Chapter 5
Traditional cultural expressions: Preservation and innovation
Tzen Wong and Claudia Fernandini

Introduction

This chapter addresses challenges faced by indigenous peoples and local communities in the legal protection of their traditional cultural expressions (TCEs). It also highlights considerations for governments, public institutions and non-profit organizations in attempts to promote TCEs to support indigenous peoples and local communities in their cultural, economic and social development. While TCEs are embraced within the broad, holistic approach to traditional knowledge (TK) adopted in this book, there are legal issues and developments specific to the protection of TCEs which merit separate analysis from those elements of TK addressed in Chapter 4. This chapter first explores some relevant concepts towards understanding the overlap between intellectual property rights (IPRs) and the protection of TCEs. It poses questions relating to the commodification of TCEs by IPRs, and how this potentially transforms the social relations underpinning creative processes in indigenous communities. At the same time, it is recognized that the making and marketing of some forms of TCEs present potential sources of livelihoods to many indigenous communities currently marginalized in the socio-economic order. Given a global environment where TCEs are increasingly copied and commercially mass-produced by third parties, some options and limitations in relation to intellectual property (IP) protection of TCEs are discussed, along with sui generis protection. While the Latin term sui generis means ‘unique’ or ‘of its own kind’, it remains to be seen how far these hybrid solutions ultimately depart from typical concepts in IP law. Beyond legal measures, there are indigenous protocols and other standards governing third-party access to and use of TCEs, including those evolving within the context of the Internet. These are also explored briefly in this chapter.

1. Concepts and definitions

According to Article 1(a) of the Revised Draft Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore being reviewed at WIPO (‘WIPO Revised Provisions’), ‘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…

To be treated as subject matter for protection under the WIPO Revised Provisions, such forms of expression have to be ‘characteristic of a community’s cultural and social identity and cultural heritage’ (Article 1(a)). They also have to fulfil other conditions, such as being ‘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’ (Article 1(a)).

The United Nations Educational, Scientific and Cultural Organization (UNESCO) has been involved in the protection of tangible and intangible cultural heritage for many decades. The phrase ‘expressions of folklore’ is used in the UNESCO-WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1982 (‘UNESCO-WIPO Model Provisions’). Section 2 of the Model Provisions provides that ‘expressions of folklore’ are understood 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’. Only ‘artistic heritage’ is covered by the Model Provisions.

While the term ‘traditional cultural expressions’ is used in this chapter instead of ‘expressions of folklore’, it is noted that WIPO uses these terms as ‘interchangeable synonyms’ (WIPO 2006, p. 3). At the same time, the term ‘folklore’ has been critiqued by some as ‘reflecting a western attitude of folklore as something dead to be collected and preserved, rather than part of an evolving living tradition’ (Shinya 2004). Indeed, conceptual difficulties remain in relation to the various terminologies used in this field.

The discussion in this chapter focuses mainly on traditional motifs, arts and crafts of indigenous peoples which form a part of their TCEs and address the impact on indigenous culture and livelihoods of mass reproduction of such TCEs within the global crafts industries. It is noted that TCEs extend well beyond these forms to include, for example, traditional music, dance and other rituals. While it is impossible within the current discussion to address all those elements, some IP considerations for the performative aspects of these forms of TCEs are mentioned in this chapter as well as in Chapter 8. Further research and thinking is needed on each of these forms of TCEs. It is also qualified that TCEs represent only a part of the cultural heritage of indigenous peoples, and there are many other aspects of cultural heritage protection which may or may not overlap with IP law. Furthermore, there is no agreement on the meaning of ‘protection’ in relation to TCEs. Documents such as the UNESCO-WIPO Model Provisions and the WIPO Revised Provisions define protection differently (see Torsen 2008). To avoid confusion, this chapter restricts the use of the term to legal protection by instruments and provisions including IPRs, in contrast to possible broader meanings of protection in relation to preserving the integrity or ‘authenticity’ of TCEs. The latter concepts are also open to many interpretations (see Lindholm 2008).
There is no fixed definition of an indigenous people, and the definitions provided in international instruments vary in their language and scope (see Laird & Noejovich 2002, p. 180); the ILO Convention No. 169 provides some points of reference (see Articles 1(1) and 1(2)), although this remains a highly debated issue. Apart from indigenous peoples living by customary practices, other non-indigenous local communities could be treated as custodians of TCEs under draft international provisions and some national laws. There is little international consensus as to which local communities the latter would comprise. This ambiguity has led WIPO to include in the Revised Provisions a rather broad and tentative definition of beneficiaries of TCEs protection as ‘Indigenous Peoples and traditional and other cultural communities’ in whom ‘the custody, care and safeguarding of the traditional cultural expressions/expressions of folklore are entrusted in accordance with their customary law and practices’ (Article 2(i)) and ‘who maintain, use or develop the traditional cultural expressions/expressions of folklore as being characteristic of their cultural and social identity and cultural heritage’ (Article 2(ii)). The WIPO Secretariat’s commentary on the provisions suggests that the term ‘cultural communities’ is broad enough to ‘include also the nationals of an entire country’, apparently reflecting views from countries such as Egypt and Morocco that TCEs may be ‘national folklore’ and belong to all of the people of a particular country (WIPO 2006, p. 17). Such broad definitions of ‘community’ raise complex questions over the recognition of indigenous peoples and other local communities as culturally distinct groups within a nation state and have far-reaching implications, not least for the protection of their TCEs.

It is also possible, of course, that more than one community might claim custodianship of the same or similar TCEs in a country. Furthermore, through geographical proximity, common history, migration or displacement of the TCE custodians to new territories, certain renditions of TCEs might well appear concurrently in different countries. All these raise complex, context-specific questions which cannot be adequately addressed within this chapter. Transboundary TCEs seem to call especially for regional or international frameworks of protection, with mechanisms for distributing benefits to the various communities concerned (see the discussion on TK in Chapter 4). Whether some of these cases would fall within the ambit of an international framework in future to protect TCEs remains to be seen, and present areas for further research.

2. Circulation and commodification of traditional cultural expressions

There is keen debate amongst indigenous communities, government officials, public negotiators and academic commentators alike over whether IPRs are appropriate for the preservation and legal protection of TCEs. These debates need to be understood in relation to the intrinsic nature of TCEs, and how TCEs carry with them ‘shared, symbolic meaning[s], which may represent for a community a link with the sacred…its history, or an attribute of its identity’.

At the same time, the social or kinship relations underlying the creation of TCEs are continually challenged and re-defined by new contexts. Intellectual property protection of TCEs, along with the assumptions about ownership and property that come with it, poses one of the more recent challenges. This does not mean that traditional communities do not have concepts of ownership or property, but rather that the ideas of property which underpin IP systems come from specific historical and largely Western contexts (Dutfield 2006, pp. 2, 8).
Leach (2005) argues that using IP as a ‘register of ownership’ may implicitly transform the social networks in a society which underpin its creative processes, thus undoing the very traditions and creative expressions that the laws are meant to protect. Drawing from anthropological fieldwork in the Madang region of Papua New Guinea, he suggests (2005, p. 37) that:

Preservation of materials is one (important) thing, but it seems to me that of more basic importance is the preservation of the social conditions of creativity itself. Laws that take such property relations as their baseline inhibit the utilization of indigenously appropriate mechanisms for the control, distribution, and protection of indigenous resources. In other words, it is not just the material expressions (object outcomes of creative work), but the actual form of social relations, which must be considered in a discussion of protection or attribution.

It is important to nuance discussions such as the present one in terms of the historical and socio-economic realities of indigenous peoples around the world. Many indigenous peoples share histories of colonization and other impositions of political power which continue to the present day, and have common struggles in recovering or sustaining their land rights, cultural identity and customary practices. Indeed, the protection of TK and TCEs is seen by many indigenous peoples as ‘central to their struggle for self-determination and control and management of their land and resources’ (Aroha Te Pareake Mead 2005, p. 18; see also Burri-Nenova 2007, p. 208). Myers (2005, p. 54) observes that indigenous peoples ‘see control over their own culture as a political issue, a remedy for historical loss, and a necessity for survival as a people, for survival as a culture’ (see also Anaya 2004, p. 26; Chander & Sunder 2004).

At the same time, indigenous peoples’ engagement with such issues as IPRs to protect their TCEs is differentiated among communities. Some indigenous communities may consider the concept and articulation of ‘property rights’ underlying Western IP systems as inapplicable to their TK, including their TCEs. Accordingly, any proposed legislation or other measures concerning TCEs should first undergo consultations with the indigenous peoples and local communities involved. The obligations under relevant international and regional instruments to obtain the free, prior and informed consent (FPIC) of indigenous and local communities for measures pertaining to TK (and genetic resources managed by them) are discussed in Chapter 4 and repetition is avoided here. It is worth highlighting, however, that the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), adopted by the UN General Assembly in September 2007, emphasizes that ‘free, prior and informed consent’ of indigenous peoples is to be obtained ‘before adopting and implementing legislative and administrative measures that may affect them’ (Art. 19). This and other provisions of the UNDRIP reinforce the right of indigenous peoples to ‘determine and develop priorities and strategies for exercising their right to development’ (Art. 23; see also Art. 34).

Depending on local contexts, some communities may see the protection of TCEs by certain forms of IPRs as consistent with their vision of human development and sustainable livelihoods, and as a possible legal redress for third-party copying of their TCEs for commercial purposes. It is important that the communities themselves have access to information (including information on the full-range of legal options) and decision-making to protect and promote their...
TCEs. Of particular significance to our present discussion, Article 31(1) of the UNDRIP makes explicit the right of indigenous peoples to ‘maintain, control, protect and develop their intellectual property over [their] cultural heritage, traditional knowledge, and traditional cultural expressions’ (see also Art. 31(2), discussed in Chapter 4). Article 11 further provides that indigenous peoples have the right not only to ‘practise’ but also to ‘revitalize’ their cultural traditions and customs’ (emphasis added). This extends to the right to maintain, protect and develop the ‘past, present and future manifestations of their cultures’ (Article 11) and would include TCEs. The challenges in this area are accentuated by the fact that many indigenous communities remain socio-economically marginalized in the countries in which they live (see United Nations 2009).

For some indigenous communities, or groups within the communities, marketing of objects based on TCEs may present an ongoing or potential source of income to help resolve problems of poverty. Importantly, Article 23(1) of the ILO Convention No. 169 dealing with traditional occupations stipulates that ‘handicrafts, rural and community-based industries…shall be recognized as important factors in the maintenance of their cultures and in their economic self-reliance and development’. Crafts, for example, often develop in a specific area or geographic concentration and may present one of the primary sources of income for the local community. Since craft making frequently involves self- and family employment, with the development of surrounding clusters, there may be a ‘multiplier effect’ on the number of persons benefiting from craft making in the community. As women are traditionally involved in craft making in many indigenous communities, such activities might present particular sources of income and autonomy to women. Strom notes, for example, that the sale of Maasai beadwork and other souvenirs based on TCEs present an important source of livelihood for indigenous Maasai women.

Indigenous communities’ understanding, attitudes and approaches towards IP protection of their TCEs may vary significantly even within the same region or country. Geismar (2005, p. 441) describes from anthropological field work in the North Ambrym region of Vanuatu how locals have been adapting copyright concepts towards protecting kastom carvings, drawing parallels with ‘ritual injunctions concerning making and circulating’ these traditional carvings. She notes how TCE custodians have actively pursued enforcement of their customary entitlements against third parties dealing with these artefacts allegedly without their consent (ibid., pp. 451–453). At the same time, she observes that indigenous women basket weavers from various regions of Vanuatu have yet to fully consider IP protection for their crafts. These baskets are woven from the leaves of pandanus trees and coloured using a combination of natural and synthetic dyes. Geismar notes that ‘while their vibrant patterns are seen very much as local island resources, they circulate widely throughout Vanuatu and beyond…’ (ibid., p. 33). She adds that:

Despite the explicit linkage of innovative designs to individual women, there has been no move to restrict their movement (and thus control the potential capital to be raised by them) by galvanizing ideas about copyright. Patterns transmit themselves freely from woman to woman by the movement of baskets and therefore may be woven by any woman who sees them. (Ibid.)
This example also illustrates how the potential transformative effects of IPRs on TCEs need to be understood in relation to the systems of reciprocity that underpin both trade and gift exchange within and among traditional communities (Mauss 1950). Along with the historical relations of trade between indigenous and other communities, tourism and new information and communication technologies (ICTs) are contributing to the spread of some TCEs well beyond their area of origin. Studies on the effects of tourism on retention of ritual practices, for example, would be relevant towards a better understanding of the impact of globalization on TCEs. The research of Strom in relation to Maasai beadwork suggests that members of an indigenous community are moreover complex agents in their self-representation of cultural identity and integrity, including to tourists.

Meanwhile, the commodification of TCEs of indigenous peoples by third parties other than their custodians is increasing at a scale which has prompted many indigenous communities around the world to seek urgent redress, including through legal measures. Dissemination of TCEs through digital technology and the Internet has exacerbated these concerns. In some regions, including the Pacific, collective action and model laws are being pursued (see Section 6). Mindful that ‘traditional knowledge and expressions of culture are the foundation of Pacific Island societies’, the Secretariat of the Pacific Community has highlighted that:

The heightened global competition for new products, processes and services brought about by the globalization of trade and advances in information technology has unfortunately triggered widespread appropriation of the cultural and social identity of Pacific Island peoples. In many Pacific Island countries and territories, handicrafts and souvenirs have been replicated and imported for sale to an unknowing tourism industry. Music and images are recorded for publication without the permission of traditional owners…

Mass-produced copies of TCEs can dilute the cultural identity and other values associated with the latter. As TCEs become implicated in the global crafts market, for example, newer techniques enabling increased volume of production and reduced production costs also result in lower-priced products by third parties. Faced with ‘serial’ copies of their TCEs, indigenous peoples are often unable to compete in terms of market access and price. Loss of traditional techniques may further occur through their efforts to accommodate lower market prices by altering techniques or materials used in craft making, or to cater to the aesthetic demands of the global crafts market. Along with addressing illegitimate mass copying by third parties, one challenge for the preservation of TCEs is in finding ways to differentiate authentic embodiments of TCEs from copies by third parties. For indigenous communities who do rely on making and marketing arts and crafts as a source of livelihood, a further challenge lies in identifying ways to support the price of these creations (among mass-produced copies) and cultivate a discerning eye in the purchaser for the provenance of the TCEs, including their cultural origins. These efforts are comparable to the ‘fair trade’ movement, although the latter has so far dealt mainly with agricultural products (DeCarlo 2007).

Towards understanding the overlap of IPRs with the protection of TCEs, it is helpful to bear in mind the variety of rights that make up the IP matrix (see Chapter 1), and their different histories and functions. In considering their relative relevance and implications for TCEs, it...
might be analytically useful to draw a distinction between IP regimes such as copyright and patents which typically emphasize individuals as ‘authors’ or ‘inventors’ of new works, and those which more readily accommodate concepts of incremental innovation by communities. As Zografos (2007, p. 178) notes: ‘[C]ertification marks and labels of authenticity are potentially unlimited in time and allow for collective use. They do not confer a monopoly right but limit the class of persons who can use a certain symbol’. She notes that such forms of IPRs can ‘help protect consumers and indigenous communities from imitation products’. What this suggests at least is that distinct types of IPRs may operate differently in preserving or altering the social relations and creative processes in indigenous communities.

Equally challenging when setting out to ‘preserve’ social relations underpinning creative processes in a society is to reconcile these with other considerations from a human development perspective. Some TCEs may result, for example, from a highly hierarchical system of production, and ‘narratives’ of entitlement may in some cases serve to reinforce those hierarchies, with implications on gender roles and other concerns of social equality. The Human Development Report 2004: Cultural Liberty in Today’s Diverse World, published by the United Nations Development Programme (UNDP), invites reflection on the implications of ‘inheritance laws that are biased against women, or decision-making procedures that are not participatory and democratic’ on broader concepts of cultural liberty and human development (UNDP 2004, p. 89).

Discussions of IPRs and TCEs do not take place in a vacuum, but may furthermore be understood in relation to (the unravelling of) cultural assumptions surrounding European discourses of ‘cultural property’ and ‘cultural heritage’. Leach suggests, for example, that there is a danger in current versions of cultural property regulations in ‘obviating innovation among those with culture to protect’ (2005, p. 41). He adds that: ‘This in turn reinforces a stereotypical divide between traditional culture (valued as heritage, but barrier to innovation) and modern (no heritage value, but reliant on innovation)’ (ibid.). Other commentators have questioned the stereotypical divides between the ‘traditional’ and ‘modern’ which amplify the isolation and ‘otherness’ of some societies (Boateng 2005; Oguamanam 2008). Boateng (2005, pp. 64–70) warns against drawing an artificial separation of the ‘modern’ and ‘scientific’ from what is termed as ‘traditional’ or ‘folkloric’, given that constant innovation exists in all realms. She notes that ‘Ghanaian kente cloth, for example, has changed continually in its encounter with global markets’, and that ‘these changes go back to the era of mercantile capitalism during which colored silk yarns were introduced into the cloth-weaving economy from Europe’ (ibid., p. 68). The latter apparently enabled ‘weavers to extend their palette beyond the white of raw cotton and blue of indigo dyes’. Strom has also noted the use of colours (and indeed materials) new to Maasai ‘traditional’ beadwork for some tourist ‘souvenirs’.

These raise complex questions relating to innovations based on TCEs. For example, can IP or sui generis laws be engaged to protect the interests of custodians of TCEs, while also encouraging innovations based on TCEs? Who can participate in these innovations, and to what extent? How far can an individual or a group innovate on TCEs without transforming the ‘essential’ or ‘intrinsic’ characteristics of the TCEs? Are there any countervailing concepts (e.g. equivalent to those of ‘fair use or fair dealing’ exceptions to copyright) which deal with public access to protected TCEs? While there are no straightforward answers to these questions in the
evolving policies and laws around TCEs, the following sections seek to provide some background on the state of laws and reforms relevant to the topic. We begin by exploring how current IP regimes relate to the protection of TCEs. After identifying some unresolved areas, we look at contemplated reforms at the national, regional and international levels.

3. Limited protection of traditional cultural expressions through copyright, moral rights and design rights

Attempts to address the protection of TCEs through IP are not new. The issue of IP protection of folklore was already raised at the 1967 Stockholm revision of the Berne Convention. While the insertion of an article into the Berne Convention to deal with ‘the case of unpublished works where the identity of the author is unknown’ (Article 15(4)) was intended to address the issue, doubts have persisted over the adequacy of copyright as a vehicle to protect TCEs. Many TCEs are communally created, for example, and do not fit easily within the notions of ‘individual’ authorship typically emphasized under national copyright laws (see Chapter 8). There are also inherent difficulties in accommodating most TCEs within long-held copyright concepts such as originality, fixation, a fixed term of protection and ‘fair dealing’ or ‘fair use’ (Torsen 2008). As such, communities guided by shared, customary practices tend to find limited solutions within copyright laws for the protection of their TCEs.

Under most national laws, TCEs which do not satisfy conditions for existing forms of IP protection would, by default, fall within the public domain. By way of example, indigenous art will frequently use traditional iconography, such as iconography found in archaeological sites and imbedded in the local culture. This iconography is considered to be part of the public domain in many countries and is usually not protected through copyright legislation. Meanwhile, more and more ‘souvenirs’, jewellery and other crafts featuring traditional iconography are being mass-produced by third parties, often in countries other than the country of origin. Iconography is also copied or adapted for commercial use in designer and decoration trends. This tends to blur the cultural identity associated with some iconography and does not provide for re-distribution of profits towards the country of origin and especially towards the communities that practise and preserve some of these traditions.

Torsen (2008, p. 203) notes that copyright can be an option for TCE protection if the custodians grant permission to individual artists within the community to make new, ‘original’ art based on TCEs. There are some cases in Australia where the courts have stretched copyright protection to cover ‘original’ works based on TCEs. In the Bulun Bulun case, an image of the artist’s painting ‘Magpie Geese and Water Lilies at the Waterhole’, based on the heritage of the Ganalbingu people to which he belonged, was reproduced by third parties on textile made in Indonesia and imported into Australia. The artist, John Bulun Bulun, successfully brought an action for infringement by importation under the Australian copyright law. Recognizing the creation as an original work, the Federal Court of Australia held that copyright to the work resided with the artist John Bulun Bulun. One question was whether the community also had rights over the work. Among other arguments by the plaintiffs, the suggestion that the community might be considered joint-authors for the work failed before the court. While the Federal Court of Australia found that there could be no ‘communal title’ to and group ownership of the copyright in the artistic work, whether under common law or the Copyright Act 1968, it

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nevertheless held that there was a fiduciary relationship between the artist and his clan which arose from the ‘use with permission by Mr. Bulun Bulun of ritual knowledge of the Ganalbingu people, and the embodiment of that knowledge within the artistic work’ in accordance with the law and customs of the Ganalbingu people.\textsuperscript{32} It followed that equity law ‘imposes on him [the artist] obligations as a fiduciary not to exploit the artistic work in a way that is contrary to the laws and custom of the Ganalbingu people, and, in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy infringement of the copyright in the artistic work’.\textsuperscript{33} The court did not find, however, that the Ganalbingu people had an equitable interest in the ownership of the copyright in the work, which rested with the artist himself. While the decision has been critiqued by commentators as failing to recognize the copyright of communities (Bowrey 2006; Anderson 2009), the court’s reference to customary laws in determining the fiduciary relationship and duties of the artist to the community remains highly significant. The court found that the ‘artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge’.\textsuperscript{34}

While national copyright laws cannot typically accommodate communal claims to copyright over TCEs, there are some exceptions.\textsuperscript{35} Geismar (2005, pp. 451–453) notes, for example, that copyright law has been adopted (though not as yet gazetted) in Vanuatu to cover communal TCEs.\textsuperscript{36} There are also regional attempts to design sui generis protection for TCEs based, it would seem, on adaptation of copyright laws (see Section 6). To what extent these hybrid laws depart from provisions in the Berne Convention (1971 Paris Act, as amended in 1979) or from copyright principles more generally remains to be fully explored. While a redefinition of authorship (and ‘joint-authorship’) in copyright law to accommodate communal copyright ownership does not seem too far-fetched an idea, more fundamental challenges might be posed, for example, by attempts to protect TCEs perpetually through copyright given the conventional approach to copyright as time-limited. Furthermore, Indigenous Declarations such as the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples have called for ‘retroactive coverage of historical as well as contemporary works’, noting that these ideas do not fit neatly within existing copyright concepts.\textsuperscript{37}

What about moral rights? Unlike copyright and neighbouring rights, moral rights comprise a bundle of rights which are non-pecuniary in nature (see discussion in Chapter 8). These include, for example, the author’s right of paternity (i.e. the right to receive attribution for his work) and the right of integrity in the work, in terms of preventing distortion and/or destruction. The nature and boundaries of moral rights vary significantly with jurisdictions. They are perpetual and inalienable in some jurisdictions, and in this sense could potentially be interesting for the protection of TCEs where the custodians call for perpetual protection. However, as with copyright, moral rights attach to individual creators and do not typically apply to rights of communities, although specific legislation on ‘indigenous communal moral rights’\textsuperscript{38} has been considered in Australia (Torsen 2005, p. 7; see Anderson 2009b, pp. 209–217).

Some TCEs may be protectable by IPRs in relation to designs, depending on the national jurisdiction. However, a not uncommon qualification under design laws is that the design must fulfil the condition, among others, of ‘novelty’ (as in the case, e.g. of registered designs under the Community Designs Regulation in the European Community),\textsuperscript{39} even though such conditions
are usually less strict than the novelty requirements under patent law (Cornish & Llewelyn 2003, p. 544). Thus, while contemporary adaptations of traditional designs may in some cases be protectable by design law, truly old designs from TCEs may not be protectable (see WIPO 2003). It has furthermore been suggested that hand-woven textiles and handicrafts may not be protected in countries where there is a requirement that protected designs be capable of industrial replication (ibid., p. 46).

Thus, protection for TCEs in existing IP regimes such as copyright, moral rights and design rights under most national systems are likely to be more applicable to new renditions of TCEs. Where the IP laws in question specify standards of ‘originality’ or novelty, it is unlikely that pre-existing TCEs would pass the test. However, von Lewinski (2007) points out that works made in the context of TCEs may in some cases be protected by copyright and neighbouring rights (e.g. rights relating to performers, sound-recording producers and broadcasters) even where the TCEs themselves do not meet existing thresholds for such protection. She notes that ‘different kinds of recording of folklore may result in protection for the recordings rather than the folklore itself’ (ibid., p. 213). In her words:

A photographer who fixes folklore will receive copyright in the photographic work or a neighbouring right in a non-copyrightable photograph; the producer of a recording of folklore music or the producer of a film fixing folklore dances can be protected as a phonogram producer or a film producer respectively in relation to the phonograph or film (as opposed to the folklore as such). Also, researchers who collect expressions of folklore and arrange them in a certain order may be protected for such collections (i.e. not the folklore itself) if the general copyright conditions for collections are fulfilled. Performers of folklore may be protected in respect of their performances (not the folklore as such) and even have to be so under recent international law, namely article 2(a) of the WIPO Performances and Phonograms Treaty…. (Ibid.)

According to von Lewinski, in most of these cases the indigenous communities would not in fact benefit from such protection, ‘since they usually do not make fixations or collections of their own folklore’ (ibid.). However, she points out that performers of folklore will often stem from indigenous communities and therefore benefit from protection in their performances, so that ‘the communities may be protected indirectly in respect of the folklore performed’ (ibid.) As explored in Section 7 of this chapter, there are legal developments as well as soft-law measures seeking to address issues of indigenous peoples’ consent for third-party access, use and recordings relating to their TCEs. Indigenous peoples and other custodians of TCEs are also increasingly at the helm of the recorder or camera (e.g. in participatory video) for their own performances or other rituals. Among other purposes, this might be for their inter-generational transmission of TCEs, language and other bio-cultural heritage. Particular issues have been raised in relation to dissemination, whether by the custodians or third parties, of indigenous cultural expressions through media including the Internet (Deer 2009). This is discussed briefly in Section 7.
4. Labels denoting origin and other characteristics

Labelling devices such as trademarks, collective marks, certification marks and geographical indications may be relevant for denoting the origin, ‘authenticity’ or other characteristics associated with TCEs. In this sense, they may be helpful to indigenous communities trying to distinguish their renditions of TCEs from copies by third parties. Historically, these forms of IP developed separately from patents and copyright, with objectives and functions distinct from the latter IPRs. While ideas of ‘originality’ or ‘novelty’ are part of the criteria for copyright and patents, respectively, labelling devices such as certification marks and geographical indications (GIs) can potentially be used by a community to reflect the traditional practices and concepts of ‘authenticity’ associated with their TCEs and other cultural heritage. As Zografos (2007, p. 178) notes, such labelling devices can ‘reward the goodwill accumulated over time’ and potentially provide for indefinite protection (this depends on any conditions, formalities or fees for renewal within a jurisdiction). At the same time, it should be qualified at the outset that these tools are primarily used within the context of trade, and like other forms of IPRs bring with them issues relating to the treatment of TCEs as products discussed in Section 2. The latter issues are not repeated here.

4.1. Trademarks, collective marks and certification marks

A trademark is basically a sign indicating trade origin of goods and services (Bently 2008, p. 3). This distinctive sign can be owned (as a form of IP) by one or more individuals, one or more business organizations or any other legal entity (Das 2008). According to Article 15.1 of the TRIPs Agreement: ‘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’….These marks operate as indicators of the trade source from which good or services come (or are in some other way connected) and may symbolize qualities associated by consumers with certain good or services (Cornish & Llewelyn 2003, p. 587). They can also serve to associate the reputation of a particular manufacturer or service provider with the good or service to which the trademark is attached. A WIPO-commissioned case study suggests that trademarks may be useful for indigenous peoples to protect their trade interests, though pointing out several shortfalls in this endeavour, such as the requirement to use the trademark (Janke 2003).

As far back as 1909, the trademark ‘Harris Tweed’ was introduced in the UK for tweed from the Outer Hebrides, Scotland, when competitors from the mainland set up industrial looms (Dutfield & Suthersanen 1998, pp. 193–194; Donkin 2001, p. 23). This interesting example is discussed further in Box 5.1. Donkin (2001, p. 35) notes that:

Governmental legislation can define standards of authenticity, thus protecting crafts products from competition from imitative industrial products. The identification of authenticity criteria for use in marketing has been successfully developed with regards to food products characteristic of a particular region and produced by a skilled and often manual process…However, despite notable exceptions such as Harris Tweed from the Outer Hebrides, such labelling is slower to be applied to crafts and is notable by its absence from British and European standards.
Box 5.1. The story of the Harris Tweed trademark

Harris Tweed is a cloth made in the Scottish islands of Lewis, Harris, Uist and Barra, which together form a large part of an area known as the Outer Hebrides; it is handwoven and made from wool that is spun and dyed in the Outer Hebrides (Dutfield & Suthersanen 2008, pp. 193–194). While mechanization during the Industrial Revolution transformed production in other areas, the Outer Hebrides continued to make cloth entirely by hand, and it remained to a large extent a cottage industry (ibid.). From the mid-nineteenth century, this cloth became popular throughout the UK. At the time, the raw material, wool, was produced locally and part of it would have been used in its natural uncoloured state; the rest was dyed. In the nineteenth century vegetable dyes were used. The dyeing, spinning, and weaving of the wool into tweed followed traditional methods and ‘was often accompanied by songs in Gaelic’ (ibid.). Around the beginning of the twentieth century, a degree of modernization took place and production increased in consequence. The Harris Tweed Association applied for a trademark to help the producers compete in a market in which industrial spinning mills able to mass-produce cloth were threatening to force out the small producers. The Harris Tweed mark, which was granted in 1909, comprises the words ‘Harris Tweed’ with an orb and a Maltese cross and has since become very well known. The official definition of Harris Tweed then was ‘a tweed, hand-spun, hand-woven and dyed by the crofters and cottars in the Outer Hebrides’.

In 1934, the trademark definition was changed to the following: ‘Harris Tweed means a tweed made from pure virgin wool produced in Scotland, spun, dyed and finished in Outer Hebrides and hand-woven by the islanders at their own homes in the Islands of Lewis, Harris, Uist, Barra and their several purtenances and all known as the Outer Hebrides’. This allows for increased production while ensuring that it was still at least to some extent a tradition-bound cottage industry. Production reached a peak of 7.6 million yards in 1966, but subsequently began to contract as Harris Tweed became less fashionable, and the British textiles industry, once the world’s largest, was about to begin shrinking in the face of competition from lower cost producers overseas. To be more competitive, it was felt necessary to retrain weavers, introduce tougher standards and better meet new demands, including for softer, lighter cloth (ibid.). In 1993, the UK government came to the producers’ aid by passing legislation, the Harris Tweed Act. The law set up the Harris Tweed Authority, a statutory body, in place of the Harris Tweed Association.

Source: Dutfield & Suthersanen 2008, pp. 193–194

Until recently, Labels of Authenticity have been used in Australia to identify works of Aboriginal origins. Janke (2003, p. 135) notes that these labels registered as trademarks under the country’s laws were designed in response to the many imitation products that were flooding the indigenous arts market, and to assist consumers in identifying authentically produced indigenous art and cultural products. The ‘Label of Authenticity’ mark in Australia denotes that any work to which that label is attached is the authentic work of an Aboriginal or Torres Strait Islander. Notably, there has also been a registered ‘Collaboration Mark’ which denotes that any work to which this label is attached is the result of a collaboration in which an Aboriginal or Torres Strait Islander has a significant creative input, and is the subject of a fair agreement with the non-indigenous manufacturer.

Similarly, in New Zealand, the ‘Toi Iho’ Māori Made Mark is a registered trademark that has been used exclusively for artists of Māori descent, while two further marks have been used to acknowledge cross-cultural ventures between Māori and non-Māori – the ‘Toi Iho’ Mainly
Māori Mark and the ‘Toi Iho’ Māori Co-production Mark. In the case of the ‘Toi Iho’ Labels of Authenticity, the Arts Council of New Zealand Toi Aotearoa (also known as ‘Creative New Zealand’) has elaborated detailed rules that govern usage of each of the ‘Toi Iho’ marks (see discussion in Chalk & Dunlop, p. 978). Under the New Zealand Trade Marks Act, the Commissioner of Trade Marks must approve regulations governing use of certification marks,\(^44\) including ‘Toi Iho’ Labels of Authenticity.

While Chalk and Dunlop (2009, p. 978) suggest that the system for regulating and using the ‘Toi Iho’ Labels of Authenticity have resulted in the marks being more widespread in New Zealand compared to the parallel Labels of Authenticity in Australia, it is notable that the use of Labels of Authenticity in both countries is being discontinued at the time of writing.\(^45\) This holds lessons for these and other jurisdictions in exploring and designing viable protection for TCEs. Anderson (2009b, p. 206) discusses how some inherent problems with the Labels of Authenticity in the Australian context ‘ultimately contributed to their demise as an idea and a practical tool’. She observes, firstly, that ‘in defining authenticity, it was difficult to escape historically informing categorisation and constructions of “Aboriginality” that remained as remnant markers in the art world’ (ibid.).\(^46\) Secondly, the nationwide ‘pan-Aboriginal’ label apparently ‘left little room for an appreciation of indigenous individual, family, clan or community and/or cultural diversity within the Labels’ (ibid., pp. 205–206). Thirdly, there was the practical problem of who was to certify, distribute, regulate and police the labels, along with issues for funding for such administration (ibid., p. 207). This topic is revisited later in the discussion on certification marks.

Collective marks are usually given to an association of traders to show that a member belongs to the association (Cornish & Llewelyn 2003, p. 864),\(^47\) and to distinguish the goods or services of members of that association from those of others (Das 2008, p. 473). They thus serve to indicate trade origin although their definitions vary across national jurisdictions. They can be registered in the name of a collective entity, such as an association of producers, manufacturers, traders or service providers. While owned by the legal entity in question (typically an association or cooperative), a collective mark can be designed to be used by all members of the said association. In this sense, there can be ‘communal’ use of the mark. The association may often set its own standards, which its members must meet when using the mark (ibid., p. 474). Collective marks need not indicate, however, anything about quality of the goods.

Certification marks convey the message that the relevant goods or services have been examined, tested or in some way certified by the registered proprietor of the mark as to characteristics such as origin, material, mode of manufacture of the goods or performance of the services, quality or precision (ibid., p. 473). They do not necessarily indicate trade origin, although in some cases they do. Certification marks can transmit information on natural and human conditions that accompany the production of the protected goods. Such considerations are assuming a growing importance in consumer decisions. For example, the public in many countries increasingly takes into account such ethical considerations as the absence of child labour and good practices in animal care in their purchasing decisions, along with environmental concerns including the sustainable use of resources and low-carbon footprints. A plethora of areas – for example, fair trade, workplace safety, conflict-free diamonds – may be the subject of certification as to standards of ‘social responsibility’ or ‘sustainability’ (see Chon 2009, pp. 116–117). These characteristics are not necessarily perceptible directly from the product, but can be
certified with reference to prevailing standards or evolving good practices, as well as quality control systems. The certification must come from a reliable source, on the other hand, and Chon (2009) highlights the need for competent authorities to monitor the growing number of certifiers in these areas.

‘Fair Trade’ marks have been used mainly on agricultural products (DeCarlo 2007), although they have potential for the promotion of indigenous TCEs and TK-based products. The insistence on fair recompense to producers in different local contexts coincides, for example, with social calls for the rejection of sweatshop conditions of labour. This would be relevant in distinguishing crafts produced directly by TCE custodians from ‘serial’ imitations mass-produced by third parties under poor labour conditions. ‘Fair Trade’ is but one form of certification. Marks certifying sustainable use of resources are also relevant to the promotion of TCEs. Other certification marks can potentially be designed specially to draw attention to characteristics specific to TCEs. For example, certification may refer to the ‘traditional’ or ‘artisanal’ elements that have entered into the making of a craft. It could go further in conveying the message that a certain craft has been created by custodians of the TCEs, using traditional motifs, methods and materials. Concrete obligations could be clearly outlined and binding on those who obtain such ‘TCE friendly’ certification. Consideration should also be given as to who would own the collective mark and the eventual cost of using the said mark.

The Labels of Authenticity discussed earlier in relation to Aboriginal and Māori art in Australia and New Zealand respectively are a form of certification marks registered as trademarks in those countries (Janke 2003, p. 135; Frankel 2008). The experience in those countries with using (and discontinuing) those marks perhaps provide lessons for other attempts at certification of TCEs. In relation to the protection of TCEs in Australia, for example, Anderson (2009b, p. 208) sees hope in a localized, community-based system of certification, particularly in light of difficulties associated with the nationwide Labels of Authenticity for works of Aboriginal origin (see discussion earlier). In her words:

On reflection it is always easier to point to the shortcomings of the Labels. But the current localized success of community labelling perhaps points to a way forward. Cultural identity, respect and responsibility, the key elements that Wells identified as what certain communities interpreted authenticity to be, can be delivered when each community is given certain tools to choose for themselves how artists within communities are to be represented to the market. For many artists within communities, it is the association with familial relationships as well as the community itself that is fundamental to identity, respect and responsibility. Shifting these to an amorphous category named ‘Aboriginal’ was never going to work where people have (to say the least) pride and responsibility to the familial networks, clan relations, the broader community and importantly the land. (Ibid.)

4.2. Geographical indications

Geographical indications present another, often discussed, form of IP of relevance to TCEs. Article 22(1) of the TRIPS Agreement defines geographical indications as ‘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

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Under Article 23 of the TRIPS Agreement, additional protection applies to spirits and wines, for which the EU, for example, has a strong export market. This is a point of contention at the World Trade Organization (WTO) where some member states are pushing for an extension of this special treatment to products beyond wine and spirits. There is currently an uneven protection for GIs around the world.\textsuperscript{55}

One form of GIs is the ‘appellation of origin’. Under the Lisbon Agreement, ‘appellation of origin’ means ‘the geographical name of a country, region, or locality, which serves to designate a product originating therein, the quality and characteristics of which are due exclusively or essentially to the geographical environment, including natural and human factors’ (Article 2.1).\textsuperscript{56} Some examples of appellations of origin are ‘Bordeaux’ for wine and ‘Lentilles Vertes Du Puy’ for lentils.\textsuperscript{57}

Like certification marks, GIs can convey natural and human elements associated with a product. While most GIs pertain to wines and spirits, food and agricultural products, examples of GIs in crafts include those used in France like Poterie de Vallauris for pottery and Toile de Chalet for cloth. Crafts such as Talavera ceramic and Bohemia crystal are covered also under the Lisbon Agreement.\textsuperscript{58} In Peru, GI protection for ceramic has recently been obtained for Chulucanas. In Russia, GIs protect several ‘old world’ industries such as Gorodets painting, Rostov enamel and various toys (see Torsen 2005, p. 6). Certification marks often complement a GI but could be for products that do not meet strict GI criteria.

As von Lewinski (2007, p. 213) observes, along with trademarks, GIs may be a viable way of indirectly protecting expressions of folklore that are marketed. She suggests that ‘these intellectual property rights may serve the authenticity needs of indigenous peoples by clearly designating the origin of the expressions of folklore and decreasing the market for “copycat” products’ (ibid.). Parry (2008, p. 364) asserts, on the other hand, that any functions served by GIs can be better achieved by other legal means, including trademarks and the common law of ‘passing off’.\textsuperscript{59} In her opinion, GIs are limited by their explicit appeal to ‘place’ as a ‘unique assemblage of inhabitants, environment and associated cultural (artisanal) methods of production’ to provide a guarantee of the quality of the products produced in therein (ibid., p. 365).\textsuperscript{60} She adds that: ‘In order to achieve this handiwork, place must first be made to “sit still”. It must be apprehended like a butterfly pinned to a board so that its constituents and their essential character may be examined and known with absolute certainty’ (ibid.).

Gangjee (2008) offers a contrasting view. Examining the evolution of laws creating the Appellation d’Origine Contrôlée (AOC) regime for wine regulation in France – a history that has shaped much of the thinking and international legal architecture for the protection of GIs – he argues that the incorporation of traditional know-how (‘savoir faire’) and cultural heritage elements into concepts of ‘terroir’ leads to a social construction of place which is not static (ibid., pp. 382, 396).\textsuperscript{61} Gangjee furthermore notes that GIs are about recognizing traditional skills and innovations, ‘while leaving the production practices to flow freely across national borders and boundaries’ (ibid., p. 397). In other words, devices such as GIs, trademarks and certification or collective marks offer some degree of legal protection for originators of TCEs while leaving others free to access (and innovate on) methods of producing works based on TCEs, as long as they do not falsely claim authenticity of those reproductions or derivative works.
Meanwhile, the Organization for an International Geographical Indications Network (orIGIn), an association which is said to represent more than a million producers of traditional products from more than thirty countries, asserts that GIs are potential instruments for sustainable development in providing benefits for producers, consumers and local communities. Zago and Pick (2002) suggest various economic justifications for GIs, including protection to producers from unfair competition. Instruments like GIs have also been described as ‘persuasive tools’ to change consumer preferences over time (Yue, Marette & Beghin 2006). Like certification marks, they can arguably help to nurture over time a mindset and pattern of consumer social responsibility towards indigenous originators of arts and handicrafts.

India has passed legislation relating to GIs. Interestingly, the Indian Act provides for protection of all ‘homonymous’ products (and not only wines and spirits) to a level of protection similar to Art 23 of the TRIPs Agreement (see Section 10 of the Act; Das 2008, p. 485). GIs have been applied for in relation to a variety of product types under the Indian Act. Apart from agricultural items (such as Darjeeling and Kangra Teas, respectively, and Mysore Betel vine) they have been issued to such art and handicraft items as Pochampalli Ikat, Kotpad Handloom fabric, Mysore Silk, Kullu shawls, Channapatna Toys and Dolls, Kasuti Embroidery, Orissa Ikat and Mysore Traditional Paintings (see tables in Das 2008, 2010). Some of these GIs overlap with indigenous peoples’ TCEs. Whether similar GI protection might be explored in other developing countries remains to be seen. Dutfield and Suthersanen (2008, p. 197) note that: ‘At present the potential of geographical indications for developing countries is somewhat speculative because this type of intellectual property right has been used only in a few countries outside Europe. Moreover, many GIs have quite small markets, and a relatively small number are traded internationally’. In another study, Musungu (2008, pp. 13, 15) explores the potential benefits and challenges of GI protection for African countries, in relation to agricultural and cultural products (including handicrafts). It is observed in the study that legal means for the protection of GIs (whether through specific GI laws or through trademark regimes) are available in all but six African countries (ibid., pp. v, 8–11). Nevertheless, very few African GIs are registered either in the African country of origin or third countries (ibid., p. v). To help developing countries in Africa and elsewhere to determine appropriate strategies and legal reforms in relation to GIs, the study calls for ‘interdisciplinary empirical research at country and producer levels including specific case studies on particular products’ (ibid., p. 24; see also Zografos 2008).

4.3. Third-party use of indigenous insignia and motifs on products

Indigenous peoples and local communities in different parts of the world are increasingly grappling with third-party use of marks (in relation to products or services) which bear in part or in full their indigenous terms and motifs. They are often uncertain in such cases of their position in relation to free prior and informed consent (FPIC), the availability of legal remedies and other practical options. In some cases, the indigenous communities involved may indeed be oblivious to the use (and existing or potential registration) by third parties of trademarks bearing their traditional insignia and motifs. On this evolving topic, it may be observed that trademark laws and treaties do not typically contain specific prohibitions on registering indigenous names or symbols as trademarks, nor any mention of duties to obtain FPIC from indigenous groups for such use and to provide for benefit-sharing. Some exceptions under domestic laws are explored later. In general, trademark rights are awarded on a first-to-use or first-to-register basis,
depending on the country or regional system, without consideration of any ‘cultural’ entitlement rights. Nevertheless, to avoid the registration of indigenous names and symbols by non-indigenous applicants, some absolute refusal (and invalidation) grounds could be applicable under the trademark law procedure in a country. While such grounds would vary with national laws and circumstances of the case, refusal (or invalidation) of a trademark registration by third parties involving indigenous insignia might be based on the ‘non-distinctiveness’ of a mark, or on evidence that the use of the mark is misleading, deceitful, in bad faith, culturally offensive or scandalous. An indigenous group may also invoke relative grounds for refusal of a trademark, such as better rights, passing off, unfair benefit and so forth.

The 2002 New Zealand Trade Marks Act contains specific grounds for the refusal of trademarks incorporating Māori names and signs. Offensive use of Māori text and imagery in trademarks, for example, is prevented under the Act. A Māori Trade Marks Advisory Committee has been established under Section 177 of the Act to advise the Commissioner of Trade Marks as to the likely offensiveness of trademarks containing Māori text and imagery to the Māori. The Committee’s function is to advise the Commissioner on whether ‘the proposed use or registration of a trademark, that is, or appears to be, derivative of a Māori sign, including text and imagery, is, or is likely to be, offensive to Māori’. As Frankel (2008, p. 22) notes, many trademark applications examined by the Committee have been withdrawn by the applicants from the registration process based on the Committee’s advice.

Comparing the approaches to culturally offensive marks in different jurisdictions, Frankel (2008, p. 22) suggests that ‘a greater level of objection’ is available to the Māori in New Zealand than is available to indigenous peoples, for example, under the Lanham Act in the US. She cites the case of Native American petitioners who have been unsuccessful in challenging the registration under the Lanham Act for various marks containing the term ‘Redskins’ by the Washington Redskins Football Team. This case does not deal directly with third-party use of indigenous insignia or motifs in trademarks, but rather with the use of the term ‘Redskins’.

Trademark legislation in some jurisdictions provides for avenues to prevent third-party registration and use of trademarks which are not necessarily culturally offensive. In 2001, the United States Patent and Trademark Office (USPTO) established a database containing the official insignia of all State and federally recognized Native American tribes which cannot be registered as trademarks. Section 9 of the Canadian Trade-marks Act forbids the registration of trademarks consisting of or similar to ‘any badge, crest, emblem or mark, adopted and used by any public authority, in Canada as an official mark for wares and services’. Some Canadian indigenous groups have used these provisions to register indigenous names or symbols as official marks, thereby forbidding their registration by others under the official marks provisions.

There remains a lacuna in many jurisdictions in terms of specific laws to deal with third-party use of indigenous insignia, and this is an area where international and regional reforms will be useful. The extent to which general provisions in trademark law currently provide for remedies varies with jurisdictions. Public pressure and the fear of negative publicity can also play a strong role in encouraging businesses to be socially responsible to local communities in their use of marks. If the indigenous communities object to the application of a trademark, for example, or request that a registration be voided, there is some likelihood that the trademark
applicant or owner will withdraw their application or registration to avoid negative publicity. If substantiated (i.e. accompanied by some supporting evidence) such objections will usually be successful in court, although this varies with jurisdictions. Beyond the legal tools so far discussed, national laws and practices relating to unfair competition may be of additional assistance in dealing with false and misleading claims as to the authenticity and origins of products based on TCEs. The common law tort of ‘passing off’ may also be relevant.

5. Fixing or innovating?

There are several examples of national initiatives in Asia towards using labels (which may be trademarks or certification marks depending on the legal regime) to promote products of local food and craft industries based on the ‘One Village One Product’ (OVOP) concept which originated in Oita, Japan, in 1979. Zografos (2007, p. 173) notes that OVOP ‘requires people to take up a product or industry distinctive to their region and cultivate it into a nationally and globally accepted one, which reflects pride in the local culture’. Such schemes now exist in many Southeast Asian countries including the ‘Satu Kampung, Satu Produk’ initiative in Malaysia, the ‘One Barangay, One Product’ project in the Philippines, the ‘Back to Village’ campaign in East Java, Indonesia, and the nationwide ‘One Tambon, One Product’ initiative in Thailand. Cambodia and Laos have started similar projects on a national scale (ibid., p. 175). A presentation paper by the UNESCO Regional Bureau for Education in Asia and Pacific highlights the potential of the OVOP model for replication in other parts of the Asia-Pacific region. It is notable that the ‘OVOP’ concept has also been applied in Africa through a project in Malawi.

While the original OVOP movement focused on agriculturally based products, the Thai project is significant for TCE protection in that it focuses on the ‘ability of the local communities to generate sustained income from effective commercialization of unique products and handicrafts made from locally available materials utilizing local wisdom and skills handed down from generation to generation’. It is thus likely that promotion schemes based on the OVOP model will involve and impact TCEs to some extent. In such schemes, as with other endeavours to ‘preserve’ or ‘promote’ TCEs, complex questions may arise in relation to the extent to which innovations can take place while maintaining what are perceived as ‘characteristics’ typical of the TCEs in question. ‘Authenticity’ is, of course, a complex concept open to many interpretations and critiques, a full discussion of which is beyond the scope of this chapter (see e.g. Lindholm 2008). Drawing lessons from the French AOC system, Gangjee (2008, pp. 393–394) writes that:

Authenticity is the accumulated result of collective historical experimentation. In this process, a number of actors including producers, consumers, local groups and political institutions come together to construct the heritage around a product. On occasion, tensions arise between this constructed tradition and the need for innovation, such as disputed decisions about raw materials or methods of production. Moreover, while events leading up the original product specification may have incorporated innovations along the way, why should one presume that at the time of ‘fixing’ they were the last word?

Innovations on TCEs by the custodians themselves are not uncommon, as seen in the discussions by Boateng (2005, pp. 64–70) in relation to Ghanaian kente cloth, by Strom on the trading of...
Maasai beadwork, and Sunder (2007) in relation to Mysore Silk in India. To what extent (and at what pace) can such innovation take place while still sustaining characteristics that may set the TCEs in question apart from other non-traditional cultural expressions for special legal protection? Arguably, such innovation ought to take place within a gradual evolution of local practices. In relation to the TCEs of indigenous peoples, these boundaries should respect and reflect what the custodians themselves find is consistent with their worldviews, customary laws and practices. These are complex questions, and the extent to which customary laws can be clearly identified and applied to such considerations vary with regions and historical contexts (see examples from different regions in IIED 2008). Bowrey (2006, p. 72) moreover suggests that forms of ‘custom’ evolve and may appear in contemporary guises, for example, as indigenous cultural protocols (see Section 7).

Customary laws of indigenous communities are also likely to evolve in time in relation and response to the multiple dimensions of human development and aspiration (see UNDP 2004). Gender equality, education (including in native languages) and considerations of inter-generational equity that embrace the rights of children and youths are but a few areas where indigenous actors themselves are pushing for appropriate reforms in their own communities. Consistent with the capability approach discussed in Chapter 1, indigenous actors have to evolve, define and interpret their own customary laws to meet their human development needs, whereas the tendency is for third-party ‘translation’ of custom to fit within conventional Western legal concepts and frameworks (see Bowrey 2006; Okediji 2007). Gibson (2005, p. 276) further adds that: ‘An effective and relevant model of protection must not homogenise the Indigene nor historicise “tradition”, but should provide a workable legal concept for the relationship between community and the individual, towards a model for community authority and capacity with respect to traditional knowledge’.

As emphasized in both the ILO Convention No. 169 (Article 8(2); see ILO 2009, p. 81) and the UNDRIP (Article 34), the development of traditional institutions and customs must also be consistent with international human rights standards. The UNESCO Universal Declaration on Cultural Diversity further qualifies that: ‘No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope’ (Article 4; see Anaya 2004, pp. 25–26).

The next section explores some sui generis laws and initiatives which, to different degrees, attempt to address the particular characteristics of TCEs in shaping legal protection for them. Some of the models being explored or implemented – whether internationally, regionally or nationally – include intended linkages to the customary laws and practices of indigenous peoples, although much remains to be achieved in integrating indigenous viewpoints on innovation and creativity into these frameworks, along with customary concepts of rights and responsibilities.
6. Some *sui generis* forms of protection for traditional cultural expressions

The elaboration of the UNESCO-WIPO Model Provisions was an early attempt at *sui generis* solutions for the protection of TCEs. As Mihaly Ficsor, the chairman of the UNESCO/WIPO Committee of Governmental Experts meeting which adopted the Model Provisions in June 1982, described in a presentation paper:

The Model Provisions, *inter alia*, foresaw a *sui generis* system with a certain authorization procedure for any utilization made both with gainful intent and outside the traditional or customary context of folklore...Among the *acts against which adequate protection is required*, the Model Law indicated (i) use without authorization, (ii) violation of the obligation to indicate the source of folklore expressions, (iii) misleading the public by distributing counterfeit objects as folklore creations (a kind of ‘passing off’), and the public use of distorted or mutilated folklore creations in a manner ‘prejudicial to the cultural interests of the community concerned’ (violation of a kind of collective ‘moral right’). 88

In December 1984, a WIPO/UNESCO group of experts considered a draft treaty for the international protection of expressions of folklore based on the Model Provisions. According to Ficsor, industrialized countries raised two realistic problems in rejecting the proposal, namely, the ‘absence of any reliable source of identification of folklore creations in many countries; and the thorny question of “regional folklore”, that is, folklore shared by more than one – or sometimes many – countries’ (ibid., para. 8). The failure of agreement on an international instrument specifically dealing with folklore or TCEs meant that existing IP regimes have continued to govern this area for many countries, largely by default since these regimes were not originally designed for such purposes.

However, there are legislative initiatives at the national, regional and international levels to provide special protection for TCEs. While the term *sui generis* is often used to describe these initiatives, some frameworks may be essentially adaptations of existing IP concepts and regimes. The approach taken by member countries of the African Intellectual Property Organization (OAPI) through the Bangui Agreement of OAPI (as amended in 1999) [‘Bangui Agreement’], for example, is to regard ‘expressions of folklore’ and their derivative works as works ‘constituting original creations of the mind in the literary, artistic and scientific fields’ that can be protected by copyright law (Annex VII, Art. 5). 89 Significantly, the Agreement provides that such expressions need not be fixed on a material medium for copyright protection, 90 a contrast to conventional copyright law which usually requires that the protected expression be embodied in a tangible medium (although there are exceptions such as in Switzerland and some Latin American countries). Under the Bangui Agreement, copyright protection of ‘expressions of folklore’ is not perpetual but is subject to a copyright term of the author’s life plus seventy years (Annex VII, Art. 22). However, the exploitation of such works after they fall into the public domain (upon expiration of the copyright term) is subject to payment of a relevant royalty to a national collective rights administration body, which according to the instrument shall be ‘devoted to welfare and cultural purposes’ (Annex VII, Art. 59(2)). This *domaine public payant* is an interesting concept which is revisited at the end of this section.
The Model Law for the Protection of Traditional Knowledge and Expressions of Culture (2002) ['Pacific Model Law'] adopted within the Pacific Regional Framework provides a basis or reference for potential reforms of national laws in the region. This model law appears to provide far-reaching rights to custodians of TK or expressions of culture. The Pacific Model Law establishes ‘traditional cultural rights’ and ‘moral rights’ in TK or expressions of culture (see Clauses 6, 7 and 13). ‘Traditional cultural rights’ include rights to authorize and prevent third-party acts such as reproduction, publication, performance, and online distribution of TK and expressions of culture (Clause 7(2)). These rights continue in force in perpetuity, are inalienable, and cannot be waived or transferred (Clauses 9, 10, 13(4)). Under this model law, traditional owners of TK and expressions of culture can be a group, clan or community, or individual ‘in whom the custody or protection of the traditional knowledge or expression of culture are entrusted in accordance with the customary law and practices of that group, clan or community’ (Clause 4), and these traditional owners are deemed as holders of the traditional cultural rights protected by the Model Law (Clause 6). The reference to customary law and practices is particularly significant, and seems to echo some of the Australian Federal Court’s openness to considering customary laws in approaching copyright of the TCE in the Bulun Bulun case, discussed earlier. In significant contrast to the latter Australian case, however, a ‘group, clan or community’ can be the holders of rights protected under the South Pacific Model Law.

Uses of cultural expressions require prior and informed consent from the traditional owners, for which application must be made through a ‘Cultural Authority’ or directly to traditional owners (Clauses 15 and 25). An authorized user agreement should contain terms and conditions including, among other things, sharing of financial and other benefits arising from use of the TK or expressions of culture (Clause 22). Customary use of TK or expressions of culture does not give rise to any criminal or civil liability under the Act (Clause 5).

The individual Pacific islands have apparently been slow to implement the 2002 Pacific Model Law. Commenting on the Model law, von Lewinski (2007, p. 230) suggests that ‘although customary law has been taken into account to quite some extent, it seems that the Model Law is still too far away from rules with which local communities could feel comfortable’. It could be that the Model Law remains fairly rooted within conventional concepts of IP law, and ultimately approaches and interprets TCEs through an adaptation of these concepts. An interesting case study of national reforms in the Pacific to accommodate the protection of ‘expressions of indigenous culture’ within the IP rubric is the Republic of Vanuatu Copyright and Related Rights Act No. 42 of 2000 (‘Vanuatu Copyright Act’).

Meanwhile, there have been national initiatives in other parts of the world to provide sui generis protection for TCEs. An example from Latin America is Panama’s 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 of 2000 (see Obaldia 2005; Torsen 2008). Article 1 of the law states that its purpose ‘is to protect the collective rights of intellectual property and traditional knowledge of the indigenous communities upon their creations…likewise, the cultural elements of their history, music, art and traditional artistic expressions, capable of commercial use, through a special registration system, promotion, commercialization of their rights in order to stand out the value of the indigenous cultures and to apply social justice’ (emphasis added). Article 15 provides that the ‘rights of use and commercialization of the art, crafts and other cultural expressions based on the tradition of...
the indigenous community, must be governed by the regulation of each indigenous communit[y], approved and registered in DIGERPI [General Office for the Registry of the Industrial Property of the Ministry of Commerce and Industry] or the National Copyright Office of the Ministry of Education, according to the case'. 97 As with other laws that may require registration of TCEs for protection, there are considerations as to whether the registration process is accessible and affordable to the indigenous and other local communities, and whether these communities forfeit protection where registration is not sought for a TCE (sometimes for lack of awareness of such laws and requirements) or where an application to register a TCE is not approved. The criteria for approval also need to be carefully considered. In the case of Panama, Torsen (2008, p. 210) furthermore notes that: ‘If Panama’s Law is meant to protect Indigenous art and knowledge, its focus on economic compensation for the commercialization of their cultural goods could undermine that goal’ (see also Obaldia, p. 379).

A significant national sui generis instrument in Southeast Asia is the Philippines Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples (No. 8371, of 28 July 1997). The Philippines Act confirms that these communities and peoples ‘are entitled to the recognition of the full ownership and control and protection of their cultural and intellectual rights’, and ‘shall have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations…’ (section 34). Among other elements, these cultural manifestations are said to include ‘oral traditions, literature, designs, and visual and performing arts’ (section 34; see also section 32 on ‘Community Intellectual Rights’).

A detailed discussion of national sui generis laws is beyond the scope of this chapter. Since some of the challenges faced by custodians of TCEs in relation to misappropriation by third parties extend beyond national borders, domestic sui generis laws remain inherently limited in that they are pertinent to national territories and cannot be enforced elsewhere unless systems of reciprocity are in place. They would also not resolve issues relating to transboundary TCEs. Significant local and national differences in approaches to TCE protection, or regional differences as illustrated by the examples described earlier, may meanwhile render it difficult for adoption of a harmonized sui generis protection scheme at the international level. In the latter respect, it is notable that the Revised Draft Provisions for the Protection of TCEs/Expressions of Folklore (‘WIPO Revised Provisions’) have not been endorsed by the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (‘IGC’) after years of review (see Antons 2009). This is so despite the fact that they incorporate some of the concerns raised by members in relation to earlier draft provisions. However, they ‘will be developed further by the IGC under a renewed mandate for 2010 and 2011’. 98

There is a visible attempt to incorporate customary laws of indigenous peoples into the definition of what is protectable subject matter under the WIPO Revised Provisions. Under Article 1, three conditions must apply for subject matter to fall within protection as TCE or folklore: (1) they must be ‘products of creative intellectual activity’, whether by the community or individuals; (2) the forms of expression must be ‘characteristic of a community’s cultural and social identity and cultural heritage’; and (3) it is necessary that these forms of expression are ‘maintained, used or developed by’ the community or by those individuals in the community with the ‘right or responsibility to do so in accordance with the customary law and practices of that community’. The notable use of the term ‘developed’ in the latter sentence seems to allow
room for innovation in relation to TCE which is consistent with customary laws and practices. In her commentary on the provisions, von Lewinski suggests (2007, p. 219) that this reflects the ‘common feature of folklore as living heritage’. Meanwhile, the ownership of rights akin to copyright vests in the community rather than the individual. Indeed, even where individuals are deemed by customary laws and practices to be the producers of a TCE, the communities to which they belong are considered under the WIPO Revised Provisions to be the beneficiaries of any measures for the protection of the TCE (Article 2; see WIPO 2006, p. 18; von Lewinski 2007, p. 218).

Another feature of note in the WIPO Revised Provisions is the subjection of TCE protection to a trademark-like emphasis on ‘current use’. Accordingly, once a community no longer uses the TCE, or no longer exists as a distinct entity, protection for the TCE would lapse. 99 Given the inextricable link between indigenous peoples’ continuation of traditional practices and such issues as retention of their land rights, reforms on the protection of TK and TCEs to date (including the WIPO Revised Provisions) do not ultimately address the predicament of communities who are displaced from their ancestral surroundings and are no longer able to continue their traditional practices intimately bound to those surroundings. A further consideration, which is beyond detailed discussion in this chapter, pertains to the case of indigenous peoples who have been displaced, or who have migrated away from their ancestral lands but nevertheless continue to produce certain expressions based on traditional practices. Current TCE legislations, including sui generis laws, have not actively considered protection for such cases. This comes back, of course, to the ultimate question of what are the essential characteristics which render TCEs a special case for protection under IP and sui generis laws. Is linkage to ancestral lands, for example, an essential ingredient?

An area of controversy requiring further scrutiny is the proposal under the WIPO Revised Provisions that, while ‘free, prior and informed consent’ (FPIC) is needed for third-party use of TCEs of particular cultural or spiritual value to a community (Article 3(a)), prior notification or registration in a public register is required for this protection to apply (Articles 6, 7). 100 The scope of protection for TCEs thus registered or notified is far-reaching and includes among other things economic rights akin to ‘classical exclusive rights in the field of copyright’ as well as rights comparable to moral rights (von Lewinski 2007, p. 221). However, the application of this provision (particularly the consequences of non-registration) is unclear. It remains to be seen how a condition of prior notification or registration would tally with the international norms that are evolving around the principle of FPIC (see Tamang 2005; see also Laird and Noejovich 2002).

As with many existing national and regional sui generis laws, it could also be pointed out that the WIPO Revised Provisions remain very much within an ‘IP’ grid for approaching the protection of intangible creations. The complex nature of TCEs cannot be grasped without further integrating the viewpoints of the custodians and creators of TCEs in related reforms.

It is notable meanwhile that the WIPO Revised Provisions include exceptions where some cases of utilization outside the traditional or customary context will not be subject to TCEs protection if they fall within defined acts amounting to ‘fair practice’. 101 This has important implications, for example, for fair access of the public to TCEs. As explored in Chapters 6, 7 and
8, there are considerations and exceptions under copyright law, for example, purporting to balance the exclusive rights of copyright owners with public access to protected works. The extent to which mechanisms to ensure such balance for fair public access will be built into national *sui generis* laws protecting TCEs remains to be seen, and is likely to be a source of further deliberation and debate, particularly where the rights established in relation to TCEs are far-reaching and perpetual.\textsuperscript{102} Discussing the 1982 UNESCO WIPO Model Provisions, the OAPI Bangui Agreement, and the Pacific Model Law, Belder (2007, p. 48) observes that:

Interestingly, in each of these examples for a new law on proprietary rights to cultural expressions, there are exceptions that provide for the preservation of a public domain. All three have an exception for educational use and for use with a non-commercial intention. The first two [The UNESCO/WIPO Model Provisions and the OAPI Bangui Agreement] explicitly provide for the use of a cultural expression by an author/artist to create a new work, thus protecting the creativity and exchange of culture.

Belder further notes that all three model laws contain provisions for a *domaine public payant*, a system of fees for the use of traditional cultural expressions that are outside the scope of IPRs (ibid., p. 50). She questions how this approach relates to the idea of a public domain where access is free, adding that: ‘A system of fees would suggest that in the process of refining property rights into a sui generis right on the protection of cultural expressions, parts of the public domain have been shielded from access’.\textsuperscript{103}

Belder acknowledges, however, that ‘the public domain is a problematic venue for Indigenous Peoples’ (ibid., p. 45). As with legal protection over other forms of TK, there are unresolved issues over the prevalent concepts of the public domain and calls by indigenous peoples for the protection of cultural heritage (see Chander & Sunder 2004; Dutfield 2006, pp. 8–9; Deer 2009). Some of the difficulties stem from prevalent definitions of the public domain as that which is not protected by private property. As discussed in Chapters 1 and 9 of this book, approaches which assume a dichotomy between private property rights and the public domain may not be able to accommodate other concepts of ownership or systems of knowledge creation. Leach (2005, p. 41) points out, for example, that ‘property’ is only one mode of approaching ownership and many indigenous peoples have other ways of organizing ownership beyond those implied by Western property. It has been said that indigenous communities have their own systems of rights, including exclusive rights to expressions of their cultures in some contexts (see Strathern 1999; Belder 2007, p. 46). Some indigenous groups have argued that while their cultural heritage is communally held and may not be subject to private property, this does not mean necessarily that it is in the public domain (UNDP 2005, pp. 13–14; see further Deer 2009). These debates are further discussed in relation to concepts of the public domain in Chapter 9. Is a re-visioning and redefinition of the ‘public domain’ (e.g. away from a dichotomy with IPRs) needed to accommodate different cultural views on creativity and property (see Chander & Sunder 2004; Suthersanen 2008)? Might this have transformative effects on how we view IP more generally?
7. Use of codes of ethics and protocols to supplement legal provisions

While legislative reforms to protect TCEs are being pursued and debated, there are those who emphasize the need for guidelines and protocols towards a more holistic approach in protecting indigenous culture. Protocols could provide a non-legal and practical form of protection for TCEs and complement any *sui generis* legislative scheme that may be implemented in the future (Fitzgerald & Hedge 2007). Guidelines are also important in solving some of the difficult questions of public access to cultural material, for example, in relation to the cultural material of indigenous peoples held at museums, archives and libraries. A code of ethics has been produced by the International Council of Museums (ICOM) to help museums manage some of these and others issues. Indigenous peoples are themselves raising questions of repatriation and other forms of control over such material. Anderson argues that the indigenous ‘subjects’ of colonial projects are now also an indigenous ‘public’ needing access to and control over their cultural material held in cultural institutions worldwide, in making meaning of their past and future.

Some relevant guidelines have been elaborated within an interesting project on ‘Intellectual Property and Indigenous Knowledge: Access and Control of Cultural Material’ at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS). The *Guidelines on the Legal Implications of Intellectual Property for Cultural Institutions* seek to raise the standard of institutional responsibility of cultural institutions in their relations with indigenous peoples, communities and cultural material. The *Framework for Protocols* addresses practical community needs and expectations around IP law, and control of knowledge between individuals, communities and external researchers. There could be further linkages between the development of such protocols at domestic levels and the work conducted at the international level regarding the concept and application of FPIC (see Chapter 4; Laird & Noejovich 2002). The latter is crucial towards regulating access by research institutions, corporations and members of the public to TK of indigenous peoples, including their TCEs.

Indigenous protocols have been developed in some contexts to sensitize the public (including those working in particular sectors such as visual arts and filmmaking) to appropriate ways of approaching indigenous cultural material and working with indigenous communities. For example, the Australia Council for the Arts has produced and recently revised its protocol guides, covering different spheres of cultural endeavour, to help the Australian public better understand issues in accessing and using indigenous cultural material. Close consultations with indigenous peoples are essential in processes to elaborate such protocols.

There is, furthermore, scope for development of specific standards in relation to the social responsibilities of corporations and consumers towards indigenous originators of arts and crafts. As seen earlier in Section 4, such standards have evolved alongside IP protection for certification marks and geographical indications relating to TCEs. Chon (2009, pp. 137–138) observes, at the same time that: “Standards also raise issues of informed consent or choice of participation in forms of political economy – whether designated as “alternative trade”, “fair trade”, “corporate social responsibility” programs or mainstream trade”. She adds that: ‘While it makes sense for standards to be set in part by the firms involved in the relevant industries, it is not equally sensible that they should be the only actors involved in enforcement through certification. Additionally, meaningful opportunity for consumer and producer involvement in
the standards must be provided’ (ibid., p. 138). In relation to our present discussion, it is important that indigenous and other local communities are directly involved in any attempts to set standards relating to the treatment and/or certification of their TCEs. This ought to apply to standards setting not only by private firms but also by governmental and non-governmental organizations and other entities. In the context of Aboriginal art in Australia, Anderson (2009, p. 208) suggests that involving local communities in decision-making has made a difference in sustaining and regulating more recent certification schemes: ‘[L]ocally developed labels already have forms of regulation, and these conform to regulatory standards in operation within the communities themselves. Invigorating local decision-making capacity and determination around locally developed artistic practice should be a priority’.

Indeed, indigenous leaders have pointed out that indigenous peoples themselves have ‘complex management systems [for TK including TCEs] founded on ethics and detailed sets of cultural protocols, anchored in the holistic nature of TK’ (Deer 2009, p. 95). Part of indigenous customary laws, these principles and protocols relate, among other things, to the sharing, reproduction and use of TCEs (ibid., pp. 95, 98). Their application and evolution in new contexts, including those involving the onset of recent ICTs, is a matter of growing concern for indigenous peoples. Discussing the ‘real-time global dissemination of digital content’ enabled by the Internet, Deer points out that ‘the unauthorized reproduction and digital dissemination of indigenous cultural expressions such as paintings, designs, artworks, songs and performances’ may ‘seriously disrupt’ existing management systems for TK and TCEs, and are important matters for global Internet governance (ibid., pp. 94–95). An International Indigenous ICT Taskforce (IITF) with the involvement of indigenous leaders has been set up to look into the latter (ibid.).

Fitzgerald and Hedge (2007) draw inspiration from modes of governance already visible on the Internet in considering how ‘best practice’ protocols could be developed to govern both ‘pre-release’ and ‘post-release’ of TCEs. They emphasize that such protocols need to go digital – they should be generated specifically for the Internet context and complemented by campaigns to raise awareness of TCEs among access corporations, Internet users and communities. They argue, moreover, that terms of use for Internet services should expressly address TCEs: ‘As a starting point, access corporations could, through their Terms and Conditions or Acceptable Use Policies explicitly mention and explain the notion of TCE and any applicable protocol to their customers, reserving themselves a contractual right to remove access to such material’ (ibid., p. 21). Notice and take-down procedures could be considered (ibid., pp. 19–24). Principles and protocols relating to TCEs could also be woven into policies on ‘user rated’ tagging and flagging, so that users themselves could also implement a level of respect for TCE custodians through peer review and communication (ibid., p. 9). Additionally, the authors suggest that ‘labelling’ or ‘badging’ of TCEs could be explored:

The notion of labelling intellectual property has been around for a long time; marks such as ™, © and ® are used everyday. More recently, labelling or badging has been used for licensing terms such as Creative Commons or Licensa licences. The labelling or badging of materials as ‘TCE’ would allow persons to realize that content they may be reproducing from other websites or hard copy is TCE and should be treated differently to
other material. This would further enhance the spread of knowledge about TCE, what it is, and the importance of treating it respectfully. (Ibid., p. 22)

At the same time, challenges can be foreseen over how decisions are to be made on what material could be badged as TCE, as well as how to verify the accuracy or validity of such TCE badges (ibid.). It is also important that any selective ‘badging’ of TCEs does not obscure or excuse the fact that many other materials on the Internet might be considered to be TCEs. As with standards for the certification of TCEs discussed earlier, such procedures cannot be elaborated without the direct involvement of the indigenous peoples and the local community in question, and appropriate linkages to their customary practices.

8. Conclusion

Article 8 of the Universal Declaration on Cultural Diversity, adopted by UNESCO in November 2001, reminds us that particular attention must be paid to the ‘specificity of cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities and consumer goods’. The 2004 UNDP Human Development Report on *Cultural Liberty in Today’s Diverse World* furthermore emphasizes that ‘cultural goods convey ideas, symbols and lifestyles and are an intrinsic part of the identity of the community that produces them’. In approaching TCEs as ‘vectors of cultural identity, values and meaning’ to indigenous peoples and other custodians, it is also important to recognize that these expressions are constantly evolving and subject to re-definition with new contexts.114 As Anderson (2009, p. 11) suggests: ‘The insistence on the “traditional” as the key marker of difference obscures contemporary indigenous practice and the reality that indigenous knowledge also undergoes transformation overtime in usage and circulation both within family or community contexts and/or between families, the communities and external parties’.

While sharing common aspirations and struggles in relation to the maintenance of cultural identity, indigenous language, land rights and self-determination, indigenous peoples around the world have nuanced experiences based on history, geographical and current socio-economic conditions. As discussed in Section 2, some communities may object to any commodification of their cultural heritage, and thus view the assertion of IPRs over their TCEs as implying such commodification. Other communities may depend on marketing of arts and crafts based on their TCEs for sustainable livelihoods, and may regard such practices as consistent with their worldviews. For those communities, there are some risks that come along with perceived opportunities. For example, contemporary bias in aesthetics by consumers (or the use of mass-produced materials) can significantly alter the traditional rendition of these cultural expressions. Some suggest, moreover, that the application of property concepts in IP to TCEs may end up transforming the social relations behind the mode(s) of creativity in indigenous cultures (Leach 2005). Following such arguments, IP ownership claims by individuals, for example, may transform the relations of exchange and reciprocity fundamental to the communal creation of TCEs (see further Anderson 2009b). A future scenario may be imaginable where increasing protection of TCEs through IP concepts and tools ultimately unravels the very characteristics that are said to set TCEs apart from other creative endeavours.115
Steering towards the middle ground, one could also envisage an alternative future scenario where certain forms of IPRs or *sui generis* protection might be designed or moulded to provide some measure of legal protection for custodians of TCEs (e.g. in relation to third-party commercial mass-production of their expressions) while also serving to reinforce some traditional practices and social relations. For this scenario to be plausible, TCE protection would arguably need to be situated within holistic approaches towards protecting the bio-cultural heritage of indigenous peoples and local communities, which take into account their customary principles and practices (IIED 2008, see Chapter 4). The future protection and promotion of TCEs is, after all, dependent on integrated solutions for the sustainable livelihoods and cultural survival of these peoples and communities. Increasing the social awareness, responsibility and accountability of other actors – whether private firms, governmental and non-governmental entities, consumers of cultural products, and civil society more generally – to the communities and other local stakeholders involved would have a significant impact on such initiatives.

The Preamble of the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions furthermore recognizes the need ‘to take measures to protect the diversity of cultural expressions, including their contents, especially in situations where the cultural expressions may be threatened by the possibility of extinction or serious impairment’. While not a topic in this chapter, there is the largely unexplored question of whether there might be appropriate measures to ‘recuperate’ TCEs eroded by historical and socio-economic factors, including political domination, poverty, migration to urban areas, and loss of language or skill transmission. Might there perhaps be a role for IP in such attempts to safeguard cultural heritage? In *Llamas, Weaving, and Organic Chocolate*, Healy (2001, pp. 271–289) discusses traditional Jalq’a weavings from Bolivia which were lost to the villages of the Jalq’a people for some decades due to socio-economic and political factors, and how projects have taken off in recent years amongst women’s cooperatives in the valley of Chuquisaca to revive those traditions, and to find viable means of supplementing family incomes in poverty-affected areas. Community-based certification schemes for such weavings are being explored, and other forms of IP protection might be relevant in such contexts.

The fact that TCEs are the product of social relations suggests that they are subject to evolution, and that these cultural endeavours do not exist in a vacuum from other considerations and aspirations in human development discussed in this book. Further research is needed to understand how the preservation and innovation of TCEs intersect with considerations such as gender equality, education (including inter-generational transmission of language and knowledge within the communities), sustainable livelihoods and cross-fertilization of ideas with other cultures.

References


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**Notes**

1 The authors are grateful to Joshua Bell, Graham Dutfield, Haidy Geismar, Terence Hay-Edie, Honor Keeler, Uma Suthersanen and Molly Torsem for their invaluable comments.

2 These draft provisions are under revision at the WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions (IGC). For the definitions and provisions discussed in this chapter, see WIPO 2006, *Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions/Folklore*, Doc. WIPO/GRTKF/INF/1 [hereinafter ‘WIPO 2006’], available at: http://www.wipo.int/export/sites/www/tk/en/consultations/draft_provisions/pdf/draft-provisions-booklet.pdf (accessed 15 February 2010). The draft provisions have not been adopted or endorsed by the IGC and have undergone further revision since the writing of this chapter. For the latest status of this aspect of WIPO’s work, see the WIPO website, ‘Traditional Knowledge, Genetic Resources, and Traditional Cultural Expressions/Folklore’, available at: http://www.wipo.int/tk/en (accessed 24 March 2010).

Honor Keeler, a legal scholar and citizen of the Cherokee Nation in Oklahoma, observes that: ‘This discussion is
See Laird and
A distinction has to be made between IP laws which protect culture, and IP laws which co
See International Commission of Jurists (ICJ) 2008, paper s
Discussing how transboundary TCEs can give rise to regional disputes, Antons adds that: ‘As more national laws
Leach (2005
omitted).
paraphernal
Madang region of Papua New Guinea: ‘One aspect of Tambaran is a male musical cult with secret ritual
protection of TCEs intersect with the protection of cultural rights as human rights, see Chapters 1 and 8.
life and, therefore, their disregard often results in a shared sense of cultural offense’ (ibid.). On how the
character of these goods derives in the impossibility of their individual appropriation without losing [their]
serve as ‘a token or as a medium for communal cultural practices’, (pers. comm. Honor Keeler, 10 December 2009). Any national laws or government decree classifying TCEs or other cultural material as national heritage would need to address potential claims of particular local communities to the TCEs involved. Antons (2010, pp. 107–112) explores some of the considerations in the ‘distribution of rights and responsibilities’ between national governments and communities in relation to TCE protection (ibid.).
See, for example, the discussion in Antons 2010, pp. 113–116, on cross-border issues relating to the protection of TCEs in Southeast Asia.
Discussing how transboundary TCEs can give rise to regional disputes, Antons adds that: ‘As more national laws for TCE protection become enacted, dispute resolution mechanisms at the bilateral and regional levels will be important, especially to deal with those TCEs that have been widely spread across various borders’ (ibid., p. 116). International Commission of Jurists (ICJ) 2008, paper submitted to the Committee on Economic, Social and Cultural Rights (CESCR) for the ‘Day of General Discussion on the right to take part in cultural life (article 15(1)(a) of the Covenant)’, 9 May 2008, paras. 8–10, available at: http://www.ohchr.org/english/bodies/cescr/docs/discussion/InternationalCommissionJurists.pdf (accessed 24 March 2010). Discussing historical sites, sacred buildings, rituals and ceremonies as ‘collective goods’ which serve as ‘a token or as a medium for communal cultural practices’, the ICJ paper suggests that: ‘The collective character of these goods derives in the impossibility of their individual appropriation without losing [their] collective meaning. [Their] preservation…is of capital importance for the collective practices that inform cultural life and, therefore, their disregard often results in a shared sense of cultural offense’ (ibid.). On how the protection of TCEs intersect with the protection of cultural rights as human rights, see Chapters 1 and 8.
Leach (2005, p. 33) discusses, for example, customary rules governing a musical cult amongst people in the Madang region of Papua New Guinea: ‘One aspect of Tambaran is a male musical cult with secret ritual paraphernalia. The tunes and designs used by this cult are associated with particular people, are owned by them, and handed down as heirlooms. That is, they have a named owner. Yet this ownership does not give the right of disposal. They are not “property”, yet they are transacted. Spirit songs are being innovated all the time. There is a stock of ancestral songs for each residential group, but new spirits are coming into being today’ (citations omitted).
See Ficsor, M. 2005, ‘The Protect

Other provisions in the ILO Convention No. 169 of relevance to the protection of TK and TCEs are discussed in

Strom, S. 2008, ‘Maasai Beadwork for Sale: Destruction of Culture or Perpetuation of Traditional Handicraft?’,

For research within the Dogon context in Mali see, for example,

Other provisions in the ILO Convention No. 169 of relevance to the protection of TK and TCEs are discussed in

Strom, S. 2008, ‘Maasai Beadwork for Sale: Destruction of Culture or Perpetuation of Traditional Handicraft?’

See Secretariat of the Pacific Community

See Secretariat of the Pacific Community 2006, Guidelines for Developing National Legislation for the Protection

The global crafts market includes art pieces, textile articles, ceramic, bijouterie, baskets, among others. The US is

Geismar’s account of the making of slit-drums in North Ambrym shows, for example, that the creation and rituals

She adds that ‘the distinctiveness of the resulting striking colored cloth translated into a source of prestige for

Strom, S. 2008, ‘Maasai Beadwork for Sale: Destruction of Culture or Perpetuation of Traditional Handicraft?’

Strom, S. 2008, ‘Maasai Beadwork for Sale: Destruction of Culture or Perpetuation of Traditional Handicraft?’

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The communal nature of TCEs has been assumed in most discussions in relation to IPRs (see e.g. De Obaldia 2006) although creative processes in traditional communities may in fact have both individual and communal elements. Drawing on anthropological fieldwork conducted among the Nekgini speaking people on the Rai Coast of Papua New Guinea, Leach (2005, p. 31) qualifies that creativity in indigenous groups should not be ‘imagined simplistically’ as always the result of ‘communal production, making cultural resources something resembling a tribal commons’. His research suggests, for example, that ownership of tunes and designs may be attached to particular persons in a community and handed down as heirlooms, even though this does not translate into private property concepts in the West (ibid., pp. 33–36). Drawing from examples in the Madang area of Papua New Guinea, he suggests that it is useful to think of ownership over TCEs, rather, in terms of ‘multiple ownership’ (ibid.).

See Torsen (2008) for an extended discussion on the relevance for TCEs of provisions under the Berne Convention for the Protection of Literary & Artistic Works (9 September 1886), as revised at Paris, 24 July 1971, and amended 28 September 1979, 1161 U.N.T.S. 30. See also UNDP 2005, pp. 12–14. Note that there is significant variation across national jurisdictions on the precise conditions for copyright subsistence; fixation, for example, is not required in all jurisdictions.

Note, however, that iconography and motifs including sacred motifs may be given some protection from offensive use in third party’s trademarks under trademarks legislation in some jurisdictions. See Section 4.3 of this chapter; see further Frankel 2008.


Ibid., para. 91. This case is also discussed in Chapter 8 of this book, especially in relation to ‘joint-authorship’.

Ibid., paras. 53, 76.

Ibid., para. 85.

Ibid., para. 78.

Countries such as Vanuatu, Indonesia, Tunisia, Sri Lanka, Bolivia, Panama, Chile, Kenya, Mali, Congo, Ghana and Togo have tried to provide protection of TCEs in the framework of their copyright laws, and some (Congo, Ghana and Sri Lanka) have made perpetual protection explicit in their laws (WIPO 1998).


This is changing, however, as indigenous communities themselves explore means to record some forms of their TCEs for purposes including preservation and transmission.


The trademark testifies that the cloth concerned has been ‘hand woven’ by the islanders at their homes in the Outer Hebrides and made of pure virgin wool dyed and spun in the Hebrides (Donkin 2001, p. 23).


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In contrast, Gangjee (2008, p. 382) argues that GI law addresses challenges beyond the ambit of trademark law. Amongst other examples, he notes that trademark doctrine continues to view a geographical term either as a descriptive expression open to all or as an expression capable of individual appropriation through acquired distinctiveness, ‘but is uncomfortable with a collective, geographical yet “brand”-like and distinctive usage’. See his discussion on pp. 396–397; see also Bently 2008, p. 30.

Parry (2008, p. 365) asserts that ‘this reactionary claiming of a imaginary, unchanging identity (of both place and its constituents) necessarily denies the myriad ways in which both are every day remade through productive engagement with local and global communities’ (citations omitted).

‘Terroir’ is a key ingredient in differentiating between wines by reference to a distinct origin under the Appellation d’Origine Contrôlée (AOC) regime in France (Gangjee 2008, p. 383). Gangjee notes that at least three overlapping narratives have arisen, viewing ‘terroir’ as (i) holistic and mystical, (ii) geographical and deterministic, and (iii) an evolving composite of nature and human factors (ibid.). While the first two narratives are built on an assumption of ‘static place’, ‘the third begins to shake off its influence’ (ibid.).
On the law of passing off, see generally for example, under trade practices law in Australia, proceedings were brought against a company which might conclude that use of that mark would falsely suggest a connection with particular institutions. If a mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO registration of various marks, including ones applications for trademark registration. Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), disallows the registration of any mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO. The Trademark Trial and Appeal Board (TTAB) granted the petition in 1999, finding that the mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO. The Trademark Trial and Appeal Board (TTAB) granted the petition in 1999, finding that the mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO.

Corporate social responsibility (CSR) is discussed further in Section 8. See also Chapter 2.

The Snuneymuxw First Nation registered official marks for petroglyph rock carvings created by their ancestors. The Trademark Trial and Appeal Board (TTAB) granted the petition in 1999, finding that the mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO. The Trademark Trial and Appeal Board (TTAB) granted the petition in 1999, finding that the mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO. The Trademark Trial and Appeal Board (TTAB) granted the petition in 1999, finding that the mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO.

For more background, see Māori Trade Marks Advisory Committee, ‘Background Information’, available at: http://www.med.govt.nz/templates/Page–1291.aspx (accessed 24 March 2010); see further Frankel 2008. The latter study compares the approaches of the domestic systems of the US and New Zealand with regard to culturally offensive trademarks and the grounds for opposition in the registration process.

Trade Marks Act 2002 (NZ), section 17(1)(c). Under the absolute grounds for not registering a trade mark in this section, it is provided that the Commissioner must not register any matter as a trade mark or part of a trade mark if the Commissioner considers that the registration or its use ‘would be likely to offend a significant section of the community, including Māori’ (Trade Marks Act 2002 (NZ), section 17(1)(c)). In 1997, the Māori Trade Mark Focus Group in New Zealand recommended the incorporation of provisions on prior informed consent for trademark registrations (see Māori Trade Mark Focus Group 1997).

The Trademark Trial and Appeal Board (TTAB) granted the petition in 1999, finding that the marks ‘may be disparaging of Native Americans to a substantial composite of this group of people’ and ‘may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt or disrepute…’. Lanham Act, 15 U.S.C. § 1052(a).

See, for example, US Lanham Act, 15 U.S.C. § 1052(d); UK Trade Marks Act 1994, section 5; Trade Marks Act 1995 (Australia), section 44.

Trade Marks Act 2002 (NZ), section 17(1)(c). Under the absolute grounds for not registering a trade mark in this section, it is provided that the Commissioner must not register any matter as a trade mark or part of a trade mark if the Commissioner considers that the registration or its use ‘would be likely to offend a significant section of the community, including Māori’ (Trade Marks Act 2002 (NZ), section 17(1)(c)). In 1997, the Māori Trade Mark Focus Group in New Zealand recommended the incorporation of provisions on prior informed consent for trademark registrations (see Māori Trade Mark Focus Group 1997).

For more background, see Māori Trade Marks Advisory Committee, ‘Background Information’, available at: http://www.med.govt.nz/templates/Page–1291.aspx (accessed 24 March 2010); see further Frankel 2008. The latter study compares the approaches of the domestic systems of the US and New Zealand with regard to culturally offensive trademarks and the grounds for opposition in the registration process.

Trade Marks Act 2002 (NZ), section 178.


The Trademark Trial and Appeal Board (TTAB) granted the petition in 1999, finding that the marks ‘may be disparaging of Native Americans to a substantial composite of this group of people’ and ‘may bring Native Americans into contempt or disrepute’ in violation of section 2(a) of the US Lanham Act (15 U.S.C. § 1052(a)). Harjo v. Pro-Football, Inc., 50 U.S.P.Q.2d 1705, 1748 (T.T.A.B. 1999). Unfortunately, the subsequent appeal decisions offered little guidance on the meaning of ‘scandalous matter’ or ‘matter which may disparage’ under section 2(a) of the Lanham Act, because these decisions focused instead on procedural issues. See Pro-Football, Inc., 565 F.3d at 881–886 (where the Court of Appeals affirmed the district court’s application of the defence of laches in Pro-Football, Inc., 567 F. Supp. 2d at 62). A petition for hearing by the US Supreme Court was submitted in fall of 2009, but certiorari was denied. See Clayton 2010.

See USPTO, ‘Frequently Asked Questions About the Database of Native American Tribal Insignia’, available at: http://www.uspto.gov/web/offices/tac/tribalfaq.htm. The database is used as an aid in the examination of applications for trademark registration. Section 2(a) of the Lanham Act, 15 U.S.C. § 1052(a), disallows the registration of various marks, including ones which falsely suggest a connection with particular institutions. If a mark that a party wishes to register as a trademark resembles an insignia of a Native American tribe, the USPTO might conclude that use of that mark would falsely suggest a connection with the tribe.

Trade-marks Act (Canada), section 9(1)(n)(iii).

The Snuneymuxw First Nation registered official marks for petroglyph rock carvings created by their ancestors. For a discussion on whether an entity qualifies as a public authority and what entities require such a test, see Spratley 2005.

Corporate social responsibility (CSR) is discussed further in Section 8. See also Chapter 2.

For example, under trade practices law in Australia, proceedings were brought against a company which misrepresented that some of its hand-painted Aboriginal-style souvenirs were ‘authentic’, ‘certified authentic’ and/or ‘Australian Aboriginal Art’, and it was held that these representations were likely to mislead consumers because the majority of the pool of artists who produced the souvenirs were not Aboriginal or of Aboriginal descent. See WIPO 2003, p. 49.

On the law of passing off, see generally Cornish and Llewelyn 2003, pp. 593–628.
Apart from such initiatives, the protection of TCEs in Southeast Asia is said to be at its early stages even though the region possesses a rich and diversified range of TCEs (Zografos 2007, p. 2). On some recent developments in Indonesia, see Antons 2009.


Zografos (2007, p. 176), citing the Thai Ministry of Foreign Affairs, One Tambon One Product Project (OTOP).

Strom, S. 2008, ‘Maasai Beadwork for Sale: Destruction of Culture or Perpetuation of Traditional Handicraft?’ (manuscript on file with author).

There may also be disagreement within or among local communities in a region on what customary laws may exist and ought to prevail to govern a certain usage (see Antons 2009).

For historical accounts of British colonial interpretations of indigenous ‘customary’ laws to suit colonial agendas, see Okediji 2007. Okediji (ibid., pp. 376–377) takes on a critical approach to customary laws in Africa, suggesting that the categorization of certain rules as ‘customary’ was historically part of a colonial device to emphasize the primacy of foreign-imposed laws.

Article 4 of the United Nations Educational, Scientific and Cultural Organization (UNESCO), Universal Declaration on Cultural Diversity (2 November 2001), 41 I.L.M. 57 (2002), available at: http://unesdoc.unesco.org/images/0012/001271/127160m.pdf (accessed 24 March 2004). Anaya (2004, p. 26) observes the remaining question: ‘By what process may it be legitimately determined that a particular cultural practice is illegitimate?’ He adds that: ‘Whatever the ultimate answer to this question, the internal decision-making dynamics that are themselves part of a cultural group identity should be the starting point’ (ibid.).


Ibid., Annex VII, Article 4(2). Performance of expressions of folklore is accorded the same protection as is accorded to other types of performance under the Bangui Agreement (see Annex VII, Art. 48).

Secretariat of the Pacific Community, Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (2002), pp. 3–15, available at: http://www.forumsec.org/resources/uploads/attachments/documents/PacificModelLaw,ProtectionofTKandExprssnsOfCulture2002.pdf (accessed 26 February 2010); see also Secretariat of the Pacific Community 2006. According to the Secretariat: ‘[M]anifestations of intellectual creativity, traditional knowledge and expressions of culture deserve to be accorded the same legal protection that is provided to other forms of intellectual property. Robust measures need to be taken to guarantee the status of and economic support for the clans, groups or communities that are the creators, repository, custodians and trustees of traditional knowledge and expressions of culture’ (ibid., p. vii).


See Notes on Clauses, Clause 6.
108 See Part 7 of the Act, sections 41 and 42. This Act was passed by the Parliament of Vanuatu on 29 December 2000, but it still has not been gazetted (or put into force) as of the date of this writing. The full text is available at: http://www.parliament.gov.vu/legis/num_act/carra2000282/ (accessed 1 March 2010). See discussion in Marahare 2004.

109 In some cases, this is part of a broader regime to protect biodiversity and associated TK (see Chapter 4).


111 On the registration of collective rights under the law, see Articles 7–9.

112 See the WIPO website, ‘Traditional Knowledge, Genetic Resources and Traditional Cultural Expressions’, available at http://www.wipo.int/tk/en (accessed 24 March 2010). Since the time of the writing of this chapter, the IGC has initiated further revisions to these draft provisions.

113 See WIPO 2006, Revised Provisions for the Protection of TCEs/Expressions of Folklore, p. 31, where it is explained that the discontinued use is ‘analogous to abandonment of a trademark, or a trademark becoming generic’.

114 For TCEs or expressions of folklore not registered or notified, their use would not be subject to prior authorization under the WIPO Revised Provisions. In such cases, the protection would focus rather on ‘how the TCEs were used’, according to the WIPO commentary (ibid., p. 22; original emphasis). The commentary suggests applying concepts of moral rights, unfair competition principles, civil and criminal remedies, as well as the payment of an equitable remuneration or equitable benefit-sharing determined by a competent authority, ‘akin perhaps to a compulsory license or equitable remuneration’ approach found in some national sui generis laws (ibid.).

115 See WIPO 2006, Revised Provisions for the Protection of TCEs/Expressions of Culture, pp. 27–29. According to Article 5 of the WIPO Revised Provisions, this would include use by way of illustration for teaching and learning; non-commercial research or private study; criticism or review; reporting news or current events; use in the course of legal proceedings; the making of recordings and other reproductions of TCEs or expressions of folklore for purposes of their inclusion in an archive or inventory for non-commercial cultural heritage safeguarding purposes; and incidental uses.

116 Belder (2007, p. 48) suggests that a new sui generis right for the protection of TCEs ‘would have to balance the subjective rights of Indigenous Peoples or national states with the public interest in a public domain’. According to her, this right ‘should provide for a legal regime of access and benefit-sharing that may draw on the basic scheme of intellectual property law, granting the right holder a bundle of rights, while at the same time providing restrictions for fair use in order to protect the public interest’ (ibid.).

117 It also remains to be seen how any benefits from such domaine public payant will be channelled to the communities from which the TCEs have originated. At the same time, there are arguments that regulated access need not be incompatible with concepts of the ‘commons’ (Kneen 2004; see Chapter 9).


120 Some related concerns, for example on the repatriation of ceremonial objects, are expressed in Article 12 of the UNDRIP.


The five guides cover protocols for producing Indigenous Australian media arts, music, performing arts, visual arts and writing.

The Indigenous Protocols published by the Australia Council (second edition) were written by Indigenous intellectual property lawyers Terri Janke and Robynne Quiggin.

In the corporate sector, social responsibility or corporate citizenship is featuring more and more as a chapter in the year-end reports of leading companies. Initiatives such as the Global Compact of the United Nations encourage companies to ‘formulate practical solutions for problems related to globalization, sustainable development and corporate civil responsibility within a context of multiple interests’. Such global initiatives and social trends may lead to more self-regulation and private initiatives by corporations. See the United Nations Global Compact website, available at: http://www.unglobalcompact.org/ (accessed 10 March 2010). At the same time, standards achieved through ‘private ordering’ can potentially replace or sidestep norm setting through public regulation, and thus need to be scrutinized. See Chon 2009.

This is important also in the case with agricultural and non-timber forest produce involving these communities.


It has been emphasized that cultural diversity exists across and within cultures. Sen (2005, p. 162) maintains that: ‘Contrary to cultural stereotypes, the histories of different countries in the world have shown considerable variations over time as well as between different groups within the same country…there is, typically, little note taken of substantial variations within each local culture – over time and even at a point of time’.

On the other hand, this line of critique might well be directed at IP more generally. To the extent that most (if not all) creative endeavours are to some extent dependent on social networks and incremental inputs (see Chapters 1 and 8), some might well argue that IP is by nature transformative of the social relations behind innovation. Are any creative endeavours really ‘isolated’ from the social fabric of the communities from which they spring?