutit.on.ca/who/main.html> (commenting that as a result of this move Inuit culture has been severely disrupted). For some Inuit perspectives on TK and TCES, see Rosemarie Kuptana, "Relationship between Traditional Knowledge and Intellectual Cultural Properties: An Inuit Perspective," online: Canadian Heritage <http://www.traditions.gc.ca/ docs/docs_disc_kuptana_e.cfm>.

[545] "Clothing among Native peoples varies in both style and raw material, reflecting cultural preferences and the environmental conditions found in each region of Canada. It was frequently adorned with elaborate and colourful designs and motifs. These often serve to identify the tribal group that manufactured the clothing and the time period of manufacture." See "Clothing," online: Canadian Museum of Civilization <http://www.civilization.ca/aborig/stones/clothing/clmenu.htm>.

whose clothing patterns and motifs weren't that known."[546] He was further informed that "they were looking at design motifs and elements that might be incorporated into their Fall 2000 Donna Karan collection."[547] On her visit, Bonnie Young purchased thousands of dollars worth of indigenous clothing. Some of these purchases were later displayed and sold in Donna Karan's store on Madison Avenue in New York.[548] That there was a demand for such items in the United States is clearly portrayed by the fact that these items sold quickly. Patti Cohen, Company Spokesperson for Donna Karan, remarked, "There's a vintage craze in America right now. People want things that are one of a kind."[549] Word spread that within the year Dene and Inuit-inspired clothing would be featured on New York runways.[550] This raised many concerns for the Inuit.

Donna Karan's apparent interest in Inuit designs sparked fears that the designs would be misappropriated, indigenous peoples would be exploited and more harm than good would be brought to the northern people. As Karen Wright-Fraser, an aboriginal designer commented, "Sure, we're flattered they want to use these designs and there might be some work for the designers and sewers here, but to me, it's like dangling a little carrot in front of us. They're saying, 'You can bead this and you can bead that,' but they're still

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[546] Quoted in Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT" *HighGrader Magazine* (January/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

[547] Quoted in Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT" *HighGrader Magazine* (January/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

[548] For more information on this, see Maria Canton, "Fashion Faux Pas: Inuit Women Fight for Control over Designs" *Northern News Services* (October 18, 1999), online: <http://www.nnsl.com/frames/oldarchive/archive99-2/oct99/oct18_99fashion.html>; Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT" *HighGrader Magazine* (January/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

[549] See Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT" *HighGrader Magazine* (January/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

[550] See Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT" *HighGrader Magazine* (January/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

exploiting. They'll make millions off us and nothing will come back. They should give recognition."[551] From this comment, it is clear that the indigenous people want recognition for their traditional clothing, in other words, an acknowledgment that the particular item was not just made in the community, but originated from and was created by that community. However the Inuit are not prepared to simply settle for recognition. Their fight goes beyond that.

Pauuktuutit,[552] the Inuit Women's Association, is very active in protecting their cultural heritage. Pauktuutit was incorporated in 1984 with the mandate "to foster a greater awareness of the needs of Inuit women, and to encourage their participation in community, regional and national concerns in relation to social, cultural and economic development."[553] In addition, they are concerned with the protection of Inuit culture, intellectual property and traditional knowledge.

Pauktuutit had many concerns about Donna Karan's interest in the *amauti*. There was the concern that Inuit women's labour would be used to produce their traditional designs at Third World wages for the global market.[554] There were additional fears that a "mutated version of the traditional hooded women's parka, the amauti could appear on New York runways with no recognition for the women who have kept and used the design for

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[551] See Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT" *HighGrader Magazine* (January/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

[552] Pauuktuutit, online: <http://www.pauktuutit.ca/>.

[553] See "Activities," online: Pauktuutit Inuit Women's Association <http://www.pauktuutit.on.ca/activities/main.html> 1.

[554] See Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT," *HighGrader Magazine*, (Janauary/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

millennia."[555] The Pauuktuutit Vice President noted: "There is no denying the pride in having our creations recognized for their beauty and quality...But on the other hand, we see the potential danger of having our traditional designs misappropriated without due compensation to the original creators of the product."[556] The Vice President expressed further that the *amauti* was worth protecting and "is the intellectual property of all Inuit women."[557]

Pauktuutit's efforts to protect the *amauti* have included writing to Donna Karan to inquire about her intentions concerning the *amauti* and stating that these designs belong to the aboriginal women. Pauktuutit is also exploring the intellectual property protection of the *amauti* at WIPO.[558] They brought this issue to the attention of WIPO and several discussions have since been held about the protection of the *amauti*. In addition, there is a project between Pauktuutit and several Canadian government departments such as the Department of Foreign Affairs and International Trade to explore the legal protection and export potential of the item.

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[555] See Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT," *HighGrader Magazine*, (Janauary/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

[556] Quoted in Maria Canton, "Fashion Faux Pas: Inuit Women fight for control over designs," online: Northern News Service <http://www.nnsl.com/frames/newspapers/1999-10/oct18_99fashion.html>. "Veronica Dewar, president of Pauktuutit, says she is concerned when she sees a multi-million dollar company move in on designs that have been unique to the aboriginal culture for centuries. 'I am concerned about the cultural and financial appropriation of our collective and individual property by an organization with annual revenues in excess of $600 million per year,' she said in regards to New York designer Karan." Maria Canton, "Fashion Faux Pas: Inuit Women fight for control over designs," online: Northern News Service <http://www.nnsl.com/ frames/newspapers/1999-10/oct18_99fashion.html>

[557] Monica Ell, vice-president of Pauktuutit, quoted in Catherine Pigott, "Donna Karan does the North: NY Fashion Goddess Causes Stir in NWT," *HighGrader Magazine*, (Janauary/February 2000), online: <http://www.grievousangels.com/highgrader/2000/karan2000.html>.

[558] See WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., *Accreditation of Certain Organizations*, WIPO/GRTKF/IC/3/2 (2002), online: WIPO <http://www.wipo.int/edocs /mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_ 2.doc> at Annex, page 6.

A description of Pauktuutit's project to protect the *amauti* states:

> The specific objectives of Pauktuutit's project have been to evaluate and protect the intellectual property rights associated with the production and marketing of an Inuit women's parka called an *amauti*. This traditional clothing exemplifies the innovative adaptation to a harsh Arctic environment and the creative and artistic elements of Inuit culture. The *amauti*, an example of Inuit creativity that uses traditional materials, designs and motifs, is still in use today, and has yet to be exploited or misappropriated like other Inuit creations. The project's efforts to building capacity at the community level [have] helped Inuit to evaluate the limitations of existing IPR laws and has helped in the search for solutions....Overall, the *amauti* case study will highlight how a small component of Inuit material culture and heritage is gaining recognition as an interesting pilot project that explores a range of intellectual property rights, capacity-building, and sustainable development issues at the national and international level. The *amauti* embraces Inuit traditional knowledge and cultural expressions, relates to traditional harvesting and utilization of resources and the role of Inuit women, and addresses the issues of commercialization of a traditional product and how this impacts the economic circumstances of Inuit women today.[559]

This example shows that protecting TCES under intellectual property law is not a straightforward issue. It also demonstrates that the Canadian intellectual property law system is not wholly suited to protecting TCES in the form of garments and traditional designs. Tracy O'Hearn, the executive director of Pauktuuttit, stated that copyright and industrial design laws do not fit with the Inuit view of property because "They don't address the collective nature of the ownership and the protection [is] also time-limited."[560] Probably, the Inuit could consider using the certification trademark system, but that also has its limitations as will be shown below.

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[559] Phillip Bird, "The Amauti and Intellectual Property," Abstract # 14, online: Pauktuutit Inuit Women's Association <http://www.thecentrefortraditionalknowledge.org/case/abstract14.html> [emphasis added].

[560] Tracy O'Hearn quoted in "Inuit Women Seek Parka Copyright" *CBC North News* in *Canku Ota (Many Paths) An Online Newsletter Celebrating Native America*, Issue 37 (June 2, 2001) 1, online: Canku Ota <http:// www.turtletrack.org/Issues01/Co06022001/CO_06022001_Parka.htm>.

With respect to the trademark system, the Snuneymuxw First Nation of Canada, for example, used the *Trade-marks Act* in 1999 to protect some petroglyph (ancient rock painting) images.[561] Because these images hold religious significance for the Snuneymuxw First Nation, the unauthorised reproduction and commercialisation of the images was considered to be contrary to the cultural interests of the community. The Snuneymuxw First Nation registered the petroglyph images in order to stop the sale of commercial items, such as T-shirts and postcards, which bore those images. Members of the Snuneymuxw First Nation subsequently indicated that local merchants and commercial artisans had stopped using the petroglyph images. In addition, the use of trade-mark protection, accompanied by an education campaign to make others aware of the importance of the petroglyphs to the Snuneymuxw First Nation, was very successful.[562] From a perusal of the Canadian Intellectual Property Office's trademark database, it appears that the application

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[561] See the Canadian Intellectual Property Office's trademark database, online: CIPO <http://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/rfnSrch.do;jsessionid=0000aXZXmQ2g9JyEg0qB_jYEl1k:1247nfca5? V_SEARCH.command=navigate&V_TOKEN=1234296787185&V_SEARCH.docsStart=1&lang=eng>. See also "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Response of Canada," online: WIPO <http://www.wipo.int/tk/en/consultations/questionnaires/ic-2-7/canada.pdf> at 9. The full questionnaire, WIPO Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, WIPO/GRTKF/IC/2/7, June 22, 2001, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Second Session Geneva, December 10 to 14, 2001 is available online: WIPO <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_2/wipo_grtkf_ic_2_7.pdf>. For WIPO's final report on the national responses to this questionnaire, see WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, WIPO/GRTKF/IC/3/10 (2002), online: WIPO <http://www. wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_10.doc>.

[562] See "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Response of Canada" online: WIPO <http://www.wipo.int/tk/en/consultations/questionnaires/ic-2-7/canada.pdf> at 9. For further discussion on intellectual property and indigenous knowledge, see Greg Young-Ing, "Indigenous Knowledge and Intellectual Property Rights in Context" (Discussion paper), online: Canadian Heritage <http://www.traditions.gc.ca/docs/docs_disc_young_e.cfm>. See also, the other Discussion papers, online: Canadian Heritage <http://www.traditions.gc.ca/docs/docs_disc_e.cfm>.

to register these images was done as official marks which are prohibited from being connected with a business under section 9(1)(n)(iii) of the Canadian *Trade-marks Act*.[563]

With respect to textiles and textile designs, Canada's aboriginal people can use certification marks to indicate that their textiles meet certain standards such as being authentic and made by aboriginal people. In fact, the Cowichan Band Council of British Columbia holds three certification marks: COWICHAN, GENUINE COWICHAN, and GENUINE COWICHAN & Design.[564] The certification marks state: "The certification mark, to be used by persons authorized by the certifier, will certify that the wares have been hand-knit in one piece in accordance with traditional tribal methods by members of the Coast Salish Nation using raw, unprocessed, undyed, hand-spun wool made and prepared in accordance with traditional tribal methods."[565]

However, there are advantages and limitations in using a certification mark. Whether its use will be sought by a Canadian aboriginal community depends on whether it meets

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[563] See *e.g.* the petroglyph image with application number 0910393 in the Canadian Intellectual Property Office's trademark database, online: Canadian Intellectual Property Office <http://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/vwTrdmrk.do;jsessionid=0000aXZXmQ2g9JyEg0qB_jYEl1k:1247nfca5?lang=eng&fileNumber=0910393&extension=0&startingDocumentIndexOnPage=1>. *Trade-marks Act*, (R.S., 1985, c. T-13) online: Department of Justice Canada <http://laws.justice.gc.ca/en/showdoc/cs/T-13/bo-ga:s_7::bo-ga:s_12?page=1 >. Section 9 of the Trade-marks Act deals with prohibited marks. Section 9.(1) states:

> No person shall adopt in connection with a business, as a trade-mark or otherwise, any mark consisting of, or so nearly resembling as to be likely to be mistaken for …
> (n) any badge, crest, emblem or mark
> (i) adopted or used by any of Her Majesty's Forces as defined in the *National Defence Act*,
> (ii) of any university, or
> (iii) adopted and used by any public authority, in Canada as an official mark for wares or services,
> in respect of which the Registrar has, at the request of Her Majesty or of the university or public authority, as the case may be, given public notice of its adoption and use;

[564] These are registered as TMA465836, TMA467837 and TMA469023 respectively, see the Canadian Intellectual Property Office's trademark database, online: Canadian Intellectual Property Office <http://www.ic.gc.ca/app/opic-cipo/trdmrks/srch/bldSrch.do;jsessionid=0000aXZXmQ2g9JyEg0qB_jYEl1k:1247nfca5?lang=eng&textField1=Cowichan+Band+Council+&selectField1=ownname&submitButton=Search&andOr1=and&textField2=&selectField2=regnum&andOr2=and&textField3=&selectField3=regnum&andOr3=and&textField4=&selectField4=tmlookup_ext&andOr4=and&textField5=&selectField5=tmlookup_ext&selectWithin=&selectStatus=&selectDateStatus=&selectYear1=1865&selectMon1=1&selectDay1=1&selectYear2=2009&selectMon2=2&selectDay2=3&selectMaxDoc=500&selectDocsPerPage=10>.

[565] See *e.g.* the COWICHAN certification mark, TMA465836.

the needs of the respective community. The clear advantages of the use of certification marks are that they are more suitable to the communal nature of TCES because the category was not created with only individuals in mind and can therefore be used by groups. In addition, it has the potential for perpetual protection, which would address copyright's limited term of protection, which some aboriginal people see as one of the undesirable limitations of the copyright system.[566] If all that a community is seeking is to authenticate its products, then the certification process is an excellent choice. However, the use of a certification mark would not prevent non-aboriginal people from selling items that resemble aboriginal ones. Some indigenous peoples have stated in WIPO's fact-finding studies that they want to prevent copying of their designs.[567] It is therefore doubtful that a certification mark would be effective here. In addition, the inability to prevent copying means the inability to prevent the use of motifs and designs for purposes to which the community is opposed. The certification mark system does not give one that right like copyright does.

The Canadian experience therefore shows mixed results in the use of the existing intellectual property framework to protect TCES. In addition, some of the success that Canada's indigenous peoples have achieved is due to their initiative to explore using the intellectual property system to protect their cultural heritage. The Canadian government is taking seriously the issue of traditional knowledge and TCES protection. As with other countries, it is exploring the extent to which the intellectual property system can protect traditional knowledge and TCES. In Canada, departments concerned with TCES issues are The Canadian Intellectual Property Office (CIPO), Industry Canada, Parks Canada, the

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[566] See *e.g.* the discussion on Pauktuutit in this section, above.
[567] WIPO, *Intellectual Property Needs and Expectations*, *supra* note 30.

Canadian Museum of Civilization[568] and Canadian Heritage. Canada's long-term reform agenda (beyond 4 years from 2002 though) for modernizing the *Copyright Act* includes traditional knowledge.[569] Although, the Canadian government deems this an important policy issue,[570] it is a lower priority area. It is possible that Canada's indigenous people would not see any specific legal provisions expressly on TCES protection for a while.

5.3.3.2: AUSTRALIA

Although Australia has mechanisms in place to protect artisans, Australia has no laws specifically for traditional knowledge protection.[571] Consequently, the protection for the latter tends to fall under the intellectual property law mechanism although in some cases the courts respect indigenous customary laws.[572] The main intellectual property categories that have been used to protect traditional designs are copyright law, trademark law and industrial design law. However, the intellectual property law system is not the only mechanism that indigenous Australians have explored and used to protect their

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[568] See "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Response of Canada" online: WIPO <http://www.wipo.int/tk/en/consulatations/questionnaires/ic-2-7/canada.pdf > 1. This answer was given in response to the first question about which government agencies, departments, ministries or offices deal with expressions of folklore issues.

[569] See Supporting Culture and Innovation: Report on the Provisions and Operation of the Copyright Act, Copyright Act - Section 92 Report, Industry Canada, October 2002, online: Government of Canada <http://www.ic.gc.ca/epic/site/crp-prda.nsf/en/rp00863e.html> at pages 45-46. For background information, see Industry Canada and Canadian Heritage, "A Framework for Copyright Reform," online: Government of Canada <http://www.ic.gc.ca/epic/site/crp-prda.nsf/en/rp01101e.html>.

[570] See *e.g.* "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Response of Canada," online: WIPO <http://www.wipo.int/tk/en/consultations/questionnaires/ic-2-7/canada.pdf>.

[571] See Betsy J. Fowler, "Preventing Counterfeit Craft Designs," in J. Michael Finger & Philip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004) 113.

[572] See Betsy J. Fowler, *ibid.*

traditional arts and cultural expressions.[573] Other tools they have been using or exploring include contract and the strengthening of customary law protection.[574]

Australian Aboriginal communities recognise community ownership of culture and, in some cases, individuals may be the custodians of particular elements of culture[575] with the responsibility to oversee their use. Thus, the customary law of the aboriginal group in question would lay down the custodian's duties, what actions could be taken in relation to the item and the punishment for disobedience.

An examination of some Australian court cases reveals the simultaneous use of aboriginal customary law and the intellectual property law system, specifically copyright law, in solving cases. Two notable examples of those cases are *Milpurrurru v. Indofurn*[576] and *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd.*[577] In *Milpurrurru v. Indofurn*, an Australian imported carpets from Vietnam that reproduced designs by aboriginal artisans. The consent of the aboriginal artisans was not obtained before the designs were reproduced. In an action before the court for copyright infringement, the court found the importer liable and awarded *inter alia* damages to the artisans collectively for the harm that they, as the cultural custodians of these designs, had suffered. By awarding damages for

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[573] See Terri Janke, *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions*, prepared for WIPO (Geneva, Switzerland: World Intellectual Property Organization, 2003), online: WIPO <http://www.wipo.int/tk/en/studies/cultural/ minding-culture/introduction.html>.

[574] Terri Janke lists the other strategies as "the use of contracts; the establishment of collective management systems; the drafting of cultural protocols; the use of knowledge management systems; and the strengthening of Indigenous customary laws." "Case Study 4, Industrial Designs and their Application to Indigenous Cultural Material" in Terri Janke, *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions*, prepared for WIPO (Geneva, Switzerland: World Intellectual Property Organization, 2003), online: WIPO <http://www.wipo.int/export/ sites/www/tk/en/studies/cultural/minding-culture/studies/ industrialdesigns.pdf>.

[575] See Betsy J. Fowler, "Preventing Counterfeit Craft Designs," in J. Michael Finger & Philip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004) 113.

[576] *Milpurrurru v. Indofurn* (1995) 30 IPR 209.

[577] *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd* (1998) 41 IPR 513.

cultural harm, the judge stretched copyright to its limits because that remedy did not exist under copyright law.[578]

However, *Bulun Bulun and Milpurrurru v. R & T Textiles Pty Ltd.* showed that the Australian *Copyright Act* does not recognise communal ownership of copyright. The Australian *Copyright Act* is therefore useful for individual artists, aboriginal or otherwise who want to protect their works, but limited with respect to a whole community which would want to protect its traditional textile designs.

Two problems that have been identified in relation to determining the origin and authenticity of aboriginal designs and crafts are that: (1) copies of these designs or crafts are sometimes made in other countries and sold in Australia alongside Australian ones thus confusing tourists as to the authenticity of the items; and (2) in some cases, aboriginal peoples are involved in the production and sale of these imitations, which tend to be sold as "aboriginal-made," to add to the confusion.[579] The use of certification marks by aboriginal communities is seen as one solution to this confusion. IP Australia[580] has stated that certification marks are suitable for authenticating and protecting indigenous people's products.[581] Australia's aboriginal people have been using the certification marks system. For example, the Australian government has been sponsoring the National Indigenous Arts Advocacy Association's (NIAAA) program to register a certification mark which certifies the authenticity of aboriginal works. The NIAAA registered two certification marks in

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[578] See further Sally Peata McCausland, Protecting Aboriginal Cultural Heritage in Australia: Looking for Solutions in the Canadian Experience (LL.M. Thesis, University of British Columbia, 1997) [unpublished].
[579] See Betsy J. Fowler, "Preventing Counterfeit Craft Designs" in J. Michael Finger & Philip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004) 113 at 118. See also, Frankel and Janke 1998, chapter 3, at 6 (mentioned in Betsy J. Fowler, *ibid.* this note).
[580] IP Australia is the Australian government agency in charge of administering trade marks, designs, patents and plant breeder's rights, online: IP Australia <http://www.ipaustralia.gov.au/>.
[581] See Betsy J. Fowler, *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004) 113 at 118 [footnote omitted].

2000: the label of authenticity and the collaboration mark under the Australian Trademark Act.[582]

However, certification marks offer limited protection because they have to be registered to be effective. Due to their territorial nature, they are only effective in the countries where they are registered. Further because they only authenticate works, they do not appear to be able to prevent others from producing imitations and forgeries of designs. Bolivia, for example, expressed to WIPO in the latter's fact-finding missions that its people need, *inter alia*, protection against unauthorised use of their culture and against free copying of patterns and designs.[583] Against this background, the certification mark system falls short.

Australia can be described as one of the leading countries exploring the relationship between the protection of traditional knowledge and the "formal" legal system. The court cases in which aboriginal customary principles have been applied and upheld in conjunction with intellectual property laws not only attest to the fact that in some cases these two systems can co-exist and complement each other, but also give hope that more linkages between the two and the correct equation for the existence and application of these two systems can be found in the future. The Australian example also reflects the importance of strong indigenous organisations promoting and protecting their rights and the role such organisations can play in this area.

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[582] These were approved by the Australian Intellectual Property Office and numbered 772563 and 772564 respectively. See Matthew Rimmer, "Australian Icons: Authenticity Marks and Identity Politics" (2004) Indigenous L.J. 139. See also, Terri Janke, "Indigenous Arts Certification Mark," Case Study 8, online: WIPO <http://www.wipo.int/tk/en//studies/cultural/minding-culture/studies/indigenousarts.pdf> 2.

[583] See "FFM to South America: Mission to Bolivia" in WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999),* WIPO Publication 768 (Geneva: WIPO, 2001) 185 at 186-189.

One important point worth emphasizing is that while there has been success in indigenous people's use of certification marks, it is advisable not to take that as conclusive evidence that the certification marks system meets their needs and is in line with their worldview. This section would not be complete without making a reference to the use of certification marks in New Zealand. The Maori Arts Board of New Zealand, for example, uses certification marks to indicate that products are produced by people of Maori descent and are of a particular quality. In 2001, the Maori Arts Board of New Zealand introduced a New Zealand Maori Made Mark, *Toi Iho*, a registered trade mark which licenses Maori artists to use the mark to promote and sell authentic Maori works. It distinguishes Maori exhibitions, performances and products from the copy-cat ones in the market. Commenting on the process by which this mark was created, Maui Solomon, a New Zealand lawyer noted in 2006:

> The Mark was seen as an interim step to provide a level of protection to Maori artists under the current IP system until new and more responsive mechanisms to accommodate Maori aspirations for protecting their knowledge can be developed (such as the "Tikanga Maori Protection Framework" advocated by some of the Wai 262 claimants...). Although the Mark is owned by a quasi-government agency (Te Waka Toi), there is an agreement with Maori that the proprietorial rights to the Mark will be transferred and assigned to an autonomous Maori body in due course.[584]

From this example, it appears that the certification mark system is seen as a temporary measure until a system more suited to indigenous needs is created.

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[584] Maui Solomon, "Protecting Maori Heritage in New Zealand," in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 352 at 355. He provides more information on the Tikanga Maori Protection Framework in his article (*ibid.* this note). For additional discussion on New Zealand, see Matthew Rimmer, "Australian Icons: Authenticity Marks and Identity Politics" (2004) Indigenous L.J. 139 at 167; Arapata Hakiwai, "Mäori Taonga – Mäori Identity," in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 409 (commenting on the effect of museums on the Maori).

While the use of certification marks has clearly had some success in distinguishing indigenous artist's works from non-indigenous ones, its present limitations as discussed make it a partial solution for protecting communal indigenous works.

5.4: COMPLEMENTARY LEGAL CONCEPTS

Another option is to explore how other legal concepts can complement the existing intellectual property law system in its protection of folklore. This section touches on some of the most relevant ones: moral rights and contract.

Moral rights

Although moral rights originate from the civil law tradition, they are also found in some international copyright provisions and in some legislation of countries which do not follow the civil law tradition. Unlike the Universal Copyright Convention and the TRIPS Agreement, which only provide for economic rights, the Berne Convention contains both economic and moral rights provisions. With respect to moral rights, Article 6*bis* of the Berne Convention provides that:

> (1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have 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.
> (2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

> (3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.

Article *6bis* gives an author two forms of moral rights under the Berne Convention. First is the right to be named as the author of a work[585] and second is the right to object to uses of the work that would be derogatory or prejudicial to the author's honour or reputation. Although the Berne Convention does not define acts that are derogatory or prejudicial to an author's honour or reputation, this can be interpreted to cover acts that would lower society's opinion of the author's capability, that would subject the author to ridicule or that would result in the author being associated with something that is offensive to the author or to society as a whole.[586]

There is no national uniformity about the duration of moral rights. Moral rights usually exist at least until the termination of economic rights. For example, while in Canada it ends upon the expiration of copyright, in civil law countries it exists in perpetuity. This means in the case of Canada that even if traditional textiles were able to meet all the copyright eligibility criteria, which they currently do not meet, the term of moral rights protection to be afforded to traditional textiles would be limited.

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[585] This is also known as the "paternity right" or the "*droit de paternité*."

[586] For example, Canada's *Copyright Act* gives an author moral rights. Section 28(1) provides that "Any act or omission that is contrary to any of the moral rights of the author of a work is, in the absence of consent by the author, an infringement of the moral rights." The moral right of integrity enables an author to prevent any distortion, mutilation or other modification or his or her work, and the right to restrain the use of the work "in association with a product, service, cause or institution" if such a use would be prejudicial to the author's reputation or honour. Canadian *Copyright Act* at section 28.2(1). Section 28.2(2) provides that "In the case of a painting, sculpture or engraving, the prejudice referred to in subsection (1) shall be deemed to have occurred as a result of any distortion, mutilation or other modification of the work."

Moral rights are potentially important[587] in the protection of traditional textile designs because they might enable traditional communities to prevent their sacred designs from being used, for example, on tablecloths or carpets. The moral right of integrity, which is particularly relevant in a digitized world, could enable communities to prevent mutilations or modifications of their traditional textiles which are prejudicial to their reputation. Because moral rights are influenced by the personality theory for justifying intellectual property, their focus is generally based on an individual author. However, for moral rights to be very effective in this context, they would have to be given to communities as opposed to just individuals because of the communally owned nature of traditional designs. Further, they should have the potential to exist in perpetuity because of the intergenerational nature of traditional knowledge and the fact that it is heritage to be passed on from one generation to another.

Moral rights are relevant for traditional textiles only where a country: (1) has copyright legislation; (2) such copyright legislation recognises both moral and economic rights; and, most importantly (3) that country is willing to recognise that indigenous groups can have communal copyright and moral rights. It appears that this is not presently the case because while economic rights exist independently of moral rights, moral rights do not currently exist without economic rights. Achieving these three conditions would require modifying the moral rights concept and operation in conventional copyright law.

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[587] See *e.g.* Kamal Puri, "Preservation and Conservation of Expressions of Folklore," *supra* note 5 at 23 (stating that "for Aboriginal folklore, moral rights are very significant for preventing debasement, mutilation or destruction of such cultural works").

Contract

The use of contracts is another mechanism that can be explored in this area. Thus, potential exploiters can sign contracts with indigenous communities regarding the use of the latter's artworks and designs. Such contracts should include an arrangement for compensation to the communities.

For example, in New Zealand, an aboriginal community allowed a swimwear company, Moontide, to use the former's koru designs in swimwear. A community elder negotiated the use of the koru motif. One of the company's concerns was to ensure that the use of the design showed cultural respect. The Pirirakau hapu (sub-tribe) of the Ngati Ranginui people received a part of the proceeds from the sales.[588] This negotiation was successful because the company was sensitive to the community's values.

Rachel Massey and Christopher Stephens, writing on the Canadian situation, give examples of developments in the museum and other fields whereby a percentage of proceeds from exhibitions and other uses of aboriginal designs go to the source communities. The Canadian Museum of Civilization established a fund into which a percentage of the proceeds from such sales were to be paid and the use of these proceeds negotiated with the traditional communities.[589]

Some lessons from these examples are that the contract situation works best when there is no controversy as to an indigenous group being the owner of the traditional design or artwork and when that ownership is recognised and respected. The contract process is also facilitated when both parties belong to the same country, because there might be less

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[588] Peter B. Shand "Scenes from the Colonial Catwalk: Cultural Appropriation, Intellectual Property Rights, and Fashion" (2002) 3 Cultural Analysis 47.

[589] Rachel Massey & Christopher Stephens "Intellectual Property Rights, the Law and the Indigenous Peoples' Art" (1998) 32:4 Copyright Bulletin 49 at 57, online: UNESCO <http://unesdoc.unesco.org/images/0011/001162/ 116222eb.pdf#116203>.

controversy about recognising a community's ownership of a design and obtaining a community's permission to use it.

The success of the use of contracts is however dependant on other considerations. It becomes more problematic to ensure respect for community values when a foreign-based company uses traditional designs because that company might simply not seek to verify the ownership status of a design. In addition, if the community intellectual property rights are uncertain, the other party may not see a need to contract since the contract mechanism assumes that the community has legal ownership. Other issues that need to be solved involve how to ensure that the local community benefits especially in cases where governments may have set up agencies to administer proceeds from the use of TCES.[590]

5.5: POLICY CONSIDERATIONS AND ARGUMENTS FOR AND AGAINST PROTECTING FOLKLORE UNDER THE EXISTING INTELLECTUAL PROPERTY SYSTEM

5.5.1: POLICY ARGUMENTS FOR PROTECTING FOLKLORE UNDER THE EXISTING INTELLECTUAL PROPERTY SYSTEM

One argument for protecting traditional textile designs under the existing intellectual property system is that doing so would result in the establishment of a truly "international" intellectual property system. The intellectual property system is a Western construct based on Western values and philosophies. However, countries have different philosophies and value systems in terms of property. To most former colonies and to the indigenous world, expressions of folklore are extremely important. They hold a significance which is, arguably, unparalleled in the Western world. However, such

[590] This is examined in Chapter 6, below.

countries are part of the international intellectual property community and bound to protect the property that is important to the Western world. Protecting folklore under the intellectual property system would amount to an international recognition of the values of these societies. Since the international intellectual property law system protects what is important to the Western world, then to be fair, it should also protect what is important to the other peoples of the world. This is known as the principle of reciprocity.[591] However, based on the discussion in this dissertation, traditional textiles do not fit neatly into the intellectual property categories.

Another reason that is suggested for protecting traditional textile designs under the existing categories is the similarity between intellectual property categories and expressions of folklore. Due to this similarity, it is argued that there is therefore no need to modify intellectual property categories; rather, those aspects of folklore works which can be put in the existing categories should be protected as such. Thus, just as in the West designs can be protected under copyright, industrial designs or under a certification mark system then traditional textile designs should also be protected as such.[592] However, that is adopting a simplistic view because not all folklore can be finely split into these

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[591] The principle of reciprocity in relation to intellectual property law is discussed in section 6.3.2., below. "The economic interest of industrialized countries requires the protection of computer software. The economic interest of Africa and other developing regions of the world demands that folklore should be protected. On the basis of reciprocity, international regulations for the protection of folklore should be adopted." Folarin Shyllon, Conservation, Preservation and the Legal Protection of Folklore in Africa: A General Survey," *supra* note 527 at 45-46. On this point, see also 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" (1999) 49 Am. U. L. Rev. 769 at 774 (stating that for some advocates "the case for protecting folklore is based on a principle of direct reciprocity") [footnote omitted].

[592] Some of these similarities are analyzed by Paul Kuruk who states, for example, that clothing designs could be protected as trademarks and the process for making the clothing protected under patent law. See 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" (1999) 49 Am. U. L. Rev. 769 at 792-794.

categories[593] and the current construction of intellectual property with the eligible criteria do not favour protection of traditional textiles. Consequently, this would not work across the board.

5.5.2: POLICY ARGUMENTS AGAINST PROTECTING FOLKLORE UNDER THE EXISTING INTELLECTUAL PROPERTY SYSTEM

One argument against protecting folklore under intellectual property is that the two systems are at odds and are, therefore, irreconcilable. There are many angles to this argument including the following. The intellectual property law system is motivated by economic interests. It is also largely based on commercialisation and the individual as opposed to communal ownership. However traditional communities do not have the concept of ownership as exists in the Western sense.[594] They have a holistic worldview which is irreconcilable with intellectual property philosophies.

Consequently, indigenous people using the intellectual property law system to protect their heritage may be doing themselves a disservice because of the philosophical differences between the indigenous and the Western worldview.[595] Thus in protecting

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[593] On this point, see *e.g.* Paul Kuruk (1999) who identifies one of the problems of protecting folklore under existing intellectual property law as one of "inappropriate categorization." 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" (1999) 49 Am. U. L. Rev. 769 at 793.

[594] On this point, see *e.g.* Kamal Puri (1998) pg. 5. where the author states:

> In Aboriginal culture there is not the same distinction between real property and intellectual property as understood in Australian copyright law. Traditional visual designs, music, drama and dance are intimately connected with indigenous peoples' religion. Land and art are intertwined. Ownership of artworks is not based on individual rights as postulated by the *Copyright Act 1968* (Cth), but instead on a system of collective rights that are managed on a custodial basis according to Aboriginal customary laws.

[595] See Chapter 4. See also Angela R. Riley, "Indigenous Peoples and Emerging Protections for Traditional Knowledge" in Peter K. Yu ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, vol. 4, International Intellectual Property Law and Policy* (Westport: Praeger Publishers, 2007) 373 at 383. See also E.S. Nwuache, "The Protection of Expressions of Folklore Through the Bill of Rights in South Africa" (2005) 2:2 Script-ed 223.

culture under the intellectual property system, the argument continues, traditional communities will have to redefine themselves using Western terms. They would have to view themselves through a Western lens and apply Western standards and yardsticks, thus giving up some of their values.

The justificatory theories for intellectual property protection are said to create another hurdle for folklore protection because the theories are motivated by economic considerations. Their aim is to reward innovation and creativity. However, not all intellectual property categories reward innovation and creativity. Three classic examples of this are trademarks, certification marks and geographical indications where the focus is on rewarding goodwill, reputation and adherence to established group principles.[596] This weakens the argument that folklore should be excluded from intellectual property protection based on intellectual property justificatory theories.

In fact, it could even be argued that these theories could be applied to rewarding traditional communities for preserving and innovating traditional knowledge. As Weerawit Weeraworawit comments:

> It could also be argued that even the traditional rationale for IPRs could be used in support of the legal protection of TK and folklore. The concept of reasonable reward for the inventor or creator could be applied to genetic resources, TK and folklore, since the people or communities which have a role in the preservation and maintenance of such materials have the right to reasonable reward as well, at least on a par with the inventor or creator who

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[596] See Chapter 3, above. As David R. Downes states:

> [S]omeIPRs—in particular, geographical indications, and in some circumstances, trademarks—are in fact intended not to reward innovation, but rather to reward members of an established group or community for adhering to traditional practices of the community or group's culture. They are designed to reward goodwill and reputation created or built up by a group of producers over many years or even centuries. Geographical indications, in particular, could create economic rewards for producers who use traditional methods in the region where the product has been traditionally produced [footnote omitted].

"How Intellectual Property Could Be a Tool to Protect Traditional Knowledge" (2000) 25 Colum. J. Envtl. L. 253 at 259.

> enjoys protection in the form of industrial property and copyright, as well as other new rights as stipulated in TRIPS.[597]

Further, there is the difficulty of determining the boundaries of folklore. There are several dimensions to this obstacle. The first is determining which aspects of folklore can and cannot be protected under the intellectual property law system.[598] Since this work focuses on traditional textiles and traditional textile designs, and designs are recognised as protectable subject matter under copyright and industrial design laws this first obstacle does not arise. Others identify problems in establishing the folklore owner such as: (1) the lack of criteria to use in establishing how large a group should be to have its own folklore; (2) how widespread a practice should be to qualify as folklore;[599] and (3) how to identify the folklore owner, especially in cases where they may be competing groups.[600] These concerns would have to be resolved whether or not the solution to folklore protection is under the existing intellectual property system or under some other system. Thus, the existence of these additional obstacles is not necessarily fatal to intellectual property protection of traditional textiles and traditional textile designs.

What effect would the inclusion of folklore in the existing intellectual property categories have on folklore and on the intellectual property system? It is too early to

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[597] Weerawit Weeraworawit, "International Legal Protection for Genetic Resources, Traditional Knowledge and Folklore: Challenges for the Intellectual Property System" in Christophe Bellmann, Graham Dutfield & Ricardo Meléndez-Ortiz, eds., *Trading in Knowledge: Development Perspectives on TRIPS, Trade, and Sustainability* (London: Earthscan Publications Ltd., 2003) 157 at 160. The author comments further that granting such benefits appears to be "more readily accepted in the field of genetic resources used in agriculture...." (*ibid.* at 160).

[598] Gervais, for example, comments that there is a lot of traditional knowledge that is "is unfit for protection as intellectual property in any form" such as "human remains, spiritual beliefs and languages." Daniel J. Gervais, "The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New," *supra* note 31 at 958.

[599] See 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" 769 at 799-805.

[600] See generally, Michael F. Brown, *Who Owns Native Culture?* (Cambridge: Harvard University Press, 2003); Susan Scafidi, *Who Owns Culture?: Appropriation and Authenticity in American Law*, *supra* note 10; Andrew Ofoe Amegatcher, *Ghanaian Law of Copyright* (Accra: Omega (Law) Publishers, 1993) at 23.

predict accurately how an intellectual property law system, in which countries use existing intellectual property laws to protect foreign folklore, will function. It remains to be seen what will happen when there is an attempt to protect foreign folklore for indeed national folklore protection alone would be inadequate in this regard. As Ghana responded in a WIPO Questionnaire, countries have to protect foreign folklore for this to be effective.[601]

The other factor is to assess the effect that developments in the intellectual property realm will have on folklore protection. The intellectual property law system has been moving towards harmonization while a more recent issue is the consideration of intellectual property and human rights[602] and whether there is a need for a human rights framework for intellectual property. The intellectual property law system has never been "stable" as it continues to change in response to technological and other factors. It remains to be seen how these and other developments will impact folklore protection.

5.6: CONCLUSION

The aim of this chapter was to consider the extent to which traditional textile designs could be protected as intellectual property under the existing intellectual property framework. The examination showed that while there is nothing to prevent an individual, whether indigenous or not, from registering a textile design, conventional intellectual property does not recognise community intellectual property rights in traditional textile designs.

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[601] See WIPO "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana," online: WIPO <http://www.wipo.int/tk/en/consultations/questionnaires/ic-2-7/ghana.pdf>. The protection of foreign folklore is considered in section 6.3.2., below.

[602] See *e.g.* Laurence R. Helfer, "Toward a Human Rights Framework for Intellectual Property" (2007) 40 U.C. Davis L. Rev. 971; Peter K. Yu, "Reconceptualizing Intellectual Property Interests in a Human Rights Framework" (2007) 40 U.C. Davis L. Rev. 1039; Peter K. Yu, "Challenges to the Development of a Human Rights Framework for Intellectual Property" (2007), online: <http://www.peteryu.com/torremans.pdf>.

The chapter described a number of gaps in relation to copyright, trademarks and industrial design laws which make them unsuitable for communally owned traditional textiles. The discussion showed that there are some key obstacles under the existing categories such as the identifiable author eligibility criterion in copyright which make it impossible for adequate traditional textiles protection under the conventional intellectual property system. Some protection is offered in terms of certification marks, but that is limited to authenticating products as aboriginal. It does not prevent copying. Further, copyright protects intangible expressions and might therefore be unsuitable if a community wishes to protect the physical textile in addition to the design on it.

For traditional textiles to be adequately protected, the intellectual property system would have to be modified. This hurdle, coupled with ensuring respect for the holistic view that indigenous people have towards culture, leads us to consider a framework other than the existing intellectual property one. Included in the strongest points for not fitting folklore into the existing categories is the fact that not all folklore can be split into categories and indigenous communities might not want TCES to be so divided. The next chapter considers *sui generis* and other options.

CHAPTER 6

6: MOVING FORWARD—A FRAMEWORK FOR PROTECTING TRADITIONAL TEXTILES

6.1: INTRODUCTION

As this research has shown, there are a number of international agreements which, though they may offer a certain degree of protection for some traditional textiles, only offer a partial and, more importantly, an inadequate solution. The ongoing debate is therefore how to establish a system that will function effectively for traditional textiles and TCES protection, the form such a system should take and how some of the challenges that might arise should be addressed.

The main issue this chapter addresses is how a system for traditional textiles protection should be designed to be effective. The chapter assesses the opportunity to construct a unique solution for traditional textiles protection. It also examines some challenges that need to be resolved in a system for traditional textiles and TCES protection. Its central point is that the optimal system should be a combination of three main systems. First is the indigenous holistic worldview with its customary laws, practices and protocols. Second are elements of the intellectual property system that might be useful, such as the definition of a right in a work and remedies for infringement of those rights. Third are features of the cultural heritage framework, such as the cultural heritage conventions discussed in Chapter 4. This new system will be supported by the human rights framework.

The chapter is set out as follows: the second section states the rationale and objectives for establishing a system for traditional textiles protection. Section three anticipates some challenges that will be confronted in implementing this system. It focuses

on the identification of protectable subject matter and the use of the inventory system, the protection of another country's folklore, the role of customary law and an evaluation of the public interest.

Section four examines *sui generis* rights using Ghana as an example. It analyzes Ghanaian legislation to see if it is effective in protecting traditional textiles against the background of the three systems consisting of customary laws, the intellectual property system and the cultural heritage framework. This investigation will make some recommendations for countries that are using a similar model to the Ghanaian one, countries that are using a different model and countries that may not as yet have any legislation on traditional textiles and TCES protection on how to proceed to create and implement an effective system for traditional textiles protection.

Sections five and six examine the roles that regional arrangements and public awareness could play in this framework. The concluding section discusses how the chapter's findings can inform further research in this area.

6.2: RATIONALE AND OBJECTIVES FOR A NEW SYSTEM

There are four main objectives for establishing a system for traditional textiles and TCES protection. The first objective is that, due to the widespread and unfair exploitation of indigenous cultural heritage, "Important elements of traditional knowledge and folklore are being lost and will continue to be lost in the absence of a proper legal protection mechanism at national and international levels."[603] The creation of a system for TCES

[603] UNESCO/WIPO Regional Consultation on the Protection of Expressions of Folklore for

protection will prevent the loss of traditional textiles and thus benefit humankind, that is if one believes in the virtues of local cultural expressiveness and diversity of cultural expressions.

Second is the failure of the international intellectual property system, of which it can fairly be said that the Western *jupon dépasse*, especially copyright, to adequately protect folklore.[604] This study has established that the conventional intellectual property system does not adequately protect traditional textiles.[605] For example, copyright's inadequacy stems from the fact that it is "author-centric" and requires a mark of individual originality, while folklore is created by a community impersonally and consecutively.[606] The examples of indigenous textile heritage mentioned in previous chapters illustrate the community-based creations of these textiles. Copyright's failure has led to the exploration of *sui generis* protection for traditional cultural expressions. Copyright has been the most popular intellectual property category that WIPO, UNESCO and many countries have explored to protect folklore. However, WIPO's report on its 1998-1999 fact-finding missions on the needs and expectations of indigenous peoples and the experience of

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Countries of Asia and the Pacific, Hanoi, 21-23 April 1999, online: UNESCO <http://portal.unesco.org/culture/es/files/14287/10644892975Hanoi1999.pdf/Hanoi1999.pdf> at paragraphs 2-4, 7.

[604] This French metaphor is pertinent. Literally, it means that the underskirt is too long (and therefore visible).

[605] See the discussion in Chapter 5, above.

[606] A WIPO document states:

> It seems that copyright law may not be the right, or certainly the only, means for protecting expressions of folklore. This is because, whereas an expression of folklore is the result of an impersonal, continuous and slow process of creative activity exercised in a given community by consecutive imitation, works protected by copyright must, traditionally, bear a mark of individual originality. Traditional creations of a community, such as the so-called folk tales, folk songs, folk music, folk dances, folk designs or patterns, may often not fit into the notion of literary and artistic works. Copyright is author-centric and, in the case of folklore, an author–at least in the way in which the notion of "author" is conceived in the field of copyright–is absent.

WIPO, *The Attempts to Protect Expressions of Folklore and Traditional Knowledge*, (Document prepared by the International Bureau of WIPO), WIPO/IPTK/MCT/ 02/INF.5 (2001), online: WIPO <http://www.wipo.int/arab/en/meetings/2002/muscat_forum_ip/pdf/iptk_ mct02_i5.pdf> at 5 paragraph 17.

countries that have explored copyright have proved that the copyright model does not work. WIPO for example has stated that the copyright system's failure led WIPO to explore a *sui generis* option.[607] Thus, another objective is to create a system that will give more effective protection to traditional textiles by protecting parts of indigenous cultural heritage which are not covered by copyright law and other intellectual property law categories.[608]

The third argument is that the establishment of a new system will prevent folklore corruption which will result from indigenous people having to assimilate into the existing western intellectual property law system. In 1997, Farley suggested that if the copyright option was fundamentally inappropriate for folklore protection because of its emphasis on the individual, then perhaps a *sui generis* legislative regime would protect folklore without corrupting it.[609] As this dissertation has discussed, the intellectual property system is focused on the individual, innovation, commercialisation and economics, concepts which are more a feature of the Western world than the indigenous one. Thus, indigenous people using the system as it is to protect their expression of folklore can be equated with their

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[607] WIPO, *The Attempts to Protect Expressions of Folklore and Traditional Knowledge*, (Document prepared by the International Bureau of WIPO), WIPO/IPTK/MCT/ 02/INF.5 (2001) online: WIPO <http://www.wipo.int/arab/en/meetings/2002/muscat_forum_ip/pdf/ iptk_mct02_i5.pdf> 5 at paragraph 18 and commenting at paragraphs 19-22 on how this situation led to the UNESCO--WIPO Model Provisions.

[608] Similar arguments were made concerning *sui generis* rights in databases about a *sui generis* system providing effective protection and protecting parts of databases that copyright did not protect. See *e.g.* EC, *Directive 96/9/EC on the Legal Protection of Databases* of the European Parliament and of the Council of 11 March 1996 [1996] O.J. L77/20. For further discussion, see Guy Tritton, Richard Davis, *et al. Intellectual Property in Europe* (London: Sweet & Maxwell, 2008) at 522-523.

[609] See Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" (1997) 30 Conn. L. Rev. 1 at 41. She states further that "the limited success of western legal mechanisms has provoked indigenous groups to seek sui generis rights at the international level, and some international effort has been exerted to devise such protection." Christine Haight Farley, (*ibid.* at 41). For further discussion, see also Paul Kuruk, "The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17 Ind. Int'l & Comp. L. Rev. 67 at 72.

having to define themselves by alien Western yardsticks. For these reasons, I came to the conclusion, and suggest, that a new, complementary, system is required.

Fourth, a new framework will enable a system to be developed that is respectful of indigenous values and standards. Indigenous peoples have expressed that they need a *sui generis* system based on them and their rights.[610] Further, as argued here, some indigenous communities view culture and heritage as an indivisible bundle. Not all heritage can be separated into the existing intellectual property categories. Although debates and policy on this issue even in the intellectual property field tend to divide traditional knowledge into two categories—traditional knowledge and TCES—a number of traditional communities and national intellectual property legislation do not make that distinction.[611] Respecting traditional societies means finding a way to keep indivisible those things they view as indivisible. Consequently, it might be advisable that the issue be treated as one whole instead of two distinct, yet related and overlapping areas.

The absence of adequate protection for cultural heritage in international global policy has created the need for a system to protect expressions of folklore, a system that gives indigenous peoples more control over the use of their cultural heritage. It is worth noting that the discussion on the objectives of a new system and its advantages are in

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[610] See *e.g.* Grain, "Towards our sui generis rights," *Seedling* (December 1997), online: Grain <http://www.grain.org/seedling/?id=129>. Indigenous people state that the *sui generis* movement they articulated in Bangkok is a holistic one. "Towards our sui generis rights," *Seedling* (December 1997), online: Grain <http://www.grain.org/seedling/?id=129>.

[611] On this point, see also Siegfried Weissner, "Defending Indigenous People's Heritage: An Introduction" (2001) St. Thomas L. Rev. 271 at 273 (commenting on why the existing categories do not work); Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous and Local Communities" in Bruce Ziff & Pratima V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 255; Rosemary J. Coombe, "The Properties of Culture and the Possession of Identity: Postcolonial Struggle and the Legal Imagination" in Bruce Ziff & Pratima. V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 74.

essence an examination of its potential. The success of such a system depends on its formulation and implementation.

It is worth repeating that with respect to textile heritage protection indigenous and traditional communities want three main things: (1) to be able to control the production of their textiles; (2) to control how they are used and by whom; and (3) to have their traditional modes of protecting their textile heritage respected. Thus, any system which is established has to take these factors into consideration.

6.3: IMPLEMENTATION CHALLENGES

In the following section, I discuss a number of factors involved in constructing a framework for traditional textiles protection, which raise some complex challenges and policy issues. This section focuses on four of these challenges: (1) how to identify the subject matter of protection; (2) how to protect another country's folklore; (3) how to define the public interest in TCES; and (4) how to define customary law's role. These four interrelated issues are considered below.

6.3.1: THE INVENTORY SYSTEM AND THE DETERMINATION OF PROTECTABLE SUBJECT MATTER

Should an inventory or database play an integral role in the protection of traditional textiles? Whether indigenous peoples should keep an inventory of their artistic heritage or not is debatable. A major argument put forward by proponents of the inventory system or databases for traditional knowledge is that because of the huge volume of cultural heritage, an inventory will be one way to inform national governments and the international community about the subject matter of protection. Consequently, "there is a strong push to

create databases to ensure protection of TK."[612] The contrary argument is that it might not be in the interest of indigenous peoples to disclose their heritage, especially their sacred heritage. Therefore, some indigenous groups may opt not to participate.

On closer examination, there are advantages in recording traditional textiles and expressions of folklore. Clearly, one benefit of an inventory system is that it will create certainty about the works to be protected. It will be a useful guide to policy makers, will inform governments and will assist with the development of an international framework. Further in the event of an alleged infringement, the wrongdoer cannot plead ignorance since the information that the textile has an owner will be available in the inventory or database.

The *Scottish Register of Tartans Act 2008*[613] was passed by the Scottish Parliament on 9 October 2008 and received Royal Assent on 13 November 2008. The *Tartans Act* came into force on 5 February 2009.[614] It establishes a Scottish Register of tartans, requires a Keeper of the register of tartans to maintain and oversee the register and new registrations, and sets down the process for registering new tartan designs in the register.

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[612] See Angela R. Riley, "Indigenous Peoples and Emerging Protections for Traditional Knowledge" in Peter K. Yu ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, vol. 4, International Intellectual Property Law and Policy* (Westport: Praeger Publishers, 2007) 373.

[613] *Scottish Register of Tartans Act 2008 (asp 7)*, online: Office of Public Sector Information <http://www.opsi.gov.uk/legislation/scotland/acts2008/pdf/asp_20080007_en.pdf> [*Tartans Act*]. For the legislative history of the Bill, see "Scottish Register of Tartans Bill (SP Bill 08)," online: The Scottish Parliament <http://www.scottish.parliament.uk/s3/bills/08-TartanBill/index.htm>; "Scottish Register of Tartans Act 2008, Explanatory Notes," online: Office of the Queen's Printer for Scotland <http://www.oqps.gov.uk/legislation/acts/acts2008/en/aspen_20080007_en.pdf>. The *Tartans Act*'s full name is "An Act of the Scottish Parliament to establish a register of tartans; and for connected purposes." The *Tartans Act* at section 2 defines a tartan as "a design which is capable of being woven consisting of two or more alternating coloured stripes which combine vertically and horizontally to form a repeated chequered pattern."

[614] The *Tartans Act, ibid.* provides at section 18(2) that "The provisions of this Act, except this section, come into force on such day as the Scottish Ministers may by order made by statutory instrument appoint." Scottish Statutory Instruments 2009 No. 5 (C. 2) TARTANS, The *Scottish Register of Tartans Act 2008 (Commencement) Order 2009* states that the Act will come into force on 5 February 2009. The Order was made on 13th January 2009 by the Scottish Ministers in exercise of the powers conferred by section 18 of the Scottish Register of Tartans Act 2008(1). See *Scottish Register of Tartans Act 2008 (Commencement) Order 2009*, online: Office of the Queen's Printer for Scotland <http://www.oqps.gov.uk/legislation/ssi/ssi 2009/ssi_20090005_en_1>.

The register is to be kept in electronic form.[615] Registration of a tartan does not create intellectual property rights such as copyright or design rights, nor does it affect existing intellectual property rights. Intellectual property rights in Scotland, with the exception of a certain part of the *Plant Varieties Act 1997*[616] are reserved matters[617] under section C4 of Part II of Schedule 5 to the *Scotland Act 1998*.[618]

An example on a larger scale is that of China. In a document submitted to WIPO in 2002, China stated that in the 1950s it started mobilising people to record folklore. This program expanded in 1979 to one of documenting literary and artistic folklore and the information is being put into databases. The document further stated that China has established a systematic and standardised process for documenting its national folklore.[619]

However, some indigenous peoples are wary about the creation of databases to protect TCES because of the dangers of such a system. They are skeptical about how disclosure in a public forum, even one with restricted access, can protect knowledge and

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[615] The *Tartans Act*, at section 1(3) of the Act. Under section 6(7) of the *Tartans Act*, an applicant seeking to register a tartan must submit, *inter alia*, a pictorial representation of the tartan and a description of the tartan including its colours, thread county and sett. Section 9 of the *Tartans Act* states that the Keeper of the Register may also request a woven textile sample.

[616] The excluded portion is "The subject-matter of Parts I and II of the Plant Varieties Act 1997 (plant varieties and the Plant Varieties and Seeds Tribunal)." *See Scotland Act 1998, 1998 CHAPTER 46*, online: Office of the Public Sector Information <http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980046_en_14#sch5>; "Scottish Register of Tartans Act 2008, Explanatory Notes," online: Office of the Queen's Printer for Scotland <http://www.oqps. gov.uk/legislation/acts/acts2008/en/aspen_20080007_en.pdf> 1 at point 5.

[617] Reserved matters are those subjects that the Scottish Parliament cannot legislate on; the United Kingdom Parliament retains the power to legislate on these matters.

[618] *Scotland Act 1998, 1998 CHAPTER 46*, online: Office of the Public Sector Information <http://www.opsi.gov.uk/Acts/acts1998/ukpga_19980046_en_14#sch5>.

[619] WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., *Current Status on the Protection and Legislation of National Folklore in China, Document submitted by the Delegation of China*, WIPO/GRTKF/IC/3/14 (2002), the Annex at 1-2.

prevent its exploitation and destruction.[620] There is the fear that the disclosure of that information might facilitate stealing and exploitation of their traditions.

The following recommendations will be useful as guidelines. First, an inventory should not be a requirement, but should be left to the discretion of the concerned people. The inventory system should not be a prior requirement or the yardstick for the determination of protectable expressions of folklore. A contrary opinion would mean, with artistic heritage for example, that groups should list all their artistic designs and, probably, all the laws surrounding these works. It is too cumbersome and unwise from a policy perspective to wait until there is an inventory to determine what should and should not be protected. The second problem is what happens to the things that are not listed? Because of the holistic approach that indigenous people adopt regarding TCES and traditional knowledge, some items by their very nature of being sacred or a secret might not be listed.[621]

Some indigenous groups are exploring keeping an inventory. As the example of the theft of the sacred Coroma textiles showed, Bolivia had to use an inventory in accordance with the 1970 UNESCO Convention in order to recover the textiles.[622] However, since the

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[620] See *e.g.* Angela R. Riley, "Indigenous Peoples and Emerging Protections for Traditional Knowledge" in Peter K. Yu ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, vol. 4, International Intellectual Property Law and Policy* (Westport: Praeger Publishers, 2007) 373 at 385.

[621] As Angela R. Riley rightly notes, creating databases for traditional knowledge might mean "collecting sacred information to be catalogued in a restricted database." Angela R. Riley, "Indigenous Peoples and Emerging Protections for Traditional Knowledge" in Peter K. Yu ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, vol. 4, International Intellectual Property Law and Policy* (Westport: Praeger Publishers, 2007) 373 at 384 [footnote omitted].

[622] As Manus Brinkman states:

> Without a definition of cultural property, it is difficult for a country to recover lost or stolen objects; and defining cultural property is not an easy matter. A definition of cultural property may include artefacts that are expressive of a specific culture and are unusual or uniquely characteristic of that culture. Examples of such artefacts include rare collections of fauna and flora, archaeological finds, and antiquities. A definition based on these criteria would be so broad however, that it would only be effective if national governments made a list of protected cultural property. For African and Pacific countries, such a list might include native crafts and objects used for ritual purposes, whereas in Mediterranean countries it might cover antiquities and in Western countries, fine art.

recovery of the stolen sacred Coroma textiles and as part of their initiatives to try to prevent a similar event from happening, the Aymara Indians of Coroma are exploring documenting their textiles.[623] However, this recent initiative on the part of the Aymara Indians happened after the theft of the textiles.

There might be other textiles and designs which may be presently unknown to the general public because of their sensitive role in religious and spiritual events. Consequently, communities might not wish to include these items in an inventory. Other things might be inadvertently left out. It would be unrealistic to wait for the completion of an inventory before moving ahead, or to state that things which are not in the inventory cannot be protected. One consequence of this is that it might be only when some TCES are used in an unauthorised manner that indigenous peoples might have to prove their "property" in an item. In instances of an alleged infringement, the community's protocols and the concerned country's laws could be consulted to prove the ownership of the item. If countries decide to create a protected cultural heritage list, then it is suggested that indigenous peoples be actively involved both in creating the list and determining how to keep such an inventory safe.

However, the importance of indigenous peoples' participation in the management and preservation of their heritage is recognised in documents such as the *Matatuaa Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*[624] and the *United Nations Declaration on the Rights of Indigenous Peoples*[625] which require states and the international community to recognise that indigenous peoples should have control over

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Manus Brinkman, *supra* note 367 at 65.
[623] See discussion in Chapter 4 at section 4.5.1., above.
[624] *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, 1993, online: WIPO <http://www.wipo.int/export/sites/www/tk/en/folklore/ creative_heritage/docs/mataatua.pdf>.
[625] *Supra* note 13.

their intellectual and cultural property. The Maori in New Zealand, for example, are advocating that they be involved in managing records concerning them which have already been collected and in authenticating material already held in institutions of memory.[626] For instance, the Department for Courts of New Zealand, which holds copies of Maori Land Court Minute Books of evidence used to establish legal title to most of the Maori land in New Zealand, has embarked on a project to digitize these minute books. Prior to this, consultative meetings were held all over the country, from which certain principles emerged. These included that the relevant tribes be consulted before individuals access sacred, genealogical information concerning the relevant tribes. Further, the use of such information should not be for commercial purposes or contrary to Maori values.[627]

Commenting on the efforts to establish an indigenous digital library (IDL), Robert Sullivan, a descendant of the Nga Puhi and Kai Tahu tribes of Aotearoa, New Zealand, concludes:

> A cornerstone of an IDL is that the indigenous communities themselves control the rights management of their cultural intellectual property. Local

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[626] See *e.g.* Evelyn Wareham, "'Our Own Identity, Our Own Taonga, Our Own Self Coming Back': Indigenous Voices in New Zealand Record-Keeping," online: Simon Fraser University <http://journals.sfu.ca/archivar/index.php/archivaria/article/view/12813/14019>; Robert Sullivan, "Indigenous Cultural and Intellectual Property Rights: A Digital Library Context" in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 416. Michael Halewood has proposed two solutions for giving local communities and developing countries increased control over other peoples' use of their biological resource-related innovations. First is by "policies to increase the participation of indigenous communities in resource management decision making" and second is the "creation of national sui generis intellectual property laws to protect indigenous and local knowledge." Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection," *supra* note 28 at 953. Peter Drahos also recommends that local groups have access to networks with expertise and technical competence because these groups may not have the power to enforce their rights and having access to a network would increase their capacity and power to do so. Peter Drahos, "A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge" in Daniel J. Gervais, ed., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007) 385 at 389.

[627] See Robert Sullivan, *ibid.* at 417. See also Silke von Lewinski, "Final Considerations" in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004) 379 at 393 (suggesting the establishment of "confidential, closed access databases which are open only to those who have obtained the consent from the relevant communities" as one solution for protecting secret traditional knowledge).

> cultural protocols need to be documented and followed prior to the creation of digital content, and communities must be consulted with regard to the digitization of content already gathered by institutions of social memory. As noted in the Hilo meeting report, indigenous leaders should gather to plan and confirm the path ahead.[628]

Consequently, once the decision is made to create an inventory, it is advisable that indigenous communities play an active role in its creation and maintenance. The inventory is a useful tool, but it must be compiled and preserved with caution in order to maintain the integrity of the inventory and preserve the values associated with the items. The inventory could take several forms. It could provide information on the traditional textiles and TCES for which prior consent for their use is required. Of course, the limitation here is that some secret designs may be left off the list. In the alternative, countries could provide a list of designs and TCES which do not require consent for their use, if there are any.

6.3.2: PROTECTION OF ANOTHER COUNTRY'S FOLKLORE

After the identification of protectable subject matter, the next issue to be resolved is how one country can protect the traditional textiles of another country. An indispensable ingredient in creating an effective framework is TCES protection in foreign countries. The history of the development of intellectual property laws from the national to the multilateral level shows the inadequacy of national legislation alone in obtaining overseas protection of nationally protected intellectual property. In response to a WIPO Questionnaire on whether there should be foreign protection of folklore, Ghana responded

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[628] Robert Sullivan, *ibid.* at 418. On the Hilo meeting, see also, Maurita Peterson Holland, "We Come from around the World and Share Similar Visions" (2002) 8:3 D-Lib Magazine, online: D-Lib Magazine <http://www.dlib.org/dlib/ march02/holland/03holland.html>.

that national legislation should expressly provide for protecting foreign folklore.[629] It is therefore important that the protection standard be determined.

The main principles regulating the conduct of treaty members are national treatment,[630] reciprocity,[631] most-favoured-nation[632] and mutual recognition.[633] These principles are used in a variety of combinations within the same treaty, since it is possible for a treaty to have some things which are subject to national treatment and have exceptions based on certain criteria.[634] Intellectual property agreements tend to use the national treatment principle, as do Article 3 of the TRIPS Agreement and Article 5 of the Berne Convention. The WIPO IGC Draft Provisions—Annex suggests that the principle of national treatment in several intellectual property agreements, such as Article 5 of the Berne Convention, can be applied to protect TCES of a foreigner in national legal systems.[635]

However, Drahos in discussing a similar provision, Article 14 in WIPO's Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional

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[629] WIPO, "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana," online: WIPO <http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/ghana.pdf> at 11.

[630] The national treatment principle requires a state to protect works of foreigners to the same extent it protects those of its citizens.

[631] This principle means that country A will protect, within its borders, works from country B to the same extent that country B, within its borders, protects works from country A. For a discussion of how the principle of reciprocity has been used in intellectual property, see *e.g.* Paul Goldstein, *Copyright's Highway: From Gutenberg to the Celestial Jukebox* (New York: Hill and Wang, 1996) 180-181. The United States has used the principle of reciprocity in its 301 measures against countries. Developing countries have used the reciprocity principle in arguing that developed countries should protect traditional knowledge on grounds of fairness. Paul Kuruk, "Bridging the Gap between Traditional Knowledge and Intellectual Property Rights, Is Reciprocity an Answer?" (2004) 7:3 J. World I. P. 429.

[632] The most-favoured-nation (MFN) principle means that a country with MFN status shall receive the same benefits and privileges as another MFN country. This principle is found in Article 4 of the TRIPS Agreement.

[633] The mutual recognition principle requires one state to accept and apply another state's standards.

[634] The TRIPS Agreement, for instance, uses the national treatment and MFN principles. See also, Peter Drahos, "A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge" in Daniel J. Gervais, ed., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007) 385 at 398.

[635] WIPO IGC Draft Provisions—Annex, *supra* note 60, Part III at Article 11.

Knowledge and Folklore's Revised traditional knowledge provisions and the commentary thereon, asserts that national treatment might not be very effective here because states might want their own standards applied in foreign countries as opposed to the foreign standards. Thus national treatment would be ineffective to protect a community's traditional knowledge because the foreign country may have different standards. He asserts further that traditional knowledge holders would want their customary law rules, namely rules regulating the origins and uses of their traditional knowledge, to be used by the foreign country's courts. He concludes, however, that "this principle is radically extraterritorial in its operation."[636] For this reason Drahos argues in favour of the principle of mutual recognition "because it allows for the recognition of another party's standards."[637] He observes that states might be unwilling to use this mutual recognition principle for folklore because of "the potentially non-reciprocal effects" springing from the fact that the other party's standards may define which aspects of folklore are protected and which aspects form part of the public domain differently from the state's. However, he continues, the effects of mutual recognition are best felt when "trade in goods and services is already occurring and there is already some degree of convergence between the standards that are to be the subject of mutual recognition."[638]

This dissertation proposes the application of both the national treatment and the mutual recognition principles in protecting foreign folklore. This suggestion is given on the assumption that a country has already determined which aspects of folklore are protected.

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[636] Peter Drahos, "A Networked Responsive Regulatory Approach to Protecting Traditional Knowledge" in Daniel J. Gervais, ed., *Intellectual Property, Trade and Development: Strategies to Optimize Economic Development in a TRIPS-Plus Era* (Oxford University Press, 2007) 385 at 399.
[637] Peter Drahos, *ibid.* at 399.
[638] *Ibid.* at 399-400. On this last point, he gives the example of the success of mutual recognition between New Zealand and Australia (*ibid.* at 400).

In the event of an alleged infringement in a foreign country, the foreign court will have to decide whether there is an infringement and whether the rules as to the correct uses of TCES have been followed. If there has been an infringement, then it could proceed with the remedies available in its law. These could include the remedies under the conventional intellectual property system (such as imprisonment of infringers, fines, return of infringing material, burning the infringing material and damages); and other remedies that may be particular to cultural heritage protection such as damages for cultural harm.

Using the national treatment principle would not prevent countries from having mutual recognition agreements with other countries in the form of bilateral agreements. For example Bolivia, though a party to the 1970 UNESCO Convention, also signed a cultural heritage protection agreement with Brazil in 1999.[639]

Countries can therefore use national treatment and bilateral agreements where necessary. The application of these two principles should satisfy the concerns of countries that might want special agreements with other countries. There is no reason for a departure from the usual procedure used in conventional intellectual property cases. If the alleged infringement concerns the illicit export of a traditional textile, then the UNESCO or UNIDROIT Conventions could also apply.

6.3.3: CUSTOMARY LAW

Another challenge is the definition of customary law's role and relationship with other areas of law like intellectual property law under this new framework. It is important here to

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[639] See Elizabeth Torres, "Chronological Overview of Developments in Bolivian and Latin American Cultural Heritage Legislation with a Special Emphasis on the Protection of Indigenous Culture" in Barbara T. Hoffman, ed., *Art and Cultural Heritage: Law, Policy, and Practice* (New York: Cambridge University Press, 2006) 124 at 132.

reiterate my statement in the introduction to this Chapter that a framework for traditional textiles protection should involve the indigenous worldview, intellectual property and cultural heritage laws. Customary law falls under the indigenous worldview component of my equation.

There is clear support among indigenous peoples about their customary laws playing a role in protecting their heritage, but different views on how to proceed. As Michael Halewood states:

> As an alternative to mainstream intellectual property-style protections, many indigenous and local peoples' statements call for a reinvigoration (and legitimization) of their own customary systems of knowledge exchange and distribution. Some of these systems may in fact involve systems of control that resemble aspects of intellectual property law, and it is possible, therefore, that certain elements of current intellectual property law could be modified to fit within indigenous systems. Some declarations clearly state, however, that they want to create a system that is their own, and not a modification of "mainstream" intellectual property law."[640]

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[640] Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection," *supra* note 28 at 993 [footnotes omitted]. Siegfried Weissner questions whether the solution is the creation of a "*sui generis* intellectual property right to traditional knowledge/indigenous heritage" or "to ensure respect for the customary intellectual property laws of indigenous peoples as a matter choice of law."[italics added]. Siegfried Weissner, "Defending Indigenous Peoples' Heritage: An Introduction" (2001) 14 St. Thomas L. Rev. 271 at 273-274. See also Silke von Lewinski, "Final Considerations" in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004) 379 at 387(asserting that there are two approaches concerning the role of customary law. The first option is to recognise customary law in the field of conflicts of laws. The second option is to integrate customary law in a *sui generis* or other system through written laws). In opting for the second option as the way forward, von Lewinski cautions against the fixation of customary laws and concludes:

> A protection regime which has far more realistic chances of implementation than the recognition of customary laws beyond the relevant communities may well be a sui generis protection regime inspired by intellectual property rules and influenced by human rights, customary law, heritage laws, protection against blasphemy and the like. Although such a regime would not correspond to a holistic concept, it may meet the need of indigenous peoples at least with respect to certain aspects regarding their living heritage. The inspiration by intellectual property models is justified by the close relationship between the inventive and creative activities resulting in living heritage and in individual human inventions and creations; in addition, from a pragmatic point of view, solutions based on regimes that have proven to work well in a related area for a long time may have better chances of being accepted by legislators at and beyond the national level.

Silke von Lewinski, "Final Considerations" in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004) 379 at 388

More recently, WIPO has rightly recognised the need to uphold customary law rules in its ongoing studies in this area.[641] WIPO's ongoing project has two main questions. First is the role indigenous peoples and communities' customary laws and protocols play in relation to their traditional cultural expressions, traditional knowledge and genetic resources. Second is the relationship between customary law and intellectual property. [642]

Customary law poses several challenges that need to be resolved under a new system for the latter to adequately protect traditional textiles. These challenges can be summarised as follows: firstly, there is no uniform customary law nationally or regionally. Secondly, there is no uniform customary law with respect to artistic designs since this varies from one ethnic group to another. Third, customary law tends to be unwritten, so it is not always possible to go to a written text to determine what the custom is. This, combined with the evolving nature of customary law, means that documentation may not be a good long-term solution. Codifying customary law may prevent it from continuing to naturally develop.[643]

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[641] WIPO's work in this area spans several decades. For example, the WIPO, *Intellectual Property Needs and Expectations*, *supra* note 30, recommended the need for customary law studies. Some of WIPO's studies and programmes addressed the role of customary law such as Terri Janke, *Minding Culture: Case-Studies on Intellectual Property and Traditional Cultural Expressions*, prepared for WIPO (Geneva, Switzerland: World Intellectual Property Organization, 2003), online: WIPO <http://www.wipo.int/tk/en/studies/cultural/minding-culture/introduction.html>. The WIPO IGC has also approved studies in this area in documents such as the WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., *Final Report on National Experiences with the Legal Protection of Expressions of Folklore*, WIPO/GRTKF/IC/3/10 (2002), online: WIPO <http://www. wipo.int/edocs/ mdocs/ tk/en/wipo_grtkf_ic_3/wipo_grtkf_ic_3_10.doc> and WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 3d Sess., *Report Adopted by the Committee*, WIPO/GRTKF/IC/3/17 (2002), online: WIPO <http://www.wipo.int/ edocs/mdocs/ tk/en/wipo_ grtkf_ic_3/wipo_grtkf_ic_3_17-main1.pdf>. Further, the WIPO IGC draft objectives and principles for the protection of traditional knowledge and traditional cultural expressions that are currently being considered also affirm the importance of customary law. See WIPO, "Customary Law and Intellectual Property," online: WIPO <http://www.wipo.int/tk/en/consultations/customary_law /index.html>.

[642] See WIPO, "Customary Law and Intellectual Property," online: WIPO <http://www.wipo.int/tk/en/consultations/customary_law/index.html>.

[643] See *e.g.* John Mensah Sarbah, "Preface" in John Mensah Sarbah, *Fanti Customary Laws: A Brief Introduction to the Principles of the Native Laws and Customs of the Fanti and Akan Districts of the Gold Coast with a Report of Some Cases Thereon Decided in the Law Courts* (London: Frank Cass & Co. Ltd., 1968) at xi. See also Silke von Lewinski, "Final Considerations" in Silke von Lewinski, ed., *Indigenous*

Fourth, obtaining national, regional or international recognition for customary law is difficult since some countries do not recognise the customary law of their ethnic groups.[644]

While not all countries recognise customary law, there are many parts of the world, especially in Africa, where it has the status as a distinct and legitimate body of law. As was shown in Chapter 5, in such places customary law is applied alongside the other body of law, for example common law, in the courts. The courts apply common law and, or customary law depending on the issue for determination before them according to certain principles.[645] Like other African countries, Ghana's legal system is a mixture of customary law and common law, the latter a consequence of Ghana's colonial past. Thus, Ghanaian courts apply both common and customary law when a case so requires.[646] Chieftaincy continues to play an important role in the country with chiefs wielding political power at the district level.

Different jurisdictions have their own methods of ascertaining customary law. The common practice is for evidence to be given in courts as to what the native custom is. However, during the colonial period, the colonisers were not familiar with native customs. For example, the 1916 case of *Angu v. Attah*[647] established a rule which the white colonial judges used to try to ascertain customary law in the Gold Coast, as Ghana was then known. The Privy Council stated: "As is the case with all customary law, it has to be proved in the first instance by calling witnesses acquainted with native customs until the particular

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Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore (The Hague: Kluwer Law International, 2004) 379.

[644] For extensive discussion on this, see 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" (1999) 48 Am. U. L. Rev. 769.

[645] In Ghana the *Courts Act*, 1993 (Act 459) at sections 54 and 55 lays down rules for courts to use in ascertaining customary law.

[646] See the *Courts Act*, 1993 (Act 459) at sections 54 and 55 which provide for the use of customary law and common law in Ghanaian courts.

[647] *Angu v. Attah* 1916 Gold Coast Privy Council Judgements (1874-1928) 43.

customs have, by frequent proof, become so notorious that the courts will take judicial notice of them."[648] However as subsequent cases such as *Ababio II. v. Nsemfoo*[649] showed, where one question was whether this rule extended to the ascertainment of customary law before the native courts, M'Carthy J. held that the rule was for the benefit of British courts and there was no need to extend its application to native courts whose members were already versed in their customary law practices unless the members of the native courts wanted to call witnesses to prove an alleged custom.[650]

Using New Zealand as an example, Kuruk states that "To some degree, the rules for ascertaining customary law rules in other regions of the world resemble African practice."[651] As has been discussed in this dissertation, in Australia aboriginal customary law is sometimes recognised and applied in the courts.[652] The common factor from these examples is that evidence is given in court where necessary about the relevant customary law rule. The ascertainment of customary law rules on traditional textiles is therefore largely a domestic issue.

It is suggested that customary law principles be included in the creation of a system to protect traditional textiles and that policy makers consult indigenous peoples because a system that is based on customary law might have a greater chance of success than one in

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[648] *Angu v. Attah* 1916 Gold Coast Privy Council Judgements (1874-1928) 43.
[649] *Ababio II. v. Nsemfoo* (1947), 12 W.A.C.A. 127. See also "West African Court of Appeal Cases" (1957) 1 J. Afr. L. 51 at 55.
[650] For further discussion on the ascertainment of customary law, see *e.g.* Antony Allott, *Essays in African Law: with Special Reference to the Law of Ghana* (London: Butterworths, 1960); Robert B. Seidman, "Rules of Recognition in the Primary Courts of Zimbabwe: On Lawyers' Reasoning and Customary Law" (1983) 32 ICLQ 871; Paul Kuruk, "African Customary Law and the Protection of Folklore" (2002) 36:2 Copyright Bulletin 4, online: UNESCO <http://unesdoc.unesco.org /images/0012/ 001277/ 127784e.pdf>.
[651] Paul Kuruk, "The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17 Ind. Int'l & Comp. L. Rev. 67 at 108.
[652] See Chapter 5, at section 5.3.3.2., above.

which norms are imposed from others. [653] The advantage of traditional communities being actively involved lies in the fact that it increases the likelihood that a system will be established that is suited to and respectful of their needs. This constitutes a deviation from the former approach of trying to fit aspects of expressions of folklore into the existing intellectual property law categories.

It is advisable that traditional communities be actively involved in the formulation and establishment of the new framework. Their involvement includes a clear articulation of what form the rights will take based on their customary law practices. Due to the diversity of indigenous groups, there will be different perspectives and groups may contribute different elements guided by their various societal rules. Some of this information is already available in the WIPO and other studies on this issue where the expressed needs include recognition for customary law and prevention of the unauthorised copying or commercialisation of traditional art and designs.[654]

Although there is no uniform customary law and customary laws vary from one ethnic group to another, there are some common features which are useful for the purposes of this study. As has been shown in this dissertation,[655] rules on traditional textiles and

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[653] On this point, see also Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection," *supra* note 28; Angela R. Riley, "Indigenous Peoples and Emerging Protections for Traditional Knowledge" in Peter K. Yu ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, vol. 4, International Intellectual Property Law and Policy* (Westport: Praeger Publishers, 2007) 373; Paul Kuruk, "The Role of Customary Law Under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17 Indiana International & Comparative Law Review 67.

[654] See e.g. WIPO, Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999), online: WIPO <http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf>; Silke von Lewinski, "Final Considerations" in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004) 379 at 380-381; Michael Halewood, *ibid.* at 990-993; Michael Blakenly, "Protecting Traditional Cultural Expressions: The International Dimension," paper presented at a 2005 Workshop, online: Birkbeck University of London <http://www.copyright.bbk.ac.uk/contents/ workshops/blakem.pdf>.

[655] See especially Chapter 2, at sections 2.2.3. and 2.4.1., above.

designs may provide information on: (1) who is authorised to produce them; (2) who can wear or use them; (3) what they are used for and when they can be used; and (4) penalties for not following the rules. It is important to mention that not all these four points may exist in every single ethnic group since no two groups are uniform. Customary law also provides information on traditional textiles and their religious, spiritual, historical and cultural significance to a community or state. Thus, the application of customary law is important in a new framework to ensure respect for traditional practices and holistic worldviews.

The following recommendations would be useful as a guide. The first step is for countries to recognise customary law principles and make a summary of their main points as expressed by indigenous peoples. The immediately preceding paragraph is useful in this respect. Secondly, it should not be a requirement that customary law be codified in detail before progress can be made in this area because such a requirement would not only be too cumbersome, rigid, onerous and unrealistic, but might prevent this issue from being resolved in the near future since there is a plethora of customary laws. In the future, when there is an alleged case of infringement, customary laws can be applied within the new system just as they have been applied in various states prior to, during and post-independence.

Customary law has some limitations. Customary law rules and principles have usually applied to the relevant ethnic groups and nationally. Therefore, customary law might not have a solution for the different scenarios that may arise when foreigners use traditional cultural expressions. Consequently, it might be necessary to enlarge upon the penalties and sanctions that may exist in these laws by complementing them with remedies

that exist in other areas of law. For example, infringing copies of traditional textiles in foreign countries could be destroyed and infringers could be fined or imprisoned, just as occurs with infringements of conventional intellectual property laws. For this reason, customary law might provide a partial solution which can be complemented by intellectual property laws and cultural heritage laws.

In conclusion, it can be expected that customary law's role will be as follows: it will assist in formulating a law in a system for traditional textiles protection by providing information on the types of works to be protected, rights in those works and remedies for infringement of those rights. Secondly, it will be useful in creating an inventory where the decision is made to include works which have permitted uses and for which prior consent is required. Naturally, secret expressions of folklore such as secret designs and textiles will not be included in this list. It would also be advisable to have a representative body either at the national or district level that people can apply to for permission to use the expressions of folklore.[656]

6.3.4: PUBLIC INTEREST

Another challenge is the definition, if any, of the public interest. On closer examination, it will be found that this challenge is rooted in intellectual property law philosophy and concerns about the public domain, free speech and access to information. The previous chapters discussed how intellectual property law strives to balance the tensions between public access to works and the view that if the fruits of intellectual creativity are not protected, then fewer works would be produced.[657] This balancing is

[656] This is expanded on in the discussion on the national level in section 6.4., below.
[657] See *e.g.* the discussion in section 3.3.1., above.

done through various mechanisms such as the public domain, limited duration period and permitted uses of works, which are known in some jurisdictions as fair use or fair dealing.

The definition of the public interest challenge arises from the fact that some indigenous and traditional communities would like folklore to have perpetual protection. But, the question is, should the intellectual property law standard of balancing these interests be applied to expressions of folklore? This section examines the public interest from two main perspectives: protection period and permitted uses.

One argument against perpetual protection of folklore whether through the intellectual property system or *sui generis* laws of an intellectual property or non-intellectual property nature is that it would overprotect folklore, diminish the public domain and also be deleterious to the growth of culture. One legal scholar asserts that *sui generis* proposals for folklore which advocate that "protection should be perpetual and retroactive, and derivative works should be strictly controlled" can result in an overprotection of folklore. Overprotecting folklore would not only diminish the public domain and leave fewer new works to be built upon it, but it might also "freeze" indigenous culture by inhibiting indigenous artists from reinterpreting traditional motifs. Furthermore, indigenous culture may be preserved "at the risk of pronouncing it dead."[658]

While it is granted that the freezing of indigenous culture is an undesirable situation which should be avoided, it seems unlikely that a system for protecting traditional textiles based partly on customary law should result in the freezing of indigenous culture. Suffice it to say that customary laws have not frozen culture in time and indigenous peoples themselves such as the Inuit have stated how over the centuries they have been perfecting

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[658] Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" (1997) 30 Conn. L. Rev. 1 at 55-56 [footnote omitted].

designs created by their ancestors.[659] Thus, a system built on customary law principles, which adds other elements of intellectual property and human rights, should not result in culture being frozen in time. Rather, a system specially contrived for them which reflects their principles should prevent their culture from freezing.

Can the public interest be defined in terms of permitted uses of traditional cultural expressions? The WIPO IGC Draft Provisions—Annex, for example, recognises "permitted uses" of traditional cultural expressions.[660] However, there are sometimes different considerations where culture is concerned. As Erica-Irene Daes comments, and as mentioned in section 2.3.2., "'Heritage' is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples." [661]

However, there are several examples of indigenous communities allowing others to use their traditional designs. Some customary law systems do provide for some method of sharing.[662] Indigenous peoples do share for example through exhibitions and museum displays and sometimes make arrangements with museum authorities for the indigenous

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[659] See the discussion in Chapter 2, at section 2.2.3., above.

[660] WIPO IGC Draft Provisions—Annex, *supra* note 60, Part III at Article 5, for example, provides for exceptions concerning the use of traditional cultural expressions in areas such as study or education. In discussing the public domain, the commentary considers whether the approach should be retroactive, intermediate or prospective and opts in favour of an intermediate approach. See WIPO IGC Draft Provisions—Annex, Part III at Article 9 "Transitional Measures" and the commentary thereon.

[661] Erica-Irene Daes, "Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples," U.N. Subcommission on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1993/28, 28 July 1993 at paragraph 24. See also Angela R. Riley who states that "Indigenous peoples must have the opportunity to articulate their own paths with respect to their TK, including whether to reveal or license it, and when to veto research."[footnote omitted]. Angela R. Riley, "Indigenous Peoples and Emerging Protections for Traditional Knowledge" in Peter K. Yu ed., *Intellectual Property and Information Wealth: Issues and Practices in the Digital Age, vol. 4, International Intellectual Property Law and Policy* (Westport: Praeger Publishers, 2007) 373 at 385.

[662] This study has given some examples such as the use of the koru motif mentioned in section 5.4., above. See also Russel Lawrence Barsh, "Indigenous Knowledge and Biodiversity" in Andrew Gray, "Indigenous Peoples, Their Environments and Territories" in Darrell A. Posey, ed., *Cultural and Spiritual Values of Biodiversity* (London: Intermediate Technology, 1999) 73; Paul Kuruk, "The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17 Ind. Int'l & Comp. L. Rev. 67 at 85-86 (giving examples of the sharing ethic under customary law).

peoples to be remunerated for such displays.[663] Thus benefit sharing agreements under which indigenous peoples get a percentage of the proceeds, or non-monetary compensation as the Pacific Islands Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002 provides,[664] could be another way of ensuring public access to indigenous heritage. The New Zealand project with respect to digitizing indigenous material of the Maori, seen earlier in section 6.3.1., is another example of a means by which the public can have access to information on these peoples. It is therefore important that indigenous peoples and traditional communities be consulted on the existence of permitted uses under their customary law systems and practices and on their willingness to allow foreigners to use their designs.

Despite the Western standards and philosophies on the public interest, even in the Western world the public does not have unrestricted access to everything and cannot participate in everything. For instance, Queen Victoria is credited with inventing a tartan named the "Victoria" while Prince Albert designed the "Balmoral" tartan. To this day, the Balmoral tartan is reserved for use by the royal family.[665] Public use of this tartan is frowned upon. According to the Scottish Tartan Authority, some weavers overseas have ignored this convention and produced tartans purporting to be Balmoral. The Scottish Tartan Authority states that that behaviour is frowned upon by the Scottish industry and anyone wearing that tartan in Scotland would be regarded as committing a social, but not

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[663] This was discussed in section 5.4., above. See also Pamela Rae Krueger, *Counterfeit Cultures: Cultural Appropriation, Art by Native Artists and Canadian Art Galleries* (MA, Laurentian University of Sudbury, 1998) [unpublished].

[664] See *e.g.* Paul Kuruk, "The Role of Customary Law under Sui Generis Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge" (2007) 17 Ind. Int'l & Comp. L. Rev. 67 at 76.

[665] See Jeffrey Banks and Doria de la Chapelle, *Tartan: Romancing the Plaid* (New York: Rizzoli, 2007) 109.

legal, sin.[666] My reason for giving this example is to emphasize the restricted use of the "Balmoral" tartan. From this perspective, indigenous peoples reserving traditional textiles for their own use or for use in restricted instances should not be seen as unreasonable, especially if these textiles have ongoing religious, spiritual, historical or cultural significance in the community. Moreover, sometimes the public interest cannot be defined in terms of permitted uses in cases of sacred designs and other TCES which a community keeps secret.

Especially within the past fifty years international and organisational instruments have affirmed the rights of indigenous peoples and the importance of preserving culture within traditional communities.[667] Culture is important to keep society together and some items of culture are more vital to holding the fabric of society together than are others. Thus, if the unauthorised use of traditional textiles or the theft of the textile could result in the disintegration of a society, then it appears that the greater global public good is in the survival of the concerned ethnic community. It is in humanity's interest for that community to continue to exist and that survival should take precedence over whether a foreigner wants to use or copy the design.

There are many ways of defining the public interest. Sometimes it can be defined by permitted uses and at other times it cannot. There is no easy definition of the public interest because cultural heritage is a broad area with sacred and non-sacred items. However, indigenous peoples and traditional communities have their own systems of

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[666] Scottish Tartans Authority, "Tartans FAQs," online: Scottish Tartans Authority <http://www.tartansauthority.com/Web/Site/FAQs/tartanfaqs.asp>. The Scottish Tartans Authority is a registered charity which maintains a register of tartans. Their site states that when the official Scottish Register of Tartans is established, they will hand over tartan registration. See "Welcome to the Scottish Tartans Authority" at "Tartan Registration," online: Scottish Tartans Authority <http://www.tartansauthority.com/Web/Site/home/home. asp>; Jeffrey Banks and Doria de la Chapelle, *Tartan: Romancing the Plaid* (New York: Rizzoli, 2007) 109.

[667] A number of these instruments were mentioned in Chapter 1 and in section 4.5., above.

sharing which can be applied and through that the public can have access to information. Where cultural survival and human rights considerations are concerned, the greater global public interest is the continued survival of these people.

6.4: THE NATIONAL LEVEL

There are currently four main systems for protecting traditional textiles and TCES. The first system, which was considered in sections 5.2. and 5.3., is the protection under the existing intellectual property framework without any modification of the latter. This study argued that it offers inadequate protection for traditional textiles protection. The second is through the cultural heritage conventions and this study also contended that they are inadequate to protect traditional textiles. Third is customary law rules and protocols. The fourth umbrella is the *sui generis* option. The variations of *sui generis* rights indicate the non-uniform nature of TCES protection and the fact that there is presently no one-size-fits-all solution.[668]

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[668] WIPO has created a useful compilation of some examples of legislative texts on the protection of traditional cultural expressions. In the compilation, the legislative texts are classified as follows:

> i) special laws and measures which specifically address the protection of traditional cultural expressions/expressions of folklore, sometimes referred to as "sui generis" laws, (ii) copyright and related rights laws which provide protection of a sui generis nature for traditional cultural expressions/expressions of folklore, and (iii) cultural heritage and other laws and measures which provide intellectual property-type protection for traditional cultural expressions/expressions of folklore.

WIPO, "Legislative Texts on the Protection of Traditional Cultural Expressions (Expressions of Folklore)(TCEs)," online: WIPO <http://www.wipo.int/tk/en/laws/folklore.html>. WIPO has also compiled legislative texts on the protection of traditional knowledge and genetic resources respectively, see, online: WIPO <http://www.wipo.int/tk/en/laws/>.

Sui generis has two main meanings in this context. First, it refers to a new legal system specifically created to address a particular issue, meaning a system other than the existing intellectual property system. Second, it refers to a new right within the intellectual property law system. As a WIPO document states:

> Sui generis is a Latin phrase meaning "of its own kind". A sui generis system, for example, is a system specifically designed to address the needs and concerns of a particular issue. Calls for a "sui generis system" for TK protection are sometimes heard. This could mean a system entirely separate from and different from the current IP system. Some persons, however, also use the term to refer to new IP, or IP-like, rights. There are already several examples of sui generis IP rights, such as plant breeders' rights (as reflected in the International Convention on the Protection of New Varieties of Plants, 1991 ("The UPOV Convention")) and the IP protection of integrated circuits (as reflected in the Treaty on Intellectual Property in Respect of Integrated Circuits, 1989 ("The Washington Treaty")). In the field of TK, the 1982 Model Provisions...provide sui generis protection for expressions of folklore.[669]

Both meanings will be used here.

Several *sui generis* legislative attempts have been made internationally and nationally since the 1960s. Taking WIPO's efforts in this area, Article 15(4)[670] of the

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[669] WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (2001) online: WIPO <http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf> 1 at 24-25. See also Michael Halewood, "Indigenous and Local Knowledge in International Law: A Preface to Sui Generis Intellectual Property Protection," *supra* note 28.

[670] Article 15(4) states:

> *(a)* 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.
>
> *(b)* Countries of the Union which make such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

A WIPO document states that "This article of the Berne Convention, according to the intentions of the revision conference, implies the possibility of granting protection for expressions of folklore." WIPO, *The Attempts to Protect Expressions of Folklore and Traditional Knowledge* (Document prepared by the

Stockholm Revision of the Berne Convention, which is continued in the 1971 Revision of the Berne Convention, arguably gives countries the option of protecting expressions of folklore.[671] WIPO and UNESCO's early involvement in this field resulted in the 1976 *Tunis Model Copyright Law for Developing Countries*. The 1982 UNESCO—WIPO *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action*[672] was an attempt to address copyright's inadequacy in this area. Described as the most comprehensive attempt to resolve the folklore issue at the time,[673] the key features of the Model Provisions were that they afforded intellectual property rights in folklore to individuals and communities in works which did not necessarily have to be fixed. Although these Model Provisions were not legally binding, they served as a useful guide for countries which were interested in protecting folklore. One of the earliest efforts to establish an international treaty on TCES was in 1984 when WIPO and UNESCO convened a meeting to explore developing an international treaty based on the UNESCO—WIPO Model Provisions. However, the *Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions* in 1984[674] was never implemented.

International Bureau of WIPO) WIPO/IPTK/MCT/02/INF.5 (November 2001), online: WIPO <http://www.wipo.int/arab/en/ meetings/2002/muscat_forum_ip/doc/iptk_mct02_i5.doc> at paragraph. 16.

[671] However, there are problems with this protection and in WIPO's words, "Because the existing system of copyright protection was not adequate for the protection of folklore, attention turned to the possibilities of a sui generis solution." WIPO, *ibid.*

[672] *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action, 1982*, online: WIPO <http://www.wipo.int/export/sites/ www/tk/en/laws/pdf/unesco_wipo.pdf> [UNESCO—WIPO Model Provisions or Model Provisions].

[673] Rachel Massey and Christopher Stephens, "Intellectual Property Rights, the Law and the Indigenous Peoples' Art" (1998) 32:4 Copyright Bull. 49, online: UNESCO <http://unesdoc.unesco.org/images/0011/ 001162/ 116222eb.pdf#116203>.

[674] For a discussion on the Draft Treaty, see Agnès Lucas-Schloetter, "Folklore" in Silke von Lewinski, ed., *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore* (The Hague: Kluwer Law International, 2004) 259 at 345.

Earlier in 1981, the Australian Working Party recommended *sui generis* rights in the nature of an *Aboriginal Folklore Act*.[675] In 1994, the United Nations Development Programme[676] reviewed indigenous people's knowledge and noted problems with the intellectual property system in relation to indigenous peoples. The UNDP identified some strategies indigenous people could adopt, including "adopting existing (and evolving) intellectual property systems; developing a *sui generis* system of intellectual property protection; entering bilateral contractual arrangements; or creating a new system combining various elements of these."[677]

There are three options for *sui generis* reform. The first option is the modification of the intellectual property system to provide *sui generis* type rights for TCES such as under Ghana's *Copyright Act*, 2005 (Act 690) where protection is provided through copyright law. The second is to provide *sui generis* type rights through a new law of an intellectual property nature such as the Panama *Law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge*, Law No. 20, (June 26, 2000)[678] and the Panama *Ministry of Trade and Industries Executive Decree No. 12*

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[675] The Working Party recognised a concept similar to moral rights and the Act was also to provide *inter alia* for "(a) prohibition on non-traditional uses of sacred-secret material ...(c) (payments to traditional owners of items being used for commercial purposes..." Kamal Puri, "Preservation and Conservation of Expressions of Folklore," *supra* note 5 at 21. Further in 1994 and due to the inadequacy of copyright law, the Australian Attorney General's office produced an issue paper "Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples" and also set up an interdepartmental committee to work on a *sui generis* model for protecting indigenous culture. See Rachel Massey and Christopher Stephens, "Intellectual Property Rights, the Law and the Indigenous Peoples' Art" (1998) 32:4 Copyright Bull. 49 at 56, online: UNESCO <http://unesdoc.unesco.org/images/0011/ 001162/116222eb.pdf#116203>.

[676] United Nations Development Programme, online: <http://www.undp.org/> [UNDP].

[677] Quoted in Rachel Massey & Christopher Stephens, "Intellectual Property Rights, the Law and the Indigenous Peoples' Art" (1998) 32:4 Copyright Bull. 49 at 54.

[678] *Law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge*, Law No. 20, (26 June 2000), online: WIPO <http://www.wipo.int/tk/en/laws/folklore.html> [Panama Special Intellectual Property Regime Law].

(March 20, 2001)[679] which regulates Panama's Special Intellectual Property Regime Law. The third option is to provide *sui generis* rights by creating a new law of a non-intellectual property nature such as the U.S.A. *Indian Arts and Crafts Act* of 1990.[680] Despite ongoing international and national deliberations and the existence of these options, there are still questions concerning how to effectively protect TCES.

This section analyzes the protection of TCES and traditional textiles using Ghana as an example to illustrate traditional textiles protection and examine concerns that any future and new *sui generis* system must address. Like some other developing countries using the first option mentioned in the preceding paragraph, Ghana is providing protection for TCES through its modified copyright legislation.[681] As WIPO states, "The need for intellectual property protection of expressions of folklore emerged in developing countries."[682] By recognising folklore of indigenous peoples as protectable intellectual property and enforcing protection, the intellectual property law system can be one weapon used to address the appropriation of traditional textiles. Although this section focuses on Ghana, it draws on examples from a few other jurisdictions.

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[679] *Ministry of Trade and Industries Executive Decree No. 12* (20 March 2001), online: WIPO <http://www.wipo.int/export/sites/www/tk/en/laws/pdf/panama_execdecree.pdf> [Panama Executive Decree]. The first recital to this Decree states:

> *That* Law No. 20 of June 26, 2000, has as its purpose the protection of the collective intellectual property rights and the traditional knowledge of indigenous peoples embodied in
> their creations, such as inventions, models, designs and drawings, innovations contained in images, figures, graphic symbols, petroglyphs and other material, and also the cultural elements of their history, music, art and traditional artistic expressions susceptible of commercial use, which is to be done through a special system of registration, promotion and
> marketing of their rights in such a way as to give prominence to the indigenous socio-cultural values and do them social justice.

[680] *The Indian Arts and Crafts Act* of 1990 (P.L.101-644), the amendment (P.L. 106-497).

[681] Other countries which have used the copyright model are Tunisia in 1967 and 1994; Bolivia in 1968 and 1992; Indonesia in 1987; Nigeria in 1988 and 1992 and Panama in 1994.

[682] WIPO, *The Attempts to Protect Expressions of Folklore and Traditional Knowledge* (Document prepared by the International Bureau of WIPO) at 2 paragraph 1.

Indonesia, one of the world's largest textile suppliers is actively pursuing obtaining intellectual property rights for its traditional textile motifs and copyrighting its batik designs due to concerns about other countries imitating its textile patterns.[683] Meutia Hatta, the Minister for Women's Empowerment, recently stressed the importance of Indonesia acquiring intellectual property rights for it textile motifs and fashion.[684] The success of its quest will depend not only on its national legislation, but also on the receptiveness of the international community to copyrighting traditional motifs. Like Ghana, Indonesia also provides protection for TCES protection of a *sui generis* nature in its copyright legislation. The Ghana example will help inform countries like Indonesia on protecting traditional motifs and designs.

Ghana's experience will also inform countries that may not as yet have specific legal provisions on traditional textiles or TCES protection. In response to a WIPO Questionnaire on the protection of expressions of folklore, Bhutan replied that the concept of proprietary rights and exclusive ownership of intellectual property is new to Bhutan. Two main reasons were given for this situation. First was the fact that due to the influence of Buddhism in Bhutan, the country as a whole was regarded as the guardian of its culture. Second was the fact that Bhutan had had an isolation policy until the 1960s with little or no contact with the outside world. In these circumstances, it could not have anticipated that other people could appropriate and misuse its culture for wrong purposes and for gain.[685]

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[683] On this, see *e.g.* Dewi Savitri Reni, "We Must Copyright Our Batik Designs" (Opinion and Editorial) *The Jakarta Post* (20 November 2008), online: <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20081120.E03>; Rita A. Widiadana, "RI Textile, Fashion Face Stiff Competition" *The Jakarta Post* (9 June 2005), online: The Jakarta Post <http://old.thejakartapost.com/yesterdaydetail.asp?fileid=20050609.Q01>.

[684] See Rita A.Widiadana, *ibid.*

[685] See "Questionnaire on National Experiences with the Legal Protection of Folklore: Response of Bhutan," online: WIPO <http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/bhutan.pdf> at 3. Bhutan's response was given by Kinley Wangchuk, Bhutan's Deputy Director, Intellectual Property Division, Ministry of Trade and Industry.

However, Bhutan was increasingly becoming aware of the need to prevent the appropriation of its local "cultural properties" and was especially concerned about how to effectively protect its traditional textile designs and indigenous medicinal practices.[686]

As a first step, countries interested in implementing *sui generis* protection could enact legislation and policies concerning the nature of the subject matter of TCES and traditional textiles for protection. This could take the form of a legislative provision stipulating that a foreigner cannot acquire an intellectual property right in another country's traditional textiles. A variation of this provision is for a country to legislate that no one, whether a citizen or a foreigner, would be able to register an intellectual property right in that country's culture as so defined in the legislation. The advantage of such a provision is that it might help to reduce incidents of intellectual property legislation being used to appropriate culture.

One of the earliest measures that Ghana took on indigenous designs protection was to prohibit the registration of its well-known designs. The *Textile Designs (Registration) Decree*, 1973 (N.R.C.D. 213)[687] forbade the registration of textiles which contained substantial indigenous or traditional motifs. Similarly, section 17(1) of New Zealand's *Trademark Act* (2002) forbids the use or registration of any mark which might offend a "significant section of the community, including Maori."[688]

Second, the legislation and policies should clearly resolve all the problems that were identified with the eligibility criteria for intellectual property, especially under the

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[686] See "Questionnaire on National Experiences with the Legal Protection of Folklore: Response of Bhutan," online: WIPO <http://www.wipo.int/export/sites/www/tk/en/consultations/questionnaires/ic-2-7/bhutan.pdf> at 1.

[687] *Textile Designs (Registration) Decree*, 1973 (N.R.C.D. 213), online: WIPO <http://www.wipo.int/clea/en/details.jsp? id=1781>.

[688] *Trademark Act* (2002), online: WIPO <http://www.wipo.int/export/sites/www/tk/en/laws/pdf/nz_trademarks.pdf>.

copyright category, namely identifiable author, originality, duration, and public domain. The legislation should contain no ambiguity on these matters. Using Indonesia and Ghana as examples, this discussion examines how *sui generis* rights can address those four challenges identified with the intellectual property system.

Article 10 of Indonesia's *Copyright Law*, Number 19 (2002) vests copyright for "works of prehistoric remains, historical and other national cultural objects" in the State.[689] Under Article 10(2) "The State shall hold the Copyright for folklores and works of popular culture that are commonly owned, such as stories, legends, folk tales, epics, songs, handicrafts, choreography, dances, calligraphies and other artistic works." Any non-citizen of Indonesia wishing to publish or reproduce the works in Article 10(2) must seek permission. The Indonesian legislation's approach is to dispense with originality or identifiable author with respect to folklore by vesting copyright in works of unknown authors in the State.

The Ghanaian copyright legislation is more extensive than the Indonesian one. Folklore plays an important role in Ghana as does oral tradition. Ghana has a large portion of its cultural works in an oral form.[690] Since independence, Ghana's legislation on folklore protection has extended its scope with successive legislation.[691] Ghana's

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[689] Indonesia, *Copyright Law*, Number 19 (2002), online: WIPO <http://www.wipo.int/export/sites/www/tk/en/laws/ pdf/indonesia_copyright.pdf>. The Preamble to this *Copyright Law* of Indonesia includes the following as its statement of objective that "Indonesia is a country which has diversity of ethnics/tribes and culture as well as wealth in the field of arts and literature which needs the protection of copyright for the intellectual property originating from the diversity...."

[690] For further information, see generally Betty Mould-Iddrisu, "Development and Current Status of Copyright Protection in Ghana" (Paper presented at the WIPO National Seminar on Copyright and Neighbouring Rights for Law Enforcement Agencies, organised by WIPO in cooperation with the Government of the Republic of Ghana, Accra, May 1997).

[691] Ghana's intellectual property obligations date back to the colonial period when it was introduced to the intellectual property system by the colonial power, Britain. For example, Ghana's first copyright legislation was the *Imperial Copyright Act of 1911*, Imperial Copyright Act, 1-2 Geo.V, c. 46. It came into force in 1912 and was applicable to the British Empire as a whole. It was binding on Ghana as a British colony. Ghana's intellectual property history can be divided into parts: the colonial period, 1902-1957, when Britain governed

Copyright Law, 1985 (P.N.D.C. Law 110)[692] went a step further than N.R.C.D. 213[693] by providing specific protection for folklore within copyright. P.N.D.C. Law 110 was repealed with the passage of the *Copyright Act*, 2005 (Act 690).[694]

Act 690 has a dual role: it protects traditional copyright works, such as literary and artistic works, and it protects cultural heritage, specifically folklore. Act 690 defines folklore as follows:

> 'folklore' means the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore.[695]

Thus, works of Ghanaian folklore are part of the cultural heritage of Ghana. The list of works of folklore in the definition section of Act 690 is not exhaustive. The important status of *kente* and *adinkra* designs in Ghana is clear from the fact that they are specifically mentioned as examples of works of Ghanaian folklore in Act 690. Similarly, Panama's Executive Decree[696] lists examples of works the Panama Special Intellectual Property

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Ghana's intellectual property policy and, Ghana's post-independence era which started on 6 March 1957. However, some of the colonial period laws continued to operate in Ghana until it enacted its own.

[692] Ghana *Copyright Law*, 1985 [P.N.D.C. Law 110].This was unlike Ghana's 1960 copyright legislation which basically copied the British legislation and did not protect folklore.

[693] N.R.C.D. 213. The provisions in N.R.C.D. 213 are stated earlier in this section.

[694] Copyright Act, 2005 (Act 690), online: Parliament of Ghana <http://www.parliament.gh/org_ba.php> [Act 690]. The relevant sections of this Act are sections 4, 17, 19, 44, 54, 64 and the Interpretation section.

[695] Act 690 at section 76. When Ghana responded to a WIPO study under P.N.D.C. Law 110, whose definition of folklore was similar to that in Act 690 with the exclusion of categorically naming kente and adinkra designs, Ghana stated that folklore covered:

> -Verbal expressions such as folklore, folk poetry and riddles;
> -Musical expressions such as folk songs;
> -Expressions by actions such as folk dances, plays;
> -Tangible expressions such as production of folk art, basket weaving, Kente and "adinkra" designs

See "Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore: Response of Ghana," online: WIPO <http://www.wipo.int/globalissues/questionnaires/ic-2-7/ghana.pdf >.

[696] *Ministry of Trade and Industries Executive Decree No. 12* (20 March 2001), online: WIPO <http://www.wipo.int/export/sites/www/tk/en/laws/pdf/panama_execdecree.pdf> [Panama Executive Decree].

Regime Law[697] protects such as *Cra*, which are woven bags or purses decorated with some traditional designs used by the Ngöbe and Bugle people, and specific items of clothing made of traditional materials.[698] The definition of folklore in the Ghanaian legislation resolves the challenge that exists under copyright law of identifying a specific individual author by recognising creations by ethnic communities or those of an unidentified Ghanaian author. [699]

The protection given to traditional textiles is similar to that given to conventional copyright works since under section 4, Act 690 protects folklore against reproduction, communication to the public and "adaptation, translation and other transformation."[700] However, the "rights of folklore are vested in the President on behalf of and in trust for the people of the Republic."[701] This position is similar to the Indonesian one which vests copyright in folklore in the State.[702]

Act 690's folklore provisions differ from conventional copyright ones in that the originality requirement does not apply to folklore. In terms of duration, folklore protection in Ghana is perpetual.[703] Section 17 states: "The rights vested in the President on behalf of and in trust for the people of the Republic in respect of folklore under section 4 exist in perpetuity." Thus, Act 690's approach to the duration challenge is to state unequivocally that these cultural heritage rights do not have an end date, and thus will never enter into the

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[697] *Law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge*, Law No. 20, (26 June 2000), online: WIPO <http://www.wipo.int/tk/en/laws/folklore.html> [Panama Special Intellectual Property Regime Law].

[698] *Ministry of Trade and Industries Executive Decree No. 12* (20 March 2001), online: WIPO <http://www.wipo.int/export/sites/www/tk/en/laws/pdf/panama_execdecree.pdf> [Panama Executive Decree] at Articles 3(8), 3(13) and 3(14).

[699] Ghana *Copyright Act*, 2005 (Act 690) at section 76.

[700] Act 690 at section 4 (1) (a), (b) and (c).

[701] Act 690 at section 4 (2).

[702] Indonesia, *Copyright Law*, Number 19 (2002), online: WIPO <http://www.wipo.int/export/sites/www/tk/en/laws/ pdf/indonesia_copyright.pdf>.

[703] Ghana *Copyright Act*, 2005 (Act 690) at section 17.

public domain.[704] Adopting such direct language and express provisions on folklore protection clearly indicates to foreigners not only the importance that folklore has for these communities, but also the fact that they have an owner.

Offences under Act 690 concern the sale or distribution of imported works of Ghanaian folklore without the written permission of the National Folklore Board.[705] Commenting on a similar provision in P.N.D.C. Law 110, Ghana's former Acting Copyright Administrator stated that this provision was meant to protect Ghanaian folklore from foreigners wishing to exploit Ghanaian folklore.[706] One limitation of the certification mark system is that it cannot prevent the production, import or export of forgeries. Thus, the Ghanaian provision avoids this problem at least from the import perspective.

There are additional observations on the Ghanaian example which are worthy of mention. Indigenous peoples have stated that one of the problems with using the conventional intellectual property system to protect traditional knowledge and TCES is splitting them into categories and inappropriate categorisation. Their worldview sees TCES and traditional knowledge as interconnected. Ghana's example can be seen as an attempt to resolve this problem since it embraces a wider conception of folklore which includes scientific elements.[707]

Unfortunately, Ghana's express protection for its traditional textiles has not prevented the appropriation of these motifs and designs. The overseas production and marketing of imitations of traditional textiles occurs despite P.N.D.C.L. 110 and the more recent Act

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[704] Act 690 at section 38 defines works which are in the public domain.
[705] Act 690 at section 44.
[706] Andrew O. Amegatcher, *Ghanaian Law of Copyright* (Accra: Omega Law Publishers, 1993) at 109.
[707] The criticisms against the Western concept of folklore include the fact that it is narrow since it focuses on the cultural field. See *e.g.* Michael Blakeney's comments in "Panel II: The Law and Policy of Protecting Folklore, Traditional Knowledge, and Genetic Resources," (2002) 12 Fordham Intellectual Property, Media & Entertainment Law Journal 753 at 757.

690. Thus, provisions in national legislation alone on folklore protection are insufficient to ensure compliance overseas; there is the need for recognition beyond national borders.

Another issue is ensuring that the interests of producers of traditional textiles and other items of Ghanaian folklore are effectively protected by the State. Writing on the Ghanaian situation in 2004, before the passage of Act 690, Boateng stated that some kente and adinkra producers were doubtful about whether the State was trustworthy enough to be the custodian of their interests.[708] Under Act 690, like P.N.D.C. Law 110, copyright in folklore is vested in the Republic of Ghana; however, unlike P.N.D.C. Law 110, Act 690 provides for the establishment of a National Folklore Board.[709] With copyright in folklore being vested in the Republic of Ghana and with the establishment of a National Folklore Board to administer proceeds from the use of folklore, one issue that the government might increasingly have to address is how to ensure that folklore producers get adequate compensation from the proceeds the National Folklore Board collects. This issue is not unique to Ghana and will need to be resolved by discussions between the state, the National Folklore Board and the relevant communities. The creation of the National Folklore Board is an improvement on the position under P.N.D.C. Law 110. Probably one measure that will help is to have representatives of some communities serving on the National Folklore Board.

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[708] Boatema Boateng, "African Textiles and the Politics of Diasporic Identity-Making" in Jean Allman, ed., *Fashioning Africa: Power and the Politics of Dress* (Bloomington: Indiana University Press, 2004) 212 at 225.

[709] Ghana *Copyright Act*, 2005 (Act 690) at section 59(2) provides for the composition of the National Folklore Board as follows:

> (2) The Board shall consist of
> (a) a chairperson,
> (b) the Copyright Administrator,
> (c) a person nominated by the National Commission on Culture; and
> (d) six other persons
> who shall be appointed by the President in consultation with the Council of State.

While the Ghanaian effort to protect TCES is a step forward as compared with its former legislation on copyright, putting TCES side-by-side in one legislation with the conventional copyright system might create confusion because there is currently no clear division between permitted uses of conventional copyright works and of folklore. Moreover, folklore provisions are not all in one section, but are in different parts of Act 690. It might be better to have one law just for TCES protection or a clear section in the copyright law devoted solely to TCES protection. Of these two possibilities, copyright law does not appear to be as good a fit as a separate law, as the definition of folklore shows and for the additional reasons given later on in this section.

The Ghanaian example could be regarded as an attempt to prevent the appropriation of its culture by protecting its cultural heritage using the tools at its disposal; hence the protection of folklore under a modified copyright system.[710] There is still more to be done and more progress to be made to arrive at an effective long-term solution. However, P.N.D.C. Law 110 achieved some success in protecting Ghanaian folklore when in 1990

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[710] Several scholars have commented on the intellectual property law system's potential to address cultural appropriation. See generally, Daniel Wüger, "Prevention of Misappropriation of Intangible Cultural Heritage Through Intellectual Property Laws" in J. Michael Finger & Philip Schuler, eds., *Poor People's Knowledge: Promoting Intellectual Property in Developing Countries* (Washington, D.C.: World Bank, 2004) 183.
As Folarin Shyllon comments, especially with respect to unauthorised commercialisation of African folklore, "The protection of folklore by copyright law is to prevent such events from recurring." Folarin Shyllon, Conservation, Preservation and the Legal Protection of Folklore in Africa: A General Survey, *supra* note 527 at 41. Naomi Roht-Arriaza also points out that "One obvious response to the appropriation of indigenous and traditional knowledge and its fruits is to modify existing systems of national and international intellectual property protection to encompass the informal innovations of indigenous and local communities." Naomi Roht-Arriaza, "Of Seeds and Shamans: The Appropriation of the Scientific and Technical Knowledge of Indigenous Local Communities" in Bruce Ziff & Pratima. V. Rao, eds., *Borrowed Power: Essays on Cultural Appropriation* (New Brunswick, N.J.: Rutgers University Press, 1997) 255 at 271. The usefulness of the intellectual property system in halting the appropriation of the traditional knowledge of the use of plants has also been recognised. A similar argument has been used in relation to indigenous people using the patent system to protect their traditional knowledge. See *e.g.* Ikechi Mgbeoji, *Patents and Plants: Rethinking the Role of International Law in Relation to the Appropriation of Traditional Knowledge of the Uses of Plants (TKUP)* (JSD Thesis, Dalhousie University, 2002) [unpublished] at 362-363; Peter Drahos, "Indigenous Knowledge and the Duties of Intellectual Property Owners" (1997) 11 I. P. J. 179, online: The Australian National University <http://www.anu.edu.au/fellows/pdrahos/articles/pdfs/1997indigknowdutiesofipowners.pdf.>.

Paul Simon signed an agreement with the Copyright Office and paid some money to the Copyright Office for using a Ghanaian folklore tune.[711]

In addition to the suggestions made in this section, the following recommendations would be helpful. From the analysis of the Ghana model, it appears that what is needed is a comprehensive solution which does not distinguish tangible from intangible cultural heritage, provides rights similar to intellectual property rights without the copyright eligibility criteria, prevents the registration of rights in traditional textiles and TCES, provides remedies for unauthorised uses of traditional textiles, and enables indigenous peoples and traditional communities to be involved in managing their cultural heritage at both the national and the regional level either directly or through a representative which could be an individual or an entity. Ghana and other countries could also consider providing remedies for cultural harm and for thefts of cultural heritage such as traditional textiles. The provisions of the 1970 UNESCO and 1995 UNIDROIT Conventions are useful in this respect. Countries can vary these elements to suit their national situation.

If all these elements can be provided by modifying the conventional intellectual property categories, then doing so would be an effective solution. However, doing so might create confusion if it substantially or radically alters the conventional intellectual property categories. Additionally, the needs and expectations of indigenous peoples are so broad and diverse that they cannot be contained within copyright alone.[712] In fact, several

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[711] In 1990, the Ghana Copyright Office granted Paul Simon permission to use *Yaa Amponsah* a Ghanaian highlife (musical) tune for his work "Spirit of Voices" which was included in the album "Rhythm of the Saints." See Andrew Ofoe Amegatcher, *Ghanaian Law of Copyright* (Accra: Omega (Law) Publishers, 1993) 22; A. O. Amegatcher, "Protection of Folklore by Copyright-a Contradiction in Terms" (2002) 36:2 Copyright Bulletin 33 at 35-36.

[712] See WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders: WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)*, (2001) online: WIPO <http://www.wipo.int/tk/en/tk/ffm/report/final/pdf/part1.pdf>. On the expressed needs, see also Silke von Lewinski, "Final Considerations" in Silke von Lewinski, ed., *Indigenous Heritage and*

commentators have cautioned against stretching copyright to accommodate expressions of folklore.[713] In that case, it might be better to try the other two *sui generis* options, such as creating a law specifically for TCES and traditional knowledge protection. It really does not matter whether the law is called an intellectual property law or a cultural heritage law; the important thing is that it provides effective protection. The next section considers the role regional arrangements can play in this framework.

6.5: REGIONAL ARRANGEMENTS

Regional arrangements are a key feature of the world system where nations producing similar or identical products come together to protect and promote their common interests. In some cases, the formation of regional and sub-regional groupings are based on language ties, such as with the African Regional Intellectual Property Organisation[714] and the *Organisation Africaine de la Propriété Intellectuelle*,[715] groups which reflect the African continent's colonial past and aim at establishing a uniform intellectual property policy.

Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore (The Hague: Kluwer Law International, 2004) 379 at 380-381.

[713] See *e.g.* Christine Haight Farley, "Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?" (1997) 30 Conn. L. Rev. 1.

[714] African Regional Intellectual Property Organisation [ARIPO]. For more information about ARIPO's history and objectives, see, online: ARIPO <http://www.aripo.org/articles.php?lng=en&pg=12>. "ARIPO was mainly established to pool the resources of its member countries in industrial property matters together in order to avoid duplication of financial and human resources." ARIPO, (*ibid.*). Currently, ARIPO has 16 members and 14 potential members. See "ARIPO-membership," online: ARIPO <http://www.aripo.org/articles.php?lng=en&pg=14>.

[715] Organisation Africaine de la Propriété Intellectuelle/African Intellectual Property Organization, online: <http://www.oapi.int/en/OAPI/historique.htm> [OAPI]. OAPI was created by the adoption of a convention signed in Bangui on 2 March 1977. This Bangui Agreement was revised on 24 February 1999 to comply with TRIPS, online: WIPO <http://www.wipo.int/export/sites/www/tk/en/laws/pdf/oapi_bangui.pdf>. [Bangui Agreement]. The Bangui Agreement, Annex VII at Article 2(xx) defines expressions of folklore as :

> the production of characteristic elements of the traditional artistic heritage developed and perpetuated by a community or by individuals recognized as meeting the expectations of such community, and includes folk tales, folk poetry, folk songs and instrumental music, folk dancing and entertainments as also the artistic expressions of rites and productions of folk art.

There are at least four critical roles that regional arrangements can play concerning the protection of traditional cultural expressions. First, regional organisations or agencies can represent communities that produce the same folklore, but live in different countries.[716] In the European scramble to colonise Africa and maintain a balance of power among European nations, little attention was paid to the ethnic geographical map of Africa. Consequently, the demarcation of the boundaries of the colonies split up many ethnic groups and, in the process, created the possibility of different countries having the same folklore or even traditional textiles because part of an ethnic group is in one country and the other part is in another. For instance, the boundaries of Ghana, in West Africa, cut through seventeen major ethnic groups while Uganda, in East Africa, also experienced this division of ethnic groups.[717] The attempt to regain territory lost as a consequence of colonialism has been a source of tension, conflict and wars in Africa as in other parts of the world.

In order to ensure peace, it is important that countries work together. In this case, the establishment of a regional arrangement would be advisable to ensure that the different communities or countries, as the case may be, work together for their common good,[718]

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[716] WIPO IGC Draft Provisions–Annex, *supra* note 60, Part III at Article 2, dealing with beneficiaries, provides methods that communities with the same folklore might use and suggests using *sui generis* provisions such as

> the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defence of their Cultural Identity and their Traditional Knowledge of Panama, 2000 and the related Executive Decree of 2001 ("the Panama Law"), and the Peruvian Law of 2002 Introducing a Protection Regime for the Collective Knowledge of Indigenous Peoples Derived from Biological Resources ("the Peru Law, 2002").

[717] On this point, see Robert L. Ostergard, Jr., Ricardo Rene Laremont & Fouad Kalouche, eds., *Power, Politics and the African Condition: Collected Essays of Ali A. Mazrui,* vol. 3 (Trenton, NJ: Africa World Press, 2004) at 33.

[718] See *e.g. Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples*, 1993, online: WIPO <http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/mataatua.pdf> at paragraph 2.5. (expressing a similar comment about the need for communities to cooperate with each other).

especially where it comes to agreements with outsiders for the use of the communities' expressions of folklore. It also brings to the fore the importance of agreements between communities which might produce the same TCES. This may be one of the strongest reasons for establishing regional agreements as well:[719] to ensure as much as possible that traditional communities are not pitted against each other by prospective exploiters of TCES and traditional knowledge. Thus, the regional organisation could represent the respective communities at the bargaining table. In such negotiations, they should ensure that the communities, which are the beneficiaries of any agreements for the commercial use of their expressions of folklore, are fairly and adequately compensated. Where countries have a national department charged with administering culture, that body could work together with the regional organisation.

A second related purpose is for regional agencies to negotiate with countries for the use of the region's traditional knowledge. Because of the lack of success so far in establishing an international arrangement on traditional knowledge protection, Kuruk suggests that:

> as an alternative to a single international instrument of protection, separate agreements could be worked out between interested traditional knowledge source-countries and traditional knowledge user-countries focusing on the particular types of traditional knowledge for which protection is required, as well as the form of protection that makes sense from the point of view of the countries requesting protection.[720]

See also, the WIPO IGC Draft Provisions—Annex, *supra* note 60, commentary on General Guiding Principle II. (a), at 7.

[719] In fact, writing in 1999, Paul Kuruk argued that in view of Africa's unique situation, a regional agreement rather than an international one might be a better option. See 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," (1999) 48 American University Law Review 769.

[720] Paul Kuruk, "Bridging the Gap between Traditional Knowledge and Intellectual Property Rights, Is Reciprocity an Answer?" (2004) 7:3 J. World I.P. 429 at 444.

This might at best be a temporary solution pending an international arrangement. However, even after there is an international arrangement, there will still be room for regional arrangements within that framework.

The third purpose that regional arrangements can serve is to maintain a regional register of folklore for when countries have the same folklore. However, this agency should have representatives from the concerned groups, and the principles suggested with respect to the digitization of some Maori information,[721] could be applied here. If countries have a National Folklore Board or a similar body, as in the case of Ghana, then that body could be involved in this process.

The keeping of regional registers is not a new thing. For instance, the European Union has a system of community designs where, by successfully applying for a Registered Community Design with the Office for Harmonisation of the Internal Market of the EU (OHIM), the design is protected in all EU countries.[722] The registered community design system grants registration for an initial five year period and may be renewed for additional five year periods for a maximum total protection period of twenty-five years. The advantage of the registered community design system is the substantial lower cost as compared with obtaining registration for the design in each EU member state. To be eligible for registration a design must be new. The community design coexists with national systems, and issues not covered by the Regulation are dealt with nationally. [723]

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[721] See section 6.3.1., above.

[722] OHIM has an online database which is a registered community design database. See "Search Registered Community designs: RCD-Online," online: OHIM <http://oami.europa.eu/ows/rw/pages/QPLUS/databases/searchRCD.en. do>. The Community Design Regulation creates two types of community designs: unregistered community design and the registered community design. The former came into effect on 6 March 2002 and provides automatic protection for three years without the need for registration. See EC, EC, *Council Regulation (EC) No* 6/2002of 12 December 2001 on Community Designs [2002] O.J. L03/1.

[723] See "Community Design," online: Europa <http://europa.eu/scadplus/leg/en/lvb/l26033.htm>. See generally, International Trademark Association, "Community Design," online: International Trademark

Similarly, regional trademark systems exist with ARIPO and OAPI. ARIPO operates a regional trademark system through The Banjul Protocol on Marks which was adopted in 1993 and came into force on 6 March 1997.[724] The Banjul Protocol establishes a centralised filing system which allows an applicant to file a single application in a national office of a contracting state or directly with the ARIPO office and designate, in the application, states where the applicant would like the mark to be protected. When ARIPO accepts the application it advertises its acceptance and registers the mark, which takes effect in all the designated states. The ARIPO system does not replace national trademark systems.[725]

Similarly, under OAPI's Bangui Agreement some French-speaking African nations established a regional office for filing trademark applications. An application is filed in the Central Office in Yaoundé, Cameroon, and once accepted the registered trademark applies in the OAPI member countries. The Bangui Agreement also provides for keeping special registers for entries made under the Agreement.[726] The common thread running through these regional agreements is that they do not replace national registration systems and have the advantage of reducing the cost of filing an application in each country. Furthermore, if each applicant opts to register a mark regionally, administering a regional registration system would facilitate the procedure for verifying that the registration of a trademark does

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Association <http://www.inta.org/index.php?option=com_content&task=view&id=193&Itemid=59&get content=1>; "Design Protection Abroad," online: UK Intellectual Property Office <http://www.ipo.gov.uk/ design/d-applying/d-should/d-should-abroad.htm>; "How to Protect Your Design in the European Union," online: ICSID <http://www.icsid.org/resources/case_studies/articles49.htm>.

[724] It was revised in 1997, 1998, 1999 and 2004. For the Banjul Protocol on Marks and the Regulations for Implementing the Banjul Protocol, see online: ARIPO <http://www.aripo.org/index.php?option=com_ docman&task=doc_download&gid=5&Itemid=11%20->. See also "Legal Frameworks," online: ARIPO <http://www.aripo.org/index.php?option=com_content&view=article&id=18&Itemid=55>.

[725] See the Banjul Protocol on Marks, especially at sections 2 and 8.

[726] See the Bangui Agreement, especially Title I, Section II, at Articles 7, 9 and 16.

not infringe already existing marks since there is a common register in which to check this information.

The limitations of keeping regional registers are even greater than with national ones. Like national registers, these regional registers might not include secret information. Also, countries and communities might be less inclined to opt for a regional register of folklore. It is, however, an option that some countries and communities might support.

Fourth is the development of regional *sui generis* policies for national implementation. A noteworthy example in the traditional knowledge field is the Pacific Islands Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, 2002.[727] In fact, WIPO has compiled a list of countries and regional groupings which are also adopting or implementing part of the WIPO IGC Revised Draft Provisions.[728]

The WIPO IGC Draft Provisions—Annex envisages regional organisations playing several roles. The following two roles are worth mentioning. The first one concerns the management of rights and provides that an agency, which could possibly be a regional organisation or office, can represent a community. Prior authorisations to use TCES should be obtained directly from the community concerned or, if the community wishes, from an agency acting on the community's behalf. This agency's duties would also be to distribute

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[727] See *supra* note 664.

[728] See WIPO, "Draft Provisions on Traditional Cultural Expressions/Folklore and Traditional Knowledge," online: WIPO <http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html>; WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 9th Sess., *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Updated Draft Outline of Policy Options and Legal Mechanisms*, WIPO/GRTKF/IC/9/INF/4 (2006), online: WIPO <http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_9/wipo_grtkf_ic_9_inf_4.pdf>; WIPO, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, 10th Sess., *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Draft Objectives and Principles*, WIPO/GRTKF/IC/10/4 (2006), online: WIPO <http://www.wipo.int/ edocs/mdocs/ tk/en/ wipo_grtkf_ic_10/wipo_grtkf_ic_10_4.pdf>.

revenue obtained from such use to the relevant community.[729] Second is the possibility of an organisation keeping a register or track of notifications.[730] The WIPO IGC Draft Provisions—Annex provides that TCES with a particular level of spiritual or cultural value for which a high level of protection is sought[731] could be registered by the relevant community or by the agency referred to in Article 4 of the WIPO IGC Draft Provisions—Annex on the community's behalf.[732] Such notification or registration is, however, optional.[733] In addition, the agency's duties could include advising and assisting communities concerning sanctions, remedies and the exercise of rights.[734]

Ultimately, the actual role of regional arrangements will depend on what the communities on their own or in consultation with other communities and their national governments may decide. However, it is definitely possible that agreements between communities become part of future developments.

6.6. EDUCATION AND PUBLIC AWARENESS

One factor that contributes to the success of a new framework is education and public awareness. The implementation of a new system requires that those managing the implementation, those at the grass-roots and ordinary citizens whose actions affect the evolution of the system are aware of and understand the system. For instance, although the

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[729] See WIPO IGC Draft Provisions—Annex, *supra* note 60, Part III at Article 4 and the commentary thereon, especially at 24-25.
[730] WIPO IGC Draft Provisions—Annex, *ibid.* at Part III at Article 7 and its commentary concerning formalities and the possibility of an organisation keeping a register or track of notifications.
[731] See Article 3 in the WIPO IGC Draft Provisions—Annex, *ibid.* at 19-20 and commentary thereon at 21-23.
[732] See Article 7 in the WIPO IGC Draft Provisions—Annex, *ibid.* at 32 and commentary at 33.
[733] See the commentary on Article 7 in the WIPO IGC Draft Provisions—Annex, *ibid.*
[734] WIPO IGC Draft Provisions—Annex, *ibid.* at Part III at Article 8. The WIPO IGC Draft Provisions—Annex, at Part III at Article 7 recognises the non-fixed nature of some traditional cultural expressions and states that, as a rule, traditional cultural expressions should not be subject to formalities and should be protected from the time of creation.

intellectual property system has been in existence for more than a century, WIPO continues to organise, alone or in conjunction with national authorities, seminars, consultations and training sessions. With the implementation of TRIPS, many seminars and training sessions were held all over the world in an attempt to both educate the legal community and create public awareness about the agreement and assist with the implementation process.[735]

With particular reference to the creation of *sui generis* legislation in expressions of folklore, education and public awareness could take several forms. First is advising indigenous peoples, traditional communities and governments on their rights and obligations under the new system.[736] Second is educating the general public on the need for

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[735] An example is the National Forum to Discuss the New Copyright Bill which was held on 3 October 1997 in Accra, Ghana. At that forum, Ghana's Acting Copyright Administrator, Mr. Bernard K. Bosumprah, presented a paper, "The New Copyright Bill, Existing International Treaties and P.N.D.C. Law 110." The paper discussed TRIPS, its impact on intellectual property and how Ghana's P.N.D.C. Law 110 needed to be revised in order to comply with TRIPS. WIPO organised a National Seminar on Copyright and Neighbouring Rights for Law Enforcement Agencies in Accra, Ghana on May 26 and 27, 1997. In July 1998, WIPO and the WTO launched a joint initiative to help developing countries to meet their commitment to comply with the 1 January 2000 deadline to implement TRIPS. In September 1998, WIPO and the WTO organised a joint symposium to further assist the developing countries in that cause. See WIPO, Press Release PR/98/139, "WIPO-WTO Joint Symposium on TRIPS Agreement Implementation Process" (14 September 1998), online: WIPO <http://www.wipo.int/edocs/prdocs/en/1998/wipo_pr_1998_139.html>. Other examples are the WIPO National Seminar on the TRIPS Agreement held on 25 June 1998 to 26 Jun 1998 in Vilnius, Lithuania, online: WIPO <http://www.wipo.int/meetings/en/details.jsp?meeting_id=3473>; the WIPO National Seminar on Intellectual Property and the TRIPS Agreement held on 9 June 2001 to 10 June 2001in Sanaa, Yemen, online: WIPO <http://www.wipo.int/meetings/en/details.jsp?meeting_id=4320>; and the WIPO Seminar for Certain Asian Countries on Flexible Implementation of Trips Provisions held in July 2008 in Singapore. See *e.g.* the Opening Remarks by Mr. Viktor Cheng, Deputy Director General, Intellectual Property Office of Singapore, delivered on 28 July 2008 at the WIPO Seminar for Certain Asian Countries on Flexible Implementation of TRIPS Provisions, online: Intellectual Property Office of Singapore <http://www.ipos.gov.sg/topNav/news/spe/2008/WIPO+Seminar+for+Certain+Asian+Countries+on+Flexible+Implementation+of+Trips+Provisions.htm>.

[736] For example in analysing the *African Union Model Law for the Protection of the Rights of Local Communities, Farmers and Breeders and for the Regulation of Access to Biological Resources*, Johnson A Ekpere points out that one of the reasons for its slow adoption has been because most Africans are not aware of its existence and that of other international agreements like TRIPS and the CBD. He therefore suggests national governments ensure that those most affected by legislative processes understand the issues involved and get a chance to participate in the process. See Johnson A. Ekpere, "The African Union Model Law for the Protection of the Rights of Local Communities Farmers and Breeders and the Regulation of Access to Biological Resources" in Christophe Bellmann, Graham Dutfield & Ricardo Meléndez-Ortiz, eds., *Trading in Knowledge: Development Perspectives on TRIPS, Trade, and Sustainability* (London: Earthscan Publications Ltd., 2003) 232. This law is listed in WIPO's list on legislative texts that protect traditional knowledge.

sui generis legislation and the necessity of protecting TCES.[737] The result might be more respect for indigenous peoples and their artwork. There must also be in existence local environments receptive to and supportive of this protection. The importance of raising the level of public awareness was one of the recommendations made in the UNESCO–WIPO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific held in Hanoi, from 21-23 April 1999.[738]

WIPO has already embarked on this ongoing consultation, deliberation and public awareness creation process. It is expected that this will continue after there are international regulations in this area and will involve more discussions and education on the regulations at the various levels: local, national, regional and international. Although this will be an especially demanding project, there should also be education of the law enforcement agencies in the respective countries.

6.7: CONCLUSION

This chapter examined how to design an effective system for traditional textiles protection. The chapter also discussed why there is the need for a system for traditional textiles protection and how some of the challenges of the new system can be addressed. Furthermore, it described three approaches to *sui generis* reform. It also examined a model that provides *sui generis* rights for traditional textiles under a modified intellectual

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[737] See *e.g.* Kamal Puri "Preservation and Conservation of Expressions of Folklore," *supra* note 5 at 25 (mentioning that if there is sui generis legislation for Aboriginal folklore, then it is best that there be education before its implementation so non-indigenous people can understand that protecting indigenous expressions of folklore is not necessarily a discriminatory procedure).

[738] UNESCO—WIPO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific, Hanoi, 21-23 April 1999, online: UNESCO <http://portal.unesco.org/culture/es/files/14287/10644892975Hanoi1999.pdf/Hanoi1999.pdf>.

property system. Moreover, it provided recommendations on the role that regional arrangements and education can play in this system.

It pointed out that the need for a system for traditional textiles protection arose from the lack of adequate protection for TCES. On the identification of protectable subject matter, the chapter recommended that while the use of the inventory system is useful, it should be applied with caution in order to preserve and protect the integrity of traditional textiles. It gave some solutions on the form the inventory could take. It suggested that there could be several types of inventories, such as an inventory which listed items for which prior consent is required for their use. The limitation there is that secret TCES might not be included in an inventory. Consequently, an inventory cannot always be relied upon as conclusive evidence of protected TCES.

On the role of the public interest, it proposed that the public interest in traditional textiles cannot always be defined in terms of public access to or permitted uses of traditional textiles because some designs may either be a secret or the textiles may have some religious connotations which cannot be shared with outsiders. There is therefore a need for a distinction to be made between the definition of the public interest as exists under the intellectual property law system and the indigenous worldview with its protocols and customary laws. It contended that cultural survival should take precedence over permitted public uses. It recommended that the national treatment and mutual recognition principles be applied in protecting foreign folklore. On the role of customary law, it suggested that the foundation for this new right should be customary law principles because they are the origin of rights in traditional cultural expressions. It also proposed that

customary law would be useful in several areas such as determining protectable subject matter and permitted uses of traditional textiles.

The examination of *sui generis* rights, using Ghana as an illustration, provided some insight into the system that some African and developing countries are using to combat appropriation of traditional textiles. Ghana's definition of folklore includes scientific expressions.[739] Further, although Ghana protects folklore through copyright, what it is using is not the conventional copyright system, but a modified one. Based on the analysis of Ghana, the chapter recommended that other countries that use a model similar to Ghana's could proceed by having a specific portion of their copyright legislation devoted specifically to folklore, partly to prevent confusion. However, it can be anticipated that more changes would have to be made to Ghana's copyright legislation as it develops its TCES protection framework. For this reason, the chapter suggests that a more effective long-term solution would be to create a law specifically for traditional knowledge and TCES protection. That would be more in line with the indigenous worldview, than with using a modified copyright system to protect an area as broad as traditional knowledge and TCES.

In sum, the chapter recommended that governments, communities and regions need to work in concert to create an effective system for TCES protection. This is a broad area linked to human rights, the indigenous worldview with its protocols and customary laws, intellectual property and cultural heritage conventions. There is the need for flexibility since some countries may opt to protect TCES in one agreement and traditional knowledge in another, while others may decide to combine the two in one agreement. For such a system to succeed there should be participation by indigenous peoples as customary law

[739] See Act 690 at section 76, *supra* note 695.

should play an important role in this framework. The success of a new framework requires that the gaps that the intellectual property system could not cover be addressed and solutions to the challenges which will result from a new system be found.

CHAPTER 7

7: CONCLUSION

This study explored the protection of traditional textiles. It had two central questions: (1) why protect traditional textiles; and, (2) is the existing intellectual property system a suitable framework for traditional textiles protection? In the process of answering these questions, this work examined the meaning of folklore, reviewed the Western foundations of the current intellectual property framework, examined customary law, discussed the concept of cultural appropriation and the framework for the protection of cultural property, analyzed folklore protection in relation to the existing intellectual property system and considered *sui generis* rights as an emerging alternative.

Chapter 2 was devoted to examining the origins and significance of expressions of folklore. It found that although the origins of the term folklore in the English language can be dated, specifically to 1846, when it was coined by William John Thomas by combining two existing words to replace the phrase "popular antiquities,"[740] the actual origins of what constitutes folklore cannot be so dated because folklore is inextricably linked to the history, existence and arguably origins of human life on this planet. In addition, expressions of folklore are generally characterised as a subset of traditional knowledge although some people do not make that distinction. This work stressed that, although traditional cultural expressions have been and continue to be transmitted from one generation to the next, the use of the term traditional should not be equated with old. In fact, it would be an overgeneralisation to equate traditional with old because the use of the word traditional relates to the method of transmission from one generation to the next. In

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[740] See *supra* note 36.

addition, in transmitting this knowledge, the concerned peoples sometimes develop it further, thus bringing some innovation and creativity to the work.

In discussing indigenous peoples and traditional communities, this work found that there is no single definition of indigenous peoples; rather, there are several characteristics that define them, such as their strong ties to land and nature. It showed the limitations of language across indigenous and Western worlds and how terminology such as "ownership" as used in Western legal thought may not have an equivalent form in indigenous philosophy. Trying to define people using concepts from other jurisdictions can lead to confusion and a misrepresentation of the actual picture.

It ascertained that as one aspect of folklore, traditional textiles occupy an important place in traditional communities. There is a spectrum of significance ranging from commercialised traditional textiles to non-commercialised traditional textiles. The closer an item gets to the sacred and secret end of the spectrum, the greater the possibility of the loss of the item causing harm to and signaling the disintegration of the community.

It described how despite predictions of the end of the indigenous and traditional world, this has not happened; in fact, indigenous and traditional communities continue to thrive. Further, a number of these communities are going through changes due in part to globalization and the influence of capitalism. Thus, some of these people may not cling as tightly to their traditions as they did in the past.

In terms of traditional textiles protection, the chapter found that one distinct feature of these societies is the customary law system which regulates the use of folklore, such as who is authorised to use or produce an expression of folklore. Customary law also lays down sanctions for non-compliance. Although some customary law systems may be highly

effective within the community concerned, customary law is severely handicapped when it comes to outsiders. This is because some outsiders may either ignore customary law rules when aware of their existence on the grounds that they do not agree with them or view them as binding, or they may be ignorant of the existence of these laws. Without international support, indigenous peoples are limited in their ability to protect their culture.

Chapter 2 therefore contended that effective protection of traditional textiles requires a system which recognises customary law beyond national borders because of their significance to indigenous communities and to the continued existence of such communities. The chapter also discussed that the right to culture is guaranteed in some international human rights documents. This covers the individual's right to enjoy culture and also the group right to have its culture protected. The right to culture therefore means that an indigenous group has the right to enjoy its traditional textiles and that the latter should be protected. The existence of the human rights documents also give weight to the protection of traditional textiles

Chapter 3 examined the Western concept of property rights with respect to the intellectual property system's protection of textiles. It discussed the difference between tangible and intangible property, discussed some factors leading to the birth of intellectual property and of the international intellectual property system. Textiles stand at the junction of the tangible-intangible field, since they have features of both of these types of property.

Chapter 3 further ascertained that the protection of textiles is a complicated one for several reasons. First, textiles are not category specific, but encompass various intellectual property law categories. For example, there can be a copyright in the pattern or the design while industrial design protection applies where the textile is reproduced on an industrial

scale. Second, there is a lack of uniformity among national legislation on textiles since countries can protect them under one or more copyright, trademark or industrial design laws. The chapter also revealed that intellectual property rights in textiles are available to individuals and to a collection of people, with the latter referring to two or more people, for example, under copyright's joint authorship or industrial design's joint design concept.

It argued that the philosophical foundations for intellectual property rights are weak. One of their weaknesses originates from the fact that these philosophies do not predate the formation of the intellectual property system; rather, they are a means of justifying an already existing system. Consequently, there are questions that the theories are unable to resolve. The chapter ascertained that the different theories may not equally apply to all the intellectual property categories. Thus, the scope of intellectual property works may have little to do with the justificatory theories of intellectual property. Additionally in some countries, especially the former colonies, the rationale for the existence of intellectual property is more because it was a policy introduced into the colonies by the colonisers as distinguished from one the former colonies voluntarily chose to adopt. Consequently, the chapter argues that the philosophies are not very effective as a guide on why a particular type of work should or should not form a part of the conventional intellectual property law.

This means that designers have to be circumspect in deciding which intellectual property categories would be applicable for protecting their textiles since these categories have different registration requirements and duration periods and protect different aspects of textiles. Moreover, copyright, industrial design, and certification marks protect the design and not the actual textile or fabric the design is produced on. Therefore, a textile

designer might have to consult another system if the person wants the movable textile protected in addition to the intangible design. Further, the justificatory theories cannot be fully relied upon to explain the basis of intellectual property rights in textiles.

Chapter 4 analyzed folklore's contribution to international trade, the concept of cultural appropriation and the framework for the international protection of cultural property outside the intellectual property system. The chapter's goal was to assess whether there is adequate protection of traditional textiles as culture. The chapter found that textiles contribute significantly to international trade. In Indonesia, for example, the textiles and garment industry is a major source of revenue and, in recent decades, has contributed significantly to the national coffers and has provided employment for many people. However, there is another side of this trade which is not legitimate and results from cultural appropriation. In such cases, the true producers and creators of the authentic version of the work, the indigenous and traditional communities, do not reap all the benefits of their handiwork since the proceeds go to the illegitimate trade.

The chapter ascertained that the concept of cultural appropriation is a controversial one and some scholars reject its existence. However, cultural appropriation, which refers to the unauthorised taking from another culture and using it as one's own or the unauthorised exploitation of another culture, is a major concern for indigenous peoples. It determined that cultural appropriation is linked to other issues such as who has the right to express another culture's voice, race relations, cultural diversity, survival and human rights. For some of these traditional communities, loss of cultural heritage is not only a reminder of their history of conquest and pillage by others, but also a continuation of it. After having

lost land and resources, they are now also being robbed of their culture. The effects of cultural appropriation can be very severe and gravely injure a community.

The analysis of the international framework for the protection of cultural property revealed that there are no specific international regulations or a treaty directed at indigenous intangible cultural heritage comparable to the protection intellectual property law grants to intangible works. A number of international instruments or UNESCO Conventions address some aspects of this issue, but there is no comprehensive treaty in this area dealing adequately with both movable traditional textiles and traditional textile designs. The chapter therefore concluded that there is no effective legal protection of traditional textiles and traditional textile designs.

The conventions on movable cultural heritage do not protect the intangible part, the textile designs, against copying. Although an indigenous community might succeed in recovering a stolen textile, it might not obtain a remedy for unauthorised copying of the designs. On the other hand, those conventions dealing with cultural expressions do not offer adequate protection for either cultural objects or the intangible designs. Thus, none of these conventions offer comprehensive coverage for traditional textiles; therefore, indigenous communities might have to look to other systems for comprehensive protection.

Chapter 5 examined traditional textiles protection from an intellectual property perspective by discussing whether and how traditional textiles can be protected under the existing intellectual property categories. It was shown in the chapter that the main international intellectual property agreements such as TRIPS and the Berne Convention do

not protect traditional textiles. This means that indigenous peoples have to look to national intellectual property legislation for assistance complemented by other concepts.

The eligibility criterion for works to qualify as intellectual property works is one of the main arguments given against the intellectual property protection of folklore. In view of the various intellectual property law categories, it was not considered necessary, in this work, to launch into a consideration of the eligibility criteria under each category, which would have been a mammoth task to undertake and impossible to execute. Consequently, the examination was limited to the criteria of an identifiable author, duration of protection and originality as well as the obstacle created by the public domain concept.

This work found that there are major hurdles arising from the eligibility criteria. Although authorship in intellectual property terms is not always that of an individual, since intellectual property law protects works created by joint authors, copyright and industrial design legislation do not provide for group rights in intellectual property. While an indigenous community could get a certification mark in respect of traditional textiles, there is still the problem of the mark only authenticating a work as, for example, aboriginal, but not preventing copying of the work. As WIPO's fact-finding missions showed, indigenous groups also want to prevent the copying of their designs. Therefore, a certification mark would not give adequate coverage. Intellectual property is also based on a limited duration period. Intellectual property rights are thus a contract between the public and the author whereby the author has intellectual property rights in a work for a limited time after which the work becomes available to the public to use. The chapter ascertained that this would not be suitable for traditional textiles protection because indigenous peoples have stated that their designs require perpetual protection. Notwithstanding this argument, my analysis

established that some intellectual property categories such as trademarks also have the potential for perpetual protection because the duration period is renewable subject to certain conditions being met.

The chapter also explained that, although the existence of the public domain is generally regarded as indispensable to the success of the intellectual property system, what should and should not be in the public domain is not a settled matter. The Western construction of intellectual property law has placed traditional cultural expressions in its public domain box, but indigenous peoples do not regard traditional cultural expressions as belonging to the public domain and free for all to use or abuse. Moreover, the concept of the public domain does not traditionally exist in indigenous thought. Western values are not the only values in the world and, in this circumstance, should not be used as the standard for an international system.

The best protection the conventional intellectual property system has to offer for traditional textiles in terms of duration is the certification mark system. However, even the certification mark system is inadequate because it does not provide protection against copying. Therefore, using the intellectual property system as part of the solution for effective protection for traditional textiles would require modifying the intellectual property system's eligibility criteria and making other changes in the system. I would therefore recommend the *sui generis* option.

Chapter 6 focused on a framework for traditional textiles protection and made recommendations on how to address some of the implementation challenges of this new system. In examining the *sui generis* option, it found that the move towards *sui generis*

rights was caused by dissatisfaction with the conventional intellectual property law and by indigenous peoples wanting a system to protect their cultural heritage.

The chapter made several recommendations including the following: the success of the new system will require state and indigenous peoples' participation. Furthermore, the use of an inventory system is useful as a means of recording traditional textiles and traditional textile designs, but it should not be a requirement for protection. Protection of another country's traditional textiles should be included in the system and the intellectual property national treatment principle could be used as a starting point. In terms of the public interest, it proposes that the overall public interest lies in the continued existence of these indigenous communities. Consequently, it might not be possible in all cases to define the public interest in traditional textiles in terms of permitted uses. Customary law will play an important role in providing guidelines on traditional textiles protection and protocols concerning their use. Regional agreements will play a role here especially in cases of negotiations on behalf of communities and countries. In addition, there will have to be more education and the creation of public awareness.

In sum, this work postulated that the conventional intellectual property framework does not provide adequate protection for traditional textiles. It also suggested that the international non-intellectual property framework does not provide adequate protection. It is therefore recommended that what is needed is a system that effectively combines the indigenous system, the intellectual property system and the cultural property conventions, supported by the human rights framework. Thus, these different legal methods can complement customary law principles and will inform policy makers on how to proceed with establishing the new system. For instance, the limitations of the conventional

intellectual property system can provide lessons on how to frame agreements under this new system in order to avoid creating the challenges that confronted traditional textiles under the conventional intellectual property framework.

The following recommendations and options should also be considered in establishing an effective system for traditional textiles protection. First, indigenous peoples and developing countries rich in cultural heritage have an important role to play in traditional textiles protection. While they express concerns about the production of imitations of their textiles and the unfair commercial exploitation of their traditional textiles by non-indigenous peoples, indigenous peoples and developing countries also need to have clear policies to deter and prevent their own people from contributing to the problem and worsening the situation. If they want to maintain the intrinsic value of their traditional textiles and prevent imitations of these textiles from diluting the value of the authentic ones, indigenous communities and developing countries must ensure they do not use traditional textiles for purposes which might degrade these cultural items.

Nationally, governments need to support and cooperate with indigenous peoples in protecting and preserving their knowledge. This might be easier in countries that are former colonies and where the current government is an indigenous one, as tends to be the case in Africa, as opposed to countries where indigenous peoples are ruled by settlers and the latter need to learn about the indigenous peoples. This will require strong political will and determination from the settler governments.

There is the need for various international organisations like WIPO and UNESCO to continue to work in concert to find a solution to this issue. Traditional textiles protection touches on various areas such as intellectual property, cultural heritage and human rights.

Therefore, the international organisations in those areas must cooperate to tackle the challenges of traditional textiles protection. It is commendable that some of these organisations, especially WIPO and UNESCO have already been working in this area. For instance, the 1982 UNESCO—WIPO Model Provisions is one of the noticeable initiatives. These initiatives should be continued and developed further. The more these organisations take steps in concert, the more likely they are to successfully resolve this issue.

It must also be emphasized that traditional textiles protection should not be regarded as an isolated topic. Not only are TCES and traditional knowledge interconnected, but indigenous peoples have expressed the view that they adopt a holistic attitude to these areas and do not divide them into the categories western legal thought does. Thus, the recommendations made in this study should be viewed from a wider perspective in terms of a comprehensive approach to traditional knowledge and TCES protection as opposed to just the traditional textiles protection. I suggest that adopting that approach will help in establishing an effective solution. Accordingly, nations will have to work together with indigenous peoples in determining how best to create this new framework.

There is the need to create an international arrangement for TCES and traditional knowledge protection. Finding adequate protection for TCES and traditional knowledge is a global issue; therefore, the response must be a global one. Bhutan, for example, in response to a WIPO survey stated that there is the need for an international solution to ensure effective protection.[741] There is a movement towards an international arrangement on the protection of TCES and traditional knowledge. There are, however, different views

[741] See Bhutan Response to WIPO Survey, *supra* note 104.

on the nature this arrangement should take and whether it should be binding or non-binding.

Developing countries are increasingly putting pressure on both the WTO and WIPO for a legally binding international instrument to help protect genetic resources, traditional knowledge and folklore. However, developed countries like Canada, Japan and the United States have argued in favour of a non-binding recommendation. At the WIPO IGC meeting held in July 2007, developing countries argued that despite having *sui generis* national or regional laws in place many of them struggle with implementing these laws partly due to financial constraints. They therefore need the support of an effective binding international instrument. The Peruvian delegate, Begona Venero Aguirre, stated that Peru would greatly benefit from an international solution. [742]

Indigenous communities, governments, WIPO and the other organisations involved in this area will have to work in concert to resolve the nature an international arrangement should take. The WIPO IGC has already started working on this and its draft provisions on TCES and traditional knowledge may form the basis of an international arrangement for protecting these areas. Until a suitable international arrangement is drafted, a country that has not yet done so can consider becoming a party to the cultural heritage, cultural property, and intellectual property conventions as a start and also explore regional arrangements.

On whether there should be one arrangement for traditional knowledge and another for folklore at the international level, the essential thing now is to establish the elements

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[742] See "WIPO Committee on Genetic Resources, Traditional Knowledge Inconclusive Thus Far" *Bridges Weekly Trade News Digest* (11 July 2007), online: ICTSD <http://www.ictsd.org/weekly/ 070711/story3. htm>.

that should be in an arrangement relating to traditional knowledge and those that should be in an arrangement concerning folklore. As the investigation proceeds, the results will show whether there should be one arrangement or two.

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