

**The Legal Protection of Folklore:  
Can Copyright Assist or is a *Sui generis* Right Necessary?**

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## Abstract

Over the last few years, it became clear that copyright industries, amongst others, increasingly find their inspiration in and borrow material from folklore and other traditional sources, particularly from Indigenous and traditional communities in developing countries. A number of problems are associated with this phenomenon. The use of copyright is becoming instrumental to protect works of authorship based on traditional works. The Western copyright allows the exploitation of the original sources that provide the inspiration, the backbone and often much more for the new work. There is no reward or acknowledgements for the real creators and this can be easily defined as 'new colonialism'.

There is an internationally recognised need to protect folkloric works and satisfy Indigenous peoples' demands in regulating access to their folkloric works and in benefiting from the commercial exploitation of these works. Copyright remains inapplicable to protect folklore due to some obstacles conceived in the nature of the right while some others lie in the dominant copyright doctrine.

In response to this situation, the thesis questions the present boundaries of copyright and the proprietary doctrine inherent to the system. It proposes a new way of conceiving creation based on transactionable human relationships, instead of acquiring propriety over the creation. It thereby challenges the very foundations of copyright law. However, we argue that, at least theoretically, copyright could become a far more adaptable instrument. Admittedly, it is unrealistic to expect a change in the political setting. Historically, copyright is proven to depend on the dominant political regime and the current trend is towards an inflexible application of copyright categories.

At the international level efforts are focused towards suitable means of protection which go far beyond the copyright applicability. However, the difficulty in protecting folklore lies in the fact that there are no precise boundaries to define a phenomenon which has a dynamic and communal nature. Therefore, multiple solutions should be explored: from enhancing values as cultural diversity to implementing customary laws and empowering Indigenous peoples to allow them to participate in decision making processes. Overall, it is a matter of balancing rights, of regulating and sharing access. It is a cultural clash which needs to be set: the Western ideology of culture with its material creation *versus* the Indigenous world, bearing a complexity of very different values and principles.

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**Part I**

## Chapter 1

### The Legal Protection of Folklore: Can Copyright Assist or Is a *Sui Generis* Right Necessary?

#### 1.1. The Scope of the Thesis

The main scope of the thesis is to draw a legal framework for the protection of folklore or traditional cultural expressions (TCEs) against their exploitation through misuse and misappropriation outside the Indigenous communities where the material is produced and generated. Therefore, the thesis will focus on assessing whether the right to attribute a community ownership over works of folklore can be protected through copyright, or if a new *sui generis* right should be introduced.

Several models or approaches will be adopted in analysing the legal protection available or eventually still necessary for TCEs. These systems will be compared through the analysis of the means implemented at a national, supranational and international level. In fact, the result of this comparison will help to clarify which legislative means of protection should be pursued as well as the actual steps to be undertaken for the promotion and protection of folklore or TCEs. The work is divided into three main parts, using a multi-level structure.

This structural approach has two main implications: one is related to the level of democratic participation of all the stakeholders involved in a decision-making process and another one is the link among national, continental and international intervention.

A modern governance process should adopt an inclusive approach to decision-making through the levels of involvement of key stakeholders e.g. the dialogue among several countries, traditional communities, non-governmental and international organisations. Multi-level governance seems to be the most appropriate platform methodology to acknowledge interest groups in the decision making process. Those groups can create that political democratic pressure able to influence the legislative authority. Any methodology used to build good governance should consider this democratic process.

Distributed governance does not work only horizontally but also vertically, e.g. sub-national, national, continental and international protection. Many of the issues concerning TCEs involve mechanisms of protection that are national, continental and international. Yet solutions need to be, for a large part, local with a short-term

perspective while others must be found in long-term global strategy. Approaching the issue only at one level is unlikely to be successful. This becomes clear looking at the development of new forms of governance that brings together diverse stakeholders at local/national levels but also at continental and international *fora*, in order to define options for collective action.

It is worth mentioning that from the time the thesis was submitted a few changes were undertaken in the international legal settings. At a European level the Treaty of Lisbon was signed by EU leaders on 13 December 2007 which is awaiting the deadline for ratification by the EU member states due on first January 2009.<sup>1</sup> The Treaty of Lisbon was also defined as 'the reform treaty' to distinguish it from the Old Constitutional Treaty which has failed in its approval and which will be examined further on in the thesis. The treaty of Lisbon, however, does not differ from the old Constitutional Treaty in terms of reinforcing the rights and values on which the EU is built. Nor does it differ in enlarging the area of policy intervention through an improved EU institutional framework in the matters related to improve the EU efficiency, transparency and democracy in order to respond to the exigencies of its citizens.<sup>2</sup>

At the WIPO level, a few more ICG sessions on Traditional Knowledge and Folklore took place. The tenth session focused mainly on the revision of the points of the substantive agenda drafted under session ninth,<sup>3</sup> finally agreeing in the 11th session on a more in depth engagement within the area of TCEs/EoF in order to present recommendations to the General Assembly.<sup>4</sup> During the 12<sup>th</sup> session the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore decided to focus on two main fields of research which should be complementary: i) achieving an overall consensus on the list of issues discussed and analysed under the previous sessions and ii) the drafting a revised version of 'The Objectives and Principles for the Protection of Traditional Cultural Expressions/Expressions of Folklore'.<sup>5</sup>

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<sup>1</sup> Taking Europe in the 21st Century available at [http://europa.eu/lisbon\\_treaty/index\\_en.htm](http://europa.eu/lisbon_treaty/index_en.htm).

<sup>2</sup> [http://europa.eu/lisbon\\_treaty/glance/index\\_en.htm](http://europa.eu/lisbon_treaty/glance/index_en.htm).

<sup>3</sup> The tenth ICG session was held in Geneva on November 30 to December 8 2006 [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_10/wipo\\_grtkf\\_ic\\_10\\_decisions.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_decisions.doc) and [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_10/wipo\\_grtkf\\_ic\\_10\\_4.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_10/wipo_grtkf_ic_10_4.doc).

<sup>4</sup> The 11th ICG session was held in Geneva on July 3 to 12, 2007. See [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_11/wipo\\_grtkf\\_ic\\_11\\_4\\_a.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_4_a.doc).

<sup>5</sup> The 12th ICG session was in Geneva on February 25 to 29, 2008. See [http://www.wipo.int/edocs/mdocs/tk/en/wipo\\_grtkf\\_ic\\_12/wipo\\_grtkf\\_ic\\_12\\_4\\_b.doc](http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_12/wipo_grtkf_ic_12_4_b.doc).

## 1.2. Towards a Uniform Definition

The protection of folklore is a current debate in the international community, especially at the United Nations level. Uniform definitions are needed because it is impossible to seek legal protection without a proper comprehension of what folklore is and what it effectively means for so many communities.<sup>6</sup> For example UNESCO has drafted a convention on intangible cultural heritage and on the protection and promotion of the diversity of cultural expressions.<sup>7</sup> The debate is still open, however, in terms of the means to be used for protection, as well as universally agreed definitions on the subject matter of protection and the beneficiaries of such protection. The first chapter of the thesis will assess why this protection is needed and how copyright issues are involved. In order to understand whether a protection is needed or not it is important to define what folklore is and how a folklore-holding society should be defined. The definition of folklore is rather complex since it depends upon the identity of the community involved. In particular, the analysis carried out in the second chapter will assert the necessity of a uniform definition as the starting point for developing a possible legal protection both for folklore and for the traditional communities.

Traditional cultural expressions (TCEs) or folklore can be seen in many different ways. TCEs are identified as 'Indigenous patrimony'. In this thesis, the terms 'Indigenous peoples', and 'Indigenous communities' will be used interchangeably, keeping in mind, however, the importance attributed to the term 'peoples' which includes the right of self-determination that other communities do not have'.<sup>8</sup> Regarding this argument, Posey and Dutfield sustain that:

'The key difference is that, while non-Indigenous people may act and speak as a community, they are not claiming the right to be a "distinct people"; whereas all statements by Indigenous peoples must be seen in this light. This means that while both groups may demand similar human rights, for Indigenous peoples this means human rights for a distinct culture, not for individuals or a community.'<sup>9</sup>

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<sup>6</sup> G. Dutfield *Protecting Traditional Knowledge and Folklore: A review of progress in diplomacy and policy formulation*, ICTSD-UNCTAD, October, 2002.

<sup>7</sup> UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage (Paris, 17 October 2003) available at: <http://www.unesco.org/culture/ich/> and UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions (Paris, 20 October 2005) available at <http://unesdoc.unesco.org/images/0014/001429/142919e.pdf>

<sup>8</sup> D.A. Posey and G. Dutfield *Mind the Gaps: Identifying Commonalties and Divergencies Between Indigenous Peoples and Farmers Groups*, Oxford Centre for the Environment, Ethics and Society, UK prepared for the 5th Global Biodiversity Forum Buenos Aires, Argentina (1-3 November 1996) p.16-17.

<sup>9</sup> *Ibid*, p.10.

However, employing the term 'communities' and attaching it to the adjective 'indigenous' qualifies sufficiently the community, which then acquires a specific identity. Yet, the term 'traditional and tribal communities' will also be employed at times, although differences emerge between Indigenous and non Indigenous communities. As reported by Posey and Dutfield<sup>10</sup> Indigenous peoples have been attributed a special meaning in the International Labour Organization Convention 169 (ILO 169), the so-called Indigenous and Tribal Peoples Convention (ILO, 1989):

'Tribal peoples in countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. Peoples in countries who are regarded by themselves or others as Indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain, or wish to retain, some or all of their own social, economic, spiritual, cultural and political characteristics and institutions.'

Notwithstanding the acknowledgment of the particular meanings attributed to Indigenous and tribal people provided by the ILO definition, one can, however, identify some common denominators between Indigenous and non Indigenous. Both definitions bear the most recurrent basics for folklore: customs and traditions. Both Indigenous and non-Indigenous distinguish themselves from other sectors of the population through their specific socio-cultural, economic and political characteristics. Being Indigenous additionally means having been the inhabitants of the territory prior to colonization. This brings an extra factor: the right to claims for their land and territory, i.e. the right to self determination.<sup>11</sup>

As observed,<sup>12</sup> there are obstacles to clearly distinguishing between Indigenous and non-Indigenous. In addition to this, there is no single accepted definition of Indigenous peoples, since rigorous definitions were never accepted by those Indigenous peoples who consider the right of self identification and self definition as the most fundamental rights.<sup>13</sup> In addition, the definition of non indigenous is very

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<sup>10</sup> *Ibid*, p. 9.

<sup>11</sup> *Ibid*, pp. 8-11.

<sup>12</sup> *Ibid*, p. 10.

<sup>13</sup> E.I. Daes of the UN Working Group on Indigenous Populations in her 1995 report for the Subcommission on Prevention of Discrimination and Protection of Minorities (E.-I. Daes, 1995) underlines how definitions should be provided by the same Indigenous peoples and not by others. S. J. Anaya *Indigenous Peoples in International Law*, 2nd ed., (Oxford University Press 2004) p.99.

difficult to outline since very little is known about non-Indigenous.<sup>14</sup> Outside the issue of self-determination it has been noted that even the way of raising rights might vary between Indigenous and non-Indigenous, the first lobbying more at an international level while the other category seeks national recognition.<sup>15</sup>

Self-determination seems to be the really crucial criterion for operating a distinction. It is the specific attribution to belong to pre-colonial population – the ‘autochthone character’ – which makes this group of peoples ‘Indigenous’ and not just ‘tribal’ or ‘traditional’. The same reference to ‘peoples’ rather than to ‘people’ brings in the concept of self-determination, meaning group/population.<sup>16</sup>

Whilst using the terminology ‘traditional’ and/or ‘tribal’ attached to the wording communities, the thesis will refer to the needs of Indigenous and non-Indigenous, those needs and concerns that have in common primarily the preservation and the protection of their customs and traditions.<sup>17</sup>

In the thesis the terminology ‘Indigenous knowledge (IK)’ will also be employed to indicate a generic attribution of cultural identification and identity.

The premises asserted above are dictated by the fact that folklore is becoming more of a global phenomenon with each passing day and it is seeking a more comprehensive global protection.<sup>18</sup> Its main characteristics are ‘geographical territoriality’ and ‘local dimension’, but its exploitation and improper commercial use go beyond local, national and supranational boundaries. Therefore, if territoriality can still be a criterion to define folklore and its local dimension, it is no longer a criterion for defining its exploitation. A uniform definition will allow folklore to achieve international recognition as a right to be respected and protected. Folklore is a ‘living experience’: rooted in the past, yet always evolving. A legal protection of folklore cannot be achieved completely without creating a uniform consent of what folklore really is and what it means for many traditional

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<sup>14</sup> D.A. Posey and G. Dutfield *Mind the Gaps: Identifying Commonalities and Divergencies Between Indigenous Peoples and Farmers Groups*, Oxford Centre for the Environment, Ethics and Society, UK prepared for the 5th Global Biodiversity Forum Buenos Aires, Argentina (1-3 November 1996) p.13.

<sup>15</sup> *Ibid.*

<sup>16</sup> S. J. Anaya *Indigenous Peoples in International Law*, 2nd ed. (Oxford University Press 2004) p.60, 97, 100.

<sup>17</sup> Convention on Biological Diversity (CBD) 1992 does not distinguish, in terms of needs, between the needs of Indigenous and non-Indigenous. Reported in Posey, *op.cit.supra* pp.16-17. The Convention compromises with the use of the terminology referring to ‘Indigenous and local communities embodying traditional lifestyles’.

<sup>18</sup> UN Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press, 1995).



communities around the world.<sup>19</sup> The lack of clarity and comprehension of this theme creates uncertainty on deciding the right for its protection. A uniform definition of folklore will help the national legislator to better focus on the causes/effects of folkloric exploitation and it will also help to find a more genuine international answer.

### **1.2.1. Folklore: Defining a Human Communal/Multiple Right**

Folklore is the common heritage of Indigenous cultures.<sup>20</sup> In recent years there has been a renewed interest in the topic and in seeking an international protection for Indigenous peoples' knowledge (IK). But how does indigenous knowledge diverge from the Western type model of knowledge?

The difference between these two cultures can be defined in terms of 'formal' and 'informal' knowledge, the first referring to the Western world (basically written and documented technological knowledge) and the latter to the indigenous world (customs and practices 'developed by peoples with long histories of close interaction with the natural environment').<sup>21</sup>

The Indigenous knowledge enriched of traditions and customary practices is becoming a container of ideas to be transplanted into formal knowledge by the Western countries. This has always been the case, but due to acceleration in new technological means indigenous culture today faces the serious risk of being misused and misappropriated.<sup>22</sup> The protection of IK has been particularly emphasised after folklore was recognised as a fundamental human right, essential for the life of the community which it represents.<sup>23</sup> Sometimes its recognition is subsumed in the

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<sup>19</sup> See WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Summary of Draft Policy Objectives and Core Principles, Eight Session, Geneva June 2005.

<sup>20</sup> The Study on the Protection of the cultural and intellectual property of Indigenous peoples, E/CN.4/Sub.2/1993/28 (1993) edited by Erica-Irene Daes, Special Rapporteur of the U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities and Chairperson as one of the five independent experts of the Working Group on Indigenous Peoples (so-called *The Chairperson's Study*) at p.11 defined the heritage of Indigenous peoples as: '...everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as creative production of human thought and craftsmanship, such as songs, knowledge and artworks...'

<sup>21</sup> Definition provided in the web-site <http://www.scidev.net/index.cfm>.

<sup>22</sup> M. Batiste and J. Youngblood Henderson, *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing Ltd Saskatoon 2000) pp.36 ss.

<sup>23</sup> Human rights could be the 'key component of any realistic strategy to use international law to protect the rights of Indigenous people to their intellectual property' as suggested in his Introduction by D.B. Suagee 'Human Rights, and Cultural Heritage: Developments in the United Nations Working Group on Indigenous Populations' in *Intellectual Property Rights for Indigenous Peoples*, Tom Greaves Ed. (Society for Applied Anthropology 1994) p.193.

rights granted to Indigenous peoples. Many human rights instruments have been adopted to recognise and protect the rights of minorities, such as the Indigenous communities and their cultures. Some of the instruments applicable can be found under Art. 27.2 of the Universal Declaration of Human Rights, and under article 15.1 of the International Covenant of Economic, Social and Cultural Rights which provide the right to protect the moral and material interests in any artistic production. While Art. 27 of the International Covenant on Civil and Political Rights requires state parties to protect the rights of minorities to enjoy and develop their culture Art. 1 of this Convention and Art 1 of the International Convention on Indigenous Populations 169 (1989) establish that cultural and religious values of Indigenous populations need to be taken into 'due account' in order to promote full realisation of the cultural rights of Indigenous peoples. Finally, the Declaration on the Rights of Indigenous Peoples in article 7 states the right of Indigenous peoples to have their cultural and intellectual property protected.<sup>24</sup>

Based on these provisions, then, it follows that folklore should be recognised as a human right and protection should be granted against its misuse and misappropriation.<sup>25</sup> The UN Declaration on the Rights of Indigenous Peoples<sup>26</sup> harbours the principle of self determination substantially exercised through the recognition, among others, of the right to cultural distinctiveness. Indirectly, recognition of folklore as a category of human rights is also subsumed in the right of self determination. This right of cultural preservation is established as a human right in the UN Declaration of Human Rights 1948 which upholds the 'equal and inalienable rights of all members of the human family'. This statement is echoed by the Declaration on the Rights of Indigenous Peoples, (1993, Art. 12) which establishes the right of Indigenous people 'to maintain, to protect and develop the past, present and future manifestations of their cultures [...] as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs'. This is also re-emphasized, as stated above, by the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and

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<sup>24</sup> U.N. Doc. E/CN.4/Sub.2/1991/40/Rev. 1 (1991). See also ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries, in particular Convention 169 adopted in 1989. See A.R. Chapman 'Human Rights Implications of Indigenous Peoples' Intellectual Property Rights' in *Intellectual Property Rights for Indigenous Peoples*, Tom Greaves Ed. (Society for Applied Anthropology 1994) pp.217-18.

<sup>25</sup> UNDP *Human Development Report* 2004.

<sup>26</sup> S. J. Anaya *Indigenous Peoples in International Law*, 2nd ed.(Oxford University Press 2004) p.65, 69.

Political Rights,<sup>27</sup> with reference to the Indigenous peoples' right to pursue their cultural development.

In addition, the Maatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (1993) stresses the right of Indigenous peoples to protect and control their knowledge always within the right of self-determination. Furthermore, the vital importance of Indigenous knowledge as crucial for ecosystems in which they live is expressed in the Rio Declaration on Environment and Development. Under principle 22, it affirms that '...States should recognize and duly support their identity, culture and interests...'<sup>28</sup> While recognizing the necessity of protecting indigenous self-determination one cannot disassociate from that definition the subjects of the protection, i.e. Indigenous peoples from the object of that protection, i.e. folklore.

It should be pointed out that these principles are drafted in the nature of declarations, rather than of binding conventions. Yet, the principle of self-determination is present in well established conventions and well known resolutions. The International Labour Convention on Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169/1989) recognizes under Art. 5 the necessity of protecting and respecting 'the integrity of the values, practices...' and under Art. 8 emphasises the importance of Indigenous peoples' power 'to control, to the extent possible, their own economic, social and cultural development'. This formula is echoed in the UN Resolution 1991/32 of 29 August 1991 which strongly disapproves of the international trafficking of Indigenous peoples' cultural property, because they destroy not only Indigenous peoples' self-determination and development but also the development of the countries in which they live.<sup>29</sup>

For the purposes of this thesis, one main definition of folklore will be adopted. The definition is laid down in the Preliminary Report of the former Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities: Protection of the Heritage of Indigenous people. The Special Rapporteur, Dr. Daes affirms that: 'The heritage of an Indigenous people is not merely a collection of objects, stories and ceremonies, but a complex knowledge system with its own concepts of epistemology, philosophy, and scientific and logical

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<sup>27</sup> Article 1(1) of both these documents states: All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

<sup>28</sup> Reported in M. Batiste and J. Youngblood Henderson *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (2000 Purich Publishing Ltd Saskatoon), p.196.

<sup>29</sup> *Ibid*, p.195.

validity. Everything, which is created in common, has for the community a “special meaning”.<sup>30</sup>

In light of the above, then, even a song can become an instrument to preserve the identity of these communities.

The problem of the exploitation of these cultural resources - centrally by Western organisations using symbols, songs, artefacts belonging to Indigenous peoples for their own economic benefit - is detrimental to the Indigenous people and traditional communities, especially those threatened by cultural extinction. In losing the connection with their heritage they are also deprived of their identity. This exploitation enables Western society to enjoy the benefits, and especially economic benefits, of these communities’ cultures. Moreover, cultural diversity representing the expression of democracy and sustainable development is going to lose the battle against unequal trade globalisation rules.<sup>31</sup>

### **1.2.2. Copyright or *Sui generis*: Individualism versus Communal Creations**

One possible way of seeking protection for folklore is to ascertain if copyright, a legal means of protection for a wide range of cultural works, could be employed to achieve this protection. However, one has to assess whether the actual notion of copyright conflicts with the very nature of folklore or not.

Originality is one of the key principles of copyright law. This means that there has to be some ‘authorial personality’<sup>32</sup> to whom the work may be traced in order for it to be protected. However, the problem lies in the definition of this personality, since ‘there is no accepted standard as to what constitutes personality’.<sup>33</sup> One of the problems of defining what originality means is the application of a low or high threshold to the concept.

Most civil law copyright legislation perceives creativity within an ideology of ‘high art’ (i.e. the French *empreinte de la personnalité d’auteur*), while Anglo-American tradition protects works of low threshold<sup>34</sup>, the protection focuses more on

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<sup>30</sup> Preliminary Report of the special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities: Protection of the Heritage of Indigenous people. (1993) at para 45.

<sup>31</sup> World Bank *Governance and Development*, Washington DC 1992.

<sup>32</sup> G. Dutfield and U. Suthersanen, ‘The Innovation Dilemma: the Intellectual Property and the Historical Legacy of Cumulative Creativity’ [2004] 4 IPQ p.391.

<sup>33</sup> *Ibid.*

<sup>34</sup> See J.C. Ginsburg ‘U.S. Initiatives to Protect Works of Low Authorship’ at 57-77 in *Expanding the Boundaries of Intellectual Property* ed. By R. Breyfuss, D.L. Zimmerman, H. First, (Oxford University Press 2004).

'investment and commercial value of the work'<sup>35</sup> than on the 'mark of author personality'. The Anglo-American approach justifies the necessity for a low threshold to protect cumulative innovation.<sup>36</sup> As the anthropologist Marilyn Strathern stressed: 'A long-established form of Euro-American anticipation comes from expectations that persons should enjoy the products of their labour, not just now but also as investment in the future'.<sup>37</sup>

There are threats in both systems: the reading of originality in civil law countries while focusing on the authorial moral imprint might hinder future innovation.<sup>38</sup> Originality cannot be something new and completely artistic. On the contrary, this could prejudice future innovation due to the fact that new works are created cumulating cultures, creating new original works through the inspiration – not through copying - of pre-existing works.<sup>39</sup> Therefore, 'the present patent and copyright systems need to be reformed in ways that recognise the cumulative nature of most innovations but without hindering further innovations'.<sup>40</sup>

In their article Dutfield and Suthersanen propose to raise the creativity bar and to enlarge the limits through the expansions of limitations as the U.S. fair use.<sup>41</sup> This will avoid the dilemma that as a result of expanding the originality requirement 'all types of mental detritus' could be protected by copyright.<sup>42</sup> Without raising the creativity bar the 'circumvention measures ....might end up overprotecting works. And overprotection is worse than underprotection because it will hinder future innovation.<sup>43</sup>

The work underlying the copyright protection is the result of a creative process infused with individual personality and often solitary labour. The Western civilisation permeated copyright with values that are sometimes the antithesis of those felt by Indigenous communities for their folkloric works. Thus the strength of

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<sup>35</sup> *Ibid*, p.392.

<sup>36</sup> *Ibid*, p.380.

<sup>37</sup> M. Strathern *Property. Substance and Effect* (Athlone Press 1999) p.162.

<sup>38</sup> The choice between overprotecting works and hindering follow on innovation and underprotecting them and thereby discouraging present innovation has been defined as the 'innovation dilemma'. G.Dutfield and U. Suthersanen 'The Innovation Dilemma: the Intellectual Property and the Historical Legacy of Cumulative Creativity' [2004] 4 IPQ p.380.

<sup>39</sup> *Ibid*, pp.390-395.

<sup>40</sup> *Ibid*, p.381.

<sup>41</sup> *Ibid*, pp.416-420.

<sup>42</sup> *Ibid*, p.391.

<sup>43</sup> *Ibid*, p.399.

written literature as 'being at the artistic pinnacle'<sup>44</sup> is opposed to the less exalted orality of many Indigenous peoples' folklore. This concept of creativity, intertwined with the individualistic approach, contrasts with another concept of creativity encompassed by Indigenous peoples' cultures which is considered to be inferior.

### **1.2.2.1. The Copyright Cup: Half Empty rather than Half Full and Indigenous Creativity**

The thesis will adopt the U.S. copyright as model of analysis to illustrate and discuss the copyright regime. This has a specific reason: due to the hegemonic power of this country, many conventions including those concerning intellectual property are intended to suit this economic power and are at least to some extent modelled on domestic U.S. law. The discussion of international IP agreements will follow at a later stage in the thesis, but what should be underlined now is that the idea of copyright as a natural right attributed to the author to reward him/her for his own creation derives from the historical-philosophical roots of the doctrine of copyright. At present, there is still little room for respect and protection of creation that does not share the idea of creativity based upon economic values and designed to foster future innovation. According to the U.S. Constitution, the purpose of copyright is 'to provide an economic incentive for creative activity',<sup>45</sup> and because of this 'American legislators have never displayed serious concern for the creators of works.'<sup>46</sup> Clearly, this also depends on the political approach followed and how copyright is addressed. Goldstein, while asking if copyright is nowadays an author's or a user's right,<sup>47</sup> defines 'copyright optimists' as those in favour of the first hypothesis - these are the ones who sustain that copyright is rooted in natural justice - Goldstein refers as them as those who view copyright's cup of entitlement always as half full, only waiting to be filled still further.<sup>48</sup> 'Copyright pessimists', who view the copyright cup as half empty, believe that copyright owners should get some reward but under the condition that this fosters future innovation.<sup>49</sup> Breyer<sup>50</sup> attacked both the natural

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<sup>44</sup> R. Finnegan 'The Poetic of the Everyday: Their Pursuit in an African Village and an English Town', [1994] 3 *Folklore* 105 p.5.

<sup>45</sup> U.S. Constitution under Article 1 §8(8). See H. Porsdam 'From *Pax Americana* to *Lex Americana*: American Legal and Cultural Hegemony', in *New Directions in Copyright Law* (ed. Fiona Macmillan Edward Elgar 2005) p.104.

<sup>46</sup> R.M. Hilty 'Copyright in a digital Dilemma', Max Planck Research, Science magazine of the Max Planck Society 3 [2003], 52 reported by H. Porsdam 'From *Pax Americana* to *Lex Americana*: American Legal and Cultural Hegemony', in *New Directions in Copyright Law* (ed. Fiona Macmillan, Edward Elgar 2005) p.104 under note 28.

<sup>47</sup> P. Goldstein *Copyright's Highway* (Stanford University Press 2003) p.29.

<sup>48</sup> *Ibid*, p.11

<sup>49</sup> *Ibid*.

right rationale for copyright and in particular the theory of incentive on the grounds that few authors contribute with their work to the society. It is not only a matter to draw a line on liability, it is re-discussing the basis of copyright. This relates to the duality between author and owner: while applying the concept of ownership to, for example, the identity of Indigenous peoples the matter becomes more complicated. As suggested by Strathern:<sup>51</sup>

‘Ownership re-embeds ideas and products in an organism (whether a corporation, culture or individual author). Ownership gathers things momentarily to a point by locating them in the owner, halting endless dissemination, affecting an identity’. It is the exclusive characteristic of ownership that makes the outside world rotate around an individual concept; ownership is not about relations, it is not at all a concept created to foster people’s identity or cultural dissemination. It has a final determinate end, which consists in accomplishing the wishes of a single entity.

The introduction of moral rights into some common law countries (e.g. UK) did not help to balance the right. It is difficult to incorporate rights that belong to a foreign tradition. Cornish and Llewelyn affirm that authors’ rights and copyright differ in ‘basic assumptions’.<sup>52</sup> Overall, it is a problem of rights’ accommodation and concepts’ adaptability. The translation of moral rights into the UK Copyright Act was accepted with difficulty<sup>53</sup> and was highly criticized by Ginsburg who defined the UK implementation of moral rights as ‘cynical, or at least half-hearted.’<sup>54</sup>

In continental Europe these rights are granted *ultra vires* ( at least in French doctrine while the German approach diverges from this by limiting the duration of an economic right). In the UK, moral rights of attribution and integrity only subsist as long as copyright subsists, while the right to object to false attribution lasts only twenty years after the death of the author.<sup>55</sup>

Later on in the thesis moral rights will be discussed in detail but it is sufficient now only to introduce the difference between common and civil law countries and

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<sup>50</sup> S. Breyer ‘The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs’ [1970] 84 (2) Harvard Law Review pp.281–355.

<sup>51</sup> M. Strathern *Property. Substance and Effect* (Athlone Press 1999) p.177.

<sup>52</sup> W.R. Cornish and M. Llewelyn *Intellectual Property*, Fifth Ed (Sweet & Maxwell 2003) p.453.

<sup>53</sup> I. Stamatoudi ‘Moral Rights of Author in England: the missing emphasis on the role of the creator’ [1997] 4 IPQ 478.

<sup>54</sup> J. Ginsburg ‘Moral Rights in a Common Law System’ [1990] 4 Ent LR pp.121, 129 reported in Bently and Sherman, *op.cit.supra* p.232 and note 10.

<sup>55</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) p.189.

the different in application. In looking at the UK for example, one can say that historically these rights do not belong to this country's tradition.

Copyright in the UK started with the Stationer's Agreement, which protected not the author's right but the entrepreneur's. History entails changes as well as the necessity of complying with internationally recognised agreements<sup>56</sup> and recently the EC laws forced the British legislator to take into consideration some new rights belonging to other traditions, such as author's moral rights.<sup>57</sup>

This is why when moral rights were incorporated into the 1988 Act they were pushed through with limitations, conditions and exceptions.<sup>58</sup> The right of integrity under British law, for example, is infringed only when certain, clearly defined conditions are met;<sup>59</sup> the corrective measure introduced under British law is that moral rights can be waived. This means that moral rights can be agreed contractually. However, it seems difficult or even unreasonable that they can be waived in favour of the author. It is worth asking how much freedom is left to the author to regulate his/her moral rights and what kind of control is juridically available to defend the weaker party, the author, from suffering the domination of the stronger contractual partner, the entrepreneur. The gap between American copyright and continental copyright with its *droit moral* that sanctifies the author's personality is even wider.<sup>60</sup>

What can we learn from this? Has society any influence in shaping rules? And what happens to the individual creator and creative communities? The answer that society does have influence is also supported by eminent anthropologists. 'The difficulty of identifying cultural ownership must include the fact that cultures are not discrete bodies; it is "societies" that set up boundaries'.<sup>61</sup> The Western societies, when introducing copyright, have certainly created an automatic right to accomplish

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<sup>56</sup> To comply with article 6bis of the Berne Convention. See L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) p.232.

<sup>57</sup> W.R. Cornish and M. Llewlyn *Intellectual Property*, Fifth Ed (Sweet & Maxwell 2003) p.454 'Anglo-American tradition has manifested a certain scepticism towards the claim that authors deserve special protection in law'.

<sup>58</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004).pp.231-232 enumerates all those continental moral rights not contemplated by the British 1988 Act, 'right to publish or divulge a work, right to correct the work, to object to the alteration or destruction of the original of the work, to object of excessive criticism of the work, and to withdraw a work from circulation on that an author is not any longer happy with it'.

<sup>59</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) pp.247-49 reporting and commenting Section 80 and 87 of the 1988 Act.

<sup>60</sup> P. Goldstein *Copyright's Highway* (Stanford University Press 2003) p.136.

<sup>61</sup> M. Strathern *Property. Substance and Effect* (Athlone Press 1999) p.168



their own needs. As noted: 'Copyright and patents are premised on the specific need to give a secondary social effect to "works" and "technologies" which are already in themselves a social effect'.<sup>62</sup>

Copyright might well have a fundamental root in natural law theory, to reward the author for his own creation. However, even though this natural right is today missing, that right can only be perceived as 'natural' in Western society where it fulfils the specific needs of that society. Indigenous creations are also naturally constituted and the effect of innovation has a primary scope, that is, the immediate social effect that often does not imply any secondary effect.

Indigenous peoples' knowledge brings in a new concept of innovation - the multiple/communal creativity. Indigenous creativity is about social relationships and it is constituted of many other interactive elements. Yet, it is not the object of the creation that really matters, but the actors involved in the creative process. It is the capacity of producing an object that is important, not the creation of the object in itself.<sup>63</sup> Thus, the discourse shifts from ownership and property of the Western copyright to relations and subjects of those relations.<sup>64</sup>

Anthropologists recall the need to take into consideration 'other registers'<sup>65</sup> outside the reward granted to the creation of works by copyright. There are other models of creativity which are not based on proprietary logics. Often the Western system of appropriation and of dealing with appropriation is foreign to most Indigenous works. It is fundamental to recognise these diverse modes of feeling about innovation 'in order to facilitate [...] more productive and equitable flows'.<sup>66</sup>

Copyright is an individualistic right in terms of authorship and the ultimate protection is for the one that fixes the work. For Indigenous works 'the notion of individual authorship, and specifically intellectual work in the attribution of

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<sup>62</sup> *Ibid*, p185.

<sup>63</sup> E. Hirsh 'The Coercive Strategies of Aesthetics: Reflections on Wealth, Ritual and Landscape in Melanesia' [1995] 38 *Social Analysis* pp.64-75.

<sup>64</sup> See J. Leach 'Owning Creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea' *Journal of Material Culture* 2003 pp.125-26. The same author states that 'creativity is about certain forms of social relations' in J. Leach Issue Paper (Traditional Knowledge): 'Understanding Modes of Creativity in relation to Ownership Regimes and Cultural Flows'. SSRC Workshop on Intellectual Property, Markets, and Cultural Flows. New York 24/5 October 2003, available at <http://programs.ssrc.org/ccit/publications/james.leach.rtf>

<sup>65</sup> See J. Leach 'Owning creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea' [2003] *Journal of Material Culture* pp.137-139.

<sup>66</sup> See e.g. J. Leach Issue Paper (Traditional Knowledge): 'Understanding modes of creativity in relation to ownership regimes and cultural flows'. SSRC Workshop on Intellectual Property, Markets, and Cultural Flows. New York 24/5 October 2003, available at <http://programs.ssrc.org/ccit/publications/james.leach.rtf>.

copyright, would perform a similar distortion in the realm of 'kastom' - meaning, 'customs' in the language adopted by Aboriginals of the Rai Coast of Papua New Guinea - traditions, the way of setting up relations'.<sup>67</sup>

The difficulty is, then, to recognise that the moment of creation, innovation can also be communal, 'multiple' and not just 'collective'. Yet, the value of the work is not, for Indigenous peoples, in its possession but rather in the relationships established during the creation process.<sup>68</sup> Hence, Indigenous knowledge attributes importance to transactions and, in that respect, to communal creation. The regime of collective legal rights is diverse in its attribution. Employees in the U.S., for example, involved in 'work for hire' doctrine or in film contributions. The existing concept of co-authorship is still attached to each single co-author, 'each with a distinct and particularised identity',<sup>69</sup> and has nothing to share with Indigenous collectivity or communality. The problem lies in the difficulty of attributing precise boundaries to a folkloric work since Indigenous collectivities cannot be clearly distinguished from single or collective works and often have complicated property regimes.<sup>70</sup>

Indigenous cultures harbour multiple systems of ownership.<sup>71</sup> The engagement of more people in creative work is for the purpose of achieving special relationships. At the same time, they also engage in other types of work in order to build different social structures. While analysing the methods of creation of the Reite people in Papua New Guinea, Leach asserts that 'Indigenous knowledge is new in terms of creativity: rather than concentrating on a 'fetishized object' [they are] concerned with creativity itself'.<sup>72</sup> The Indigenous innovation helps people to be in relation to each other. As noted:

'Expectations of multiple ownership, based on customary principles of shared interest in the products of people's labour, conflict with a convenient reading of

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<sup>67</sup> *Ibid.*

<sup>68</sup> J. Leach 'Owning creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea' [2003] *Journal of Material Culture* p.138.

<sup>69</sup> A.R. Riley in 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' [2000] 18 *Cardozo Arts & Ent. L.J.* p.203.

<sup>70</sup> J. Leach Issue Paper (Traditional Knowledge): 'Understanding Modes of Creativity in relation to Ownership Regimes and Cultural Flows'. SSRC Workshop on Intellectual Property, Markets, and Cultural Flows. New York 24/5 October 2003, available at <http://programs.ssrc.org/ccit/publications/james.leach.rtf>.

<sup>71</sup> *Ibid.*

<sup>72</sup> J. Leach 'Owning creativity: Cultural Property and the Efficacy of Custom on the Rai Coast of Papua New Guinea' [2003] *Journal of Material Culture* p.139.

capitalism on the part of the organisers of business. This reading places all power and resources in the hands of the capitalist - they are his 'property'.<sup>73</sup> Even though this statement might sound extreme, it turns rationale for copyright upside down; creativity and value can be generated through relations among individuals belonging to the same clan/kinship or other clans/tribes. Importance is given to the preservation of social conditions, not to the form of expression but to its relations with other objects and the surrounding world.

Stathern recalls Brush<sup>74</sup> in defining the 'group identity problem' as one of the four obstacles to implementing intellectual property rights for Indigenous knowledge'. She adds: 'We should be thinking not of individual rights against collective rights, but of different kinds of collectives'.<sup>75</sup>

This is why in the thesis the terminology 'communal' or 'multiple' will be adopted in relation to indigenous people to contrast with collective rights, which are attributed, for example, to the work for hire doctrine. Even so, the distinction between collective and communal is not always a clear-cut and might, at times, even be confusing.

In fact, the nascent UN Human Rights Council has passed a Resolution<sup>76</sup> for the recognition of specific rights for Indigenous peoples and refers to indigenous knowledge in terms of collective rights. Its Preamble reads: '...Indigenous peoples possess collective rights which are indispensable for their existence, well being and integral development as peoples'.

Even in this Resolution copyright confers a monopoly of exploitation on the person originating the work. This is difficult to reconcile because of the diffuse nature of folklore whose rights belong to the Indigenous communities. Moreover, in this case, copyright is also characterised by the limitation in time of the author's exclusive right to exploit the work in question. Most expressions of folklore go back much further in time than the term of legal protection granted by the Berne Convention or most national and supranational laws. The introduction of a

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<sup>73</sup> *Ibid.*

<sup>74</sup> S.B. Brush 'Indigenous Knowledge of Biological Resources and Intellectual Property Rights: The Role of Anthropology' [Sep. 1993] 95 (3) *American Anthropologist*, New Series, pp. 663-64.

<sup>75</sup> *Ibid.*, p.169.

<sup>76</sup> The UN Human Rights Council was established on 2006 to substitute the UN High Commission on Human Rights. Immediately after that, it was adopted the Draft United Nations Declaration on the rights of Indigenous peoples and it was drafted the resolution according to paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994. Following this draft resolution during the course of 11 sessions (1995-2006) it was produced the final document which turns to be resolution 2006/2 of 29 June 2006. This was recommended to the General Assembly for adoption.

community ownership is a great challenge and it can either stretch the limits of copyright or lead to the creation of a new *sui generis* right.

### 1.3. Copyright: An Economic Appraisal

Cornish observed that: 'No serious student of intellectual property law can today afford to ignore the economic arguments for and against the maintenance of these rights'.<sup>77</sup> Copyright has a complex history and changes have occurred during centuries to shape the nature of the actual right or, at least, how this right is commonly perceived. New values, such as 'unfair competition' or the 'misappropriation of trade values', are now orientating the judiciary in disciplining the way copyright is exercised.<sup>78</sup> The exigencies of supporting the commercial value of copyright, which started to grow as a philosophical approach to copyright during the nineteenth century centrally to protect the interests of book publishers,<sup>79</sup> has moved away from theories of copyright as a natural right or as a reward to the work of the author. Yet this approach has been strengthened even more with effects of globalisation and developments at the international level. Strong economies, especially the United States (U.S.), have dictated the way copyright is disciplined internationally. The adoption of international agreements (for example, TRIPs) placed copyright in the trade dimension. To understand the actual copyright regime this thesis will, therefore, analyse it from an economic perspective. The non-incorporation in the TRIPs Agreement of Article 6 of the Berne Convention, which concerns moral rights, can also explain this choice. Today the framework on which copyright is constructed is basically an economic one. Copyright, which by nature is not only a proprietary right according to natural law theory, is now becoming a bundle of rights, designed to contribute to the development of the market economy. What was originally born as an author's right has been transformed into a market's right by TRIPs.

Two leading studies on the economic analysis of copyright sustain that copyright makes economic sense.<sup>80</sup> The European legislator seems to embrace this assumption and expands the functions of copyright from being useful to art and science also to include promoting competition in goods within the internal market for the benefit of authors, owners and users of works. If we take into consideration

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<sup>77</sup> W.R. Cornish and D. Llewellyn, *Intellectual Property*, Fifth Ed (Sweet & Maxwell 2003) p.35.

<sup>78</sup> *Ibid*, pp.5,13.

<sup>79</sup> *Ibid*, p.348.

<sup>80</sup> R. Cooter and T. Ulen *Law and Economics* (Glenview 1988), and W.M. Landes and R.A. Posner, 'An Economic Analysis of Copyright Law' [1989] 18 *Journal of Legal Studies* 325.

that European copyright industries contribute around € 1.2 trillion to the economy of the European Union and employ 5.2 million persons,<sup>81</sup> it is difficult to deny the economic value of investing and promoting copyright and intellectual property culture.

As will be argued under the chapter relating to the United States copyright model, a justification for copyright is found to be in fostering creativity for the benefit of the market. However, this is a view which does not correspond historically to the origins of copyright, especially for those countries with a civil law tradition where the right is recognised as *droit d'auteur* (i.e. France), concerned centrally with the natural rights of the author. The natural rights theorists of traditional civil law, place the focus on the individual author rather than on the benefit of the market. According to the natural theory, copyright should be granted to the author because it is the expression of his/her personality.<sup>82</sup> Another natural right theory explains copyright as the right of an author to be rewarded for his/her labour or creation. The labour theory, as originally formulated by John Locke,<sup>83</sup> is a combination of two concepts. According to the first concept everyone has a property right in the labour of his own body and brain. The second concept is based on the idea that applying human labour to an unbound object gives the applier of that labour a property right over the previously unbound object.

It is clear why the foundation of any copyright law is the authorship of a book, painting or sculpture. However, the labour theory may not go any further than the issue of the allocation of the (copy-)right. It does not necessarily explain why intellectual property rights need to be created and why such intellectual property rights are necessarily an 'object' for the purposes of the labour theory. Therefore, this theory can only be applicable to material objects and property, leaving unprotected all other works including folkloric ones.<sup>84</sup>

A natural right approach to copyright was not completely integrated in the legislation of those countries of common law tradition.<sup>85</sup> In the British tradition, for

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<sup>81</sup> These numbers are based on Data from the Year 2000. See R.G. Picard, T.E. Toivonen, M. Grönlund *The Contribution of Copyright and Related Rights to the European Economy* October 2003 p.2, 120. Report prepared for European Commission Directorate General -Internal Market. Available at [http://ec.europa.eu/internal\\_market/copyright/docs/studies/etd2002b53001e34\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/etd2002b53001e34_en.pdf).

<sup>82</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) p.33.

<sup>83</sup> J. Locke, 'The Second Treatise' Section 27 in *Two Treatises of Government* edited by P. Laslett, (Cambridge University Press 1970).

<sup>84</sup> A. Narciso 'IMS Health or the Question Whether Intellectual Property Still Deserves a Specific Approach in a Free Market Economy' [2003] 4 IPQ p.445-446.

<sup>85</sup> J. Boyle, 'The Second Enclosure Movement and the Construction of the Public Domain' (2003) 33 *Law & Contemp. Probs.* at 53-58. In this article the author reports the opinions expressed by

example, the 'sketchy and ambiguous Statute of Anne'<sup>86</sup> allowed two very dissimilar court interpretations. In *Millar v. Taylor*<sup>87</sup> a strong common-law right of authorship<sup>88</sup> and unlimited time of protection was affirmed, while in *Donaldson v. Becket*<sup>89</sup> the court argued against the creation of a perpetual copyright. The fear of granting a perpetual monopoly is behind this latter court decision rather than a concern to provide a service to society through the public domain.<sup>90</sup>

What is emphasised in natural theory is the individual author and not the benefits to society which, in exchange for granting a monopolistic right, are rewarded through a more innovative economy and richer market. This reward must not be confused with the theory that copyright is granted to reward an author for his/her efforts in the creation of a work that is beneficial to the public. This can be defined as the 'repayment of a debt' approach, which raises many questions beginning with the specific circumstances in which this award should be given and finding the right social and economic reward, balancing the impact of the work on the society.<sup>91</sup>

The other element in the justification of the existence of copyright is given by the economic analysis of copyright, which states reasons for the existence of monopolistic rights in a free market economy.<sup>92</sup> Free market and competition should be considered as incentives and be balanced by what seem to be barriers but are only mechanisms created to regulate how goods or services should be consumed. The creation of property rights satisfies the need of economic expectations. This

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President Jefferson in the Letter from Thomas Jefferson to Isaac PcPherson (Aug. 13, 1813), in 13 *The Writings of Thomas Jefferson* 326, 333-34 (Albert Ellery Bergh ed., 1907) and T.B. Macaulay, A speech delivered in the House of Commons (Feb. 5, 1841), in VIII *The Life and Works of Lord Macaulay* 201 (London, Longmans, Greens, and Co. 1897).

<sup>86</sup> M. Rose 'Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain'[Winter/Spring 2003] 66 *Law & Contemp. Probs.* p.85.

<sup>87</sup> 98 Eng. Rep.201, 252 (K.B. 1769).

<sup>88</sup> Although Justice Joseph Yates opposed its dissenting vote affirming that the act of publication was mainly a gift to the public and could not be measure in terms of property. Reported in M. Rose 'Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain'[Winter/Spring 2003] 66 *Law & Contemp. Probs.* p.79.

<sup>89</sup> 1 Eng. Rep.837 (H.L. 1774)

<sup>90</sup> M. Rose 'Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain'[Winter/Spring 2003] 66 *Law & Contemp. Probs.* pp.77 and 79.

<sup>91</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) pp.34-35.

<sup>92</sup> *Ibid*, p.447.

consequently helps the internal market<sup>93</sup> because innovation and creation constitute the final level of the economic theory of intellectual property rights.<sup>94</sup>

From an economic point of view it is also important to keep in mind that such access is non-exhaustive in nature<sup>95</sup> and that access and incentives must be balanced together.<sup>96</sup> Copyright is the tool that is created to remedy this imbalance and to give authors a right in their expression of ideas, hence securing appropriate profits deriving from the act of creation of them.<sup>97</sup>

Copyright will lead to the creation of an immaterial property right in the expression of an idea by the author, a right which the author can use to secure appropriate profit from his or her act of creation on the market.<sup>98</sup> This will enhance creation by providing an incentive and therefore competition on the innovation and creation level will be stimulated.<sup>99</sup>

Since there are insufficient data regarding the economic appraisal and the market value of Indigenous works on copyright and intellectual property industries, there is a tendency to ignore that folklore produces economic value. In particular, it should be underlined that in many sectors of the market, folkloric works do add economic value. Films, music and festivals, tourist attractions and artefacts represent

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<sup>93</sup> See TITLE III of the Constitution Internal Policies and Action Chapter I Internal Market section 1 Establishment and Functioning of the Internal Market Article III-130 C 310/58 EN Official Journal of the European Union 16.12.2004. In particular para 3 where is affirmed that regulations in the internal market should be focused in 'balanced progress in all the sectors concerned'.

<sup>94</sup> J. Tunney, 'EU, I.P., Indigenous People and the Digital Age: Intersecting Circles', E.I.P.R., 1998 at 335 ss. On the issue related to innovation see in general R C Dreyfuss, D L Zimmerman and H First (eds) *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press 2001).

<sup>95</sup> H. Spector 'An Outline of a Theory Justifying Intellectual and Industrial Property Rights' [1989] 8 E.I.P.R. p.272-273.

<sup>96</sup> W.M. Landes and R.A. Posner 'An Economic Analysis of Copyright Law' [1989] 18 Journal of Legal Studies p.325-326.

<sup>97</sup> '...Copyright is essential: it encourages creativity; offers the most appropriate form of payment; helps manage usage; is in the interest of individual authors and the general public; maintains a balance between various interests and offers a useful social compromise' Pierre Sirenelli 'European Copyright: Roadblock or Opportunity?' at [http://europa.eu.int/comm/internal\\_market/copyright/docs/conference/2004-dublin/miyet\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/conference/2004-dublin/miyet_en.pdf). On the issue of inappropriability see Arrow, "Economic Welfare and the Allocation of Resources for Invention" in National Bureau for Economic Research, *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton University Press 1962) pp.609-625 and J Lunn and V Ten Haken 'The Roles of Property Rights and Market Power in Appropriating Innovative Output' [1985] Journal of Legal Studies p.425.

<sup>98</sup> K. Maskus, *Intellectual Property Rights in the Global Economy* (Institute for International Economics 2000) pp.28-32.

<sup>99</sup> M. Lehmann, 'Property and Intellectual Property—Property Rights as Restrictions on Competition in Furtherance of Competition' [1989] I.I.C. 1 p.12.

only some categories of works which recognise the economic importance of folklore and its contribution to industry.<sup>100</sup> Because folklore is economically important not just for the copyright and IPRs industries but also for others, such as tourism,<sup>101</sup> a combination of legislative and non legislative elements should be adopted.<sup>102</sup> Indeed, folklore should be valued also in economic terms and means should be available to enable folklore producing communities to capture this value. Developed countries should not underestimate the economic impact of folkloric works in the internal economy of a country.

#### **1.4. The National and Supranational/Continental Dimension**

In adopting a comparative and a thematically-based approach, it will be possible to draw a picture of the different models of protection in place. The positive and negative impact of the protection achieved at a national (judicial or legislative) or at a supranational/continental level will be assessed. The comparative approach will help to understand if common elements exist among countries not only in terms of legislative means to be adopted but also in terms of problems and rights to protect. The thematically based approach will help to raise some important issues such as the role of customary laws in relation to national copyright legislation, the topic of public domain and fair use in relation to folklore, etc. The supranational/continental approach (Africa: African Union and Europe: European Union) will also be included in this section. The choice of these two supranational/continental models, which is justified further on in this paragraph, is dictated by the clear political and symbolic nature played by the role of law harmonisation by the African and even more the EU legislator. The supranational approach constitutes a *trait d'union* between national and international protection. It should somehow represent the medium term of protection. Yet, it is almost impossible for folklore to be protected internationally without having first been through the process of adaptation of mechanisms at local, national and supranational level. It is through consolidated practices and common views that conventions can be established. Thus, importance will be given to the necessity of exploring multilateral solutions, which could grant protection to Indigenous peoples' rights in a globalised world by taking into consideration the transnational nature of folklore.

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<sup>100</sup> S. Palethorpe and S. Verhulst *International Protection of Expressions of Folklore under Intellectual Property Law* University of Oxford, Report on the International Protection of Expressions of Folklore under Intellectual Property Law October 2000 p.24.

<sup>101</sup> *Ibid*, pp.23-26.

<sup>102</sup> *Ibid*, p.25.



One of the many difficulties in ratifying continental/supranational agreements is due to the ambiguity as to what should remain as the exclusive competence of the member states and which subjects should be administrated at the supranational level.<sup>103</sup>

The main risk in applying multi level protection is that it can create problems between central *versus* peripheral powers in establishing best practise.<sup>104</sup> The thesis will discuss this issue in reverse order, that is, first asking which system could guarantee the best outcomes and then enquiring whether multiple options could work complementarily. The success and accountability of a 'proto-state entity'<sup>105</sup> in determining the meaning and definition of a policy to be adopted in relation to the protection of traditional communities' folklore will consist in the majority of inter-related aspects which can synthesize protection at a national level.

These solutions should be viewed in comparison to bilateral solutions provided at a national or territorial level. Additionally, the diverse problems or positive results achieved in terms of protection should be tackled both at the national and supranational level. Australia and the United States have been selected according to the themes they raise; Australia for the influence of the courts and the United States for its strong copyright tradition, that is, the constitutionalised copyright principle, which makes it difficult to reform it at the level of fundamental principles. Hence, in the U.S., copyright is constitutionally guaranteed and it is said to be in a 'definitional balance' with the freedom of speech and the press as 'copyrights are categorically immune from challenges under the First Amendment.'<sup>106</sup> Although the U.S. only joined the Berne Convention in the late 1980s, they have tried to strengthen their copyright doctrine and impose their copyright model on other countries. They therefore have a strong copyright tradition not only internally, but also in terms of external expansion.

The continental organisations (African Union and European Union), although bearing dissimilar powers and traditional mandates, have been chosen on the basis of principles, values, and the support towards a sustainable development policy based

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<sup>103</sup> A. Tomkins 'The Draft Constitution of the European Union' [2003] P.L. p.576. See also the article of Valéry Giscard d'Estaing, on *Le Monde* 15 June 2005. The former French President and architect of the EU Constitutional Draft sustains that important matters as governance and administrative powers cannot be understood by the majority of the European citizens.

<sup>104</sup> J. Shaw 'Europe Constitutional Future', [2005] P.L. p.134.

<sup>105</sup> Expression used by C. Harlow, Carol Harlow *Accountability in the European Union* (Sweet & Maxwell 2004). See also R.A.W. Rhodes *Understanding Governance: Policy Networks, Governance, Reflexivity, and Accountability* (Open University Press 1997).

<sup>106</sup> Definition provided by Judge Ginsburg in *Eldred v. Reno*, 239 F.2d 372 (D.C. Cir. 2001) p.375.

on the belief to mainstream cultural diversity. Even though this discourse seems to be pushed a bit to the limits taking into consideration the many civil wars, internal struggles and corrupt leaders which ravaged the African continent, it is useful to assess how on paper and in principle progress has been made to protect and safeguard national cultures or, within nations, small identified groups, that is, Indigenous peoples. This common policy is set in order to achieve a better cohesion of groups' citizens, no matter what their ethnic background. Thus, continental organisations subsume national identities to unify values in the name of citizens. The political approach of these two supranational bodies will be analysed in the light of values and principles applied to foster cultural diversity. This analysis will, thus, determine whether a supranational political body does grant protection to folkloric expressions while adapting its values to different forms of creation.

In Chapter 4, the approach of the Australian courts to assessing the necessity of a new system of protection of folklore will be discussed. The reforms of the Australian Copyright Act will be also analysed with particular reference to moral rights issues. The recent Australian legislative response - the drafting of a legislation on communal moral rights - was influenced by the courts' decision, especially after *Milpurrurru*,<sup>107</sup> which recognised that folklore should be protected against unauthorised use and also that a folklore artefact can be an original. Nevertheless, the problem of how to attribute the rights of the community will be further examined. The Australian copyright authorities state that a change is occurring in a document edited by the Australian Copyright Council titled 'Indigenous Art and Copyright, 1999'.

This document suggests that a legislative response for the protection of folklore should be oriented towards a new right or better a new *sui generis* right, following the suggestion of the courts. The reason for choosing Australia as a country-model was dictated by the fact that there were some important court cases where the possibilities and limitations of copyright law applied to folkloric works and expressions were tested. The Australian courts' decisions created that political climate to accelerate a legislative response for the implementation of a new *sui generis* system.

Chapter 3 discusses the copyright statutory and constitutional provisions, the intertwining of folklore with customary practises and copyright exceptions - i.e. public domain and fair dealing/use. The United States was chosen as a model

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<sup>107</sup> *Milpurrurru & Ors v Indofurn Pty Ltd & Ors*, (1995) AIPC 91-116. *John Bulun Bulun & Anor v. R & t Textiles Pty. Ltd.* (1082 FCA (1998)). See also C. Heath and A. Kamperman Sanders (eds), *New Frontiers of Intellectual Property Law*, Hart Oxford, 2005 p.44.

country to show how the copyright doctrine shaped in this country is creating international problems of adaptability especially in the developing world. With the application of the U.S. copyright doctrine, which is spreading due to the application of TRIPs, it is difficult for any legislator to cope with the introduction of new rights, i.e. the Indigenous peoples' rights to their TCEs. The United States have become a global trend setter through the implementation of TRIPs and it is now difficult to reshape a balance of interests in the international arena though that is desirable. Therefore, in the United States, where copyright is forged more by an economic approach, the rigidity of copyright categories and parameters appear even more evident.<sup>108</sup> As will be discussed further on, copyright in the U.S. becomes a constitutionally guaranteed right for the sake of competition rules and what was may be born as an author's right becomes a 'fixer's right'.<sup>109</sup>

A response by the U.S. legislator to the issue of Indian TCEs was addressed through the Lanham Act, and the Indian Arts and Craft Act, (IACA) 1990, but this Act was insufficient to grant protection to the folklore of the Native American tribes. However, problems will still persist with regard to how national and customary laws could agree on mutual values and how to enforce court decisions. Moreover, U.S. foreign policy and attitudes toward international treaty negotiations regarding intellectual property rights have always been markedly protectionist, and little room has been left to accommodate those rights characterised by a moral nature (i.e. Indigenous peoples' communal rights) rather than by an economic one. The U.S. approach is to guarantee a 'limited monopoly'<sup>110</sup> to the author (i.e. the fixer) in order to provide incentives for the progress of science and investment.

In the chapter dealing with the U.S. approach, the issue of works that have fallen into the public domain will be raised again in relation to folklore, as well as the exceptions provided through fair use / fair dealing, which allow reproduction of the work for the purposes of 'criticism, comment, news reporting, teaching, scholarship'.<sup>111</sup>

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<sup>108</sup> For an historical background of the intellectual property regime in the U.S. see Edward C. Walterscheid 'To Promote the Progress of Science and Useful Arts: The Background and Origin of the Intellectual Property Clause of the U.S. Constitution' [1994] 2 J.Intell. Prop .L 34-35. See also R.P. Merges 'The Economic Impact of Intellectual Property Rights: An Overview and Guide' [1995] 19 J. Cultural Econ., 103, 110-11 and R.P. Merges and G.H. Reynolds 'The Proper Scope of the Copyright and Patent Power' [Winter 2000] 37 Har. J. Legis. 45.

<sup>109</sup> J. Waldron 'From Authors to Copiers: Individual Rights and Social Values in Intellectual Property Law'[1993] 68 Chicago-Kent L Rev 841.

<sup>110</sup> S. W. Halpern, C.A. Nard, K. L. Port *Fundamental of the United States Intellectual Property: Copyright, Patent and Trademark* chapter 1,1 (Kluwer Law International 1999).

<sup>111</sup> United States Copyright Act, Section 107.

Under the Chapter titled 'Traditional Cultural Expressions: The Supranational Approach', the European and African Unions, two continental political units will be examined in order to identify a solution between a strict national and a broad international approach.

As already stated, the phenomenon of folklore is localised not in a particular country but in a continental area (that is, folklore of nomadic populations tends to cover more than one country). While looking at the African continent, the Bangui Agreement and the Cultural Charter for Africa promoted by the AU will be examined in search of routes of protection for folkloric works.

In the European Union, the values that are underpinned by the draft EU Constitutional Treaty have a moral and symbolic impact upon EU internal and foreign policy. In both cases, particular emphasis will be paid to the principles in place at the EU level that can accommodate, jointly with a well structured development and cultural policies those important rights of traditional/Indigenous communities. The pros and cons of a supranational protection will also be underlined in this chapter.

Part III will touch upon the issue of whether an international convention for the protection of folklore might be foreseen since the impact of trade on development issues and in the intellectual property arena, casts folklore into an international, global environment.

In Chapter 6, the historical international backgrounds of the protection of folklore (WIPO 'Model Provisions 1982' and UNESCO 'Recommendations 1989') will be provided; The WIPO Model Provisions 1982 and the UNESCO Recommendations 1989 will be confronted, showing the developments in the debate at an international level and the evolution of granting legal protection to folklore. The 2003 UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage, and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions will also be examined further on in the thesis. The latter Convention is especially imbued with political meaning.

Protection of culture is not about the protection of cultural homogeneity and cultures are not made of 'static' elements but of dynamic and evolving attributes bearing ideas and traditions. The world has to acknowledge a shift in the meaning of culture to take into account new ways of perceiving creations. Intangible cultures have the same value as material cultures: the process of creation itself is valuable and not solely the object of that creation.

This international historical background shall also be used for the further analysis of the present international situation and approach, in the final part of the

thesis. The protection of folklore is a current debate in the international agenda especially at the UN level. Some UN agencies (WIPO and UNESCO) are working on a possible convention on the protection of folklore.

Part III will assess new developments in the international debate. It will provide a tentative statement of how things are progressing in this area especially from an intellectual property point of view. This part will ascertain in particular the work on a possible international convention that would provide for folklore a uniform international approach, recognition and indeed world-wide protection. This international dimension will take the analysis of part II a step further: from a national and supranational approach to a new comprehensive model which ideally could be able to overcome national and continental boundaries. It could also result in a better workable instrument in the new globalised setting of intellectual property rules.<sup>112</sup>

However, though this international dimension for the protection of folklore is desirable, it cannot be forgotten that the process that leads to an international convention is a long one. Moreover, there is no certainty that this convention will be signed and ratified by all the participant countries or political units. In fact, some countries could decide to adhere to the draft only partially, perhaps with the exclusion of some important provisions (if that is provided by the convention which is not always possible, depending upon the excluded provisions). In case an international convention will be drafted but not signed by the vast majority of the countries, the words of that document will remain a 'dead letter' and the protection of folklore will be even more difficult to achieve.

In light of the above, the work currently undertaken by WIPO attains great significance, which has established an *Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore*, which meets periodically. During these meetings experts, academics, NGO and government representatives discuss, among other things, the topic of folklore. These meetings help a lot in building a larger political consent on the topic of the protection of folklore. Since the success of an international agreement is based on a fragile political consensus,<sup>113</sup> Part III will explore the present political situation regarding this issue.

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<sup>112</sup> S.K. Sell *Private Power, Public Law, The Globalisation of Intellectual Property Rights* (Cambridge University Press 2003).

<sup>113</sup> J Ginsburg 'Achieving Balance in International Copyright Law' a Review of J.Reinbothe's and .S. Von Lewinski's *The WIPO Treaties 1996: Commentary and Legal Analysis* [2003] 2Columbia Journal of Law & the Arts p.201.

## Chapter 2

### The Protection of Folklore at the International Level: Defining Indigenous Peoples' Traditional Cultural Expressions

#### 2.1. Introduction

To understand what folklore is and why there is a large debate around its legal protection, it is fundamental to first agree upon a definition.<sup>114</sup> Moreover, it is essential to provide answers with regard to the notion of Indigenous peoples and those communities to whom works of folklore belong. The need for a legal protection of folklore became apparent in the early 1980s. At that time some important points were first considered, such as diverse definitions and concepts of folklore in order to develop national and international strategies for its protection. This chapter will focus on defining the origins of folklore, its etymological and anthropological background to underpin the object of protection.

#### 2.2. The Definition of Folklore

As mentioned above, it is essential to define the meaning of the concept and the ambit of copyright. The etymological origin of the name is linked to the concept of 'Volk', i.e. people, inhabitants of a country, and 'Lore', i.e. tradition, local popular knowledge.<sup>115</sup> According to William Tamayo Ángeles, it can be sustained that folklore is always an expression coming from the people having an empirical, oral, functional, traditional, anonymous and localised social character.<sup>116</sup> Therefore, folklore can be defined in many ways using different terms, but still folklore will keep its unity as an expression of a common human belief and heritage. According to Salah Abada of UNESCO's copyright division:

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<sup>114</sup> G. Dutfield *Protecting Traditional Knowledge and Folklore* June 2003, Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1 Published by International Centre for Trade and Sustainable Development (ICTSD) p.20.

<sup>115</sup> V. Thatcher and A. McQueen *The New Webster Encyclopaedic Dictionary of the English Language* (Consolidated Book Publishers Chicago 1980) p.339.

<sup>116</sup> W.T. Ángeles *Folclore: Derecho a la Cultura Propia, Guia para el Docente* (1997 Instituto Interamericano de Derechos Humanos, San José de Costa Rica) p.15.

'Folklore is the common and traditional popular culture of a group of human beings which their history has developed in function of the needs of the group's life and to whom the group links strongly its origins of its life in common.'<sup>117</sup>

It is, on the other hand, not easy to give an exact definition of folklore or to move from the etymological roots of the concept of folklore to a precise definition. In this respect it will be sufficient to refer to Dorson, who is often seen as the father of folklore studies in the United States and who began his book 'Folklore and Folk life' by stating '[t]his volume is intended to answer the questions "what is folklore?" and "what does a folklorist do?"'<sup>118</sup>

Similarly, Oring does not get any further than the statement: 'Although the word "folklore" is regularly employed in our everyday speech, its precise definition presents a problem. The term is clearly a compound made up of "folk", implying a group of people, who have something called "lore" [...]'. The eminent folklorist Dundes attempts to simplify the issue for the introductory student: "'Folk" can refer to any group of people, whatsoever who share at least one common factor'.<sup>119</sup>

### 2.2.1. Folklore and Traditional Knowledge

One of the key points of this research is to clarify what folklore means not only in terms of judicial protection but also in terms of definition since different terminology has been used through the years to define one sole concept. The definition of folklore is important if we want to find a proper protection for folklore in its integrity with all its separate aspects and appearances. Without a proper definition, there cannot be a full protection since many aspects of folklore might be left unprotected. Since folklore is just one concept but at the same time comprises various things, we will try to focus our discussion first on the definition and later to find out if the existing protection is still valid and whether a new concept needs to be developed.

There are authors which give preference to using the phrase 'Indigenous knowledge and heritage'<sup>120</sup> in the belief that folklore is a concept rooted in the so-called 'Eurocentric culture.'<sup>121</sup> However, throughout this work folklore will be used

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<sup>117</sup> S. Abada 'La Recommendation UNESCO de 1989 et les Perspectives de la Protection Internationale du Folklore' UNESCO-WIPO Forum Phuket (1997).

<sup>118</sup> R.M. Dorson *Folklore and Folklife*, University of Chicago Press (1972), at para ix.

<sup>119</sup> E. Oring 'On the Concepts of Folklore', in Elliott Oring (ed), *Folk Groups and Folklore Genres*, (Utah State University Press 1986) pp.1-22.

<sup>120</sup> M. Batiste and J. Youngblood Henderson *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing Ltd, Saskatoon 2000).

<sup>121</sup> See *op. cit. supra* p.36.

as common terminology since it is a term which can contain several connotations as mentioned above. Blakeney analyses folklore and traditional knowledge critically and he affirms that 'the expression *traditional knowledge* accommodates the concerns of those observers who criticise the narrowness of *folklore*. However, it significantly changes the context. Folklore was typically discussed in copyright or copyright-plus terms. Traditional knowledge incorporates knowledge of plants and animals, for example in medical treatment or as food'.<sup>122</sup>

Traditional knowledge appears, therefore, to be restricted to ethnobiological knowledge. Hence, folklore is about culture in its broadest sense subsuming traditional knowledge under its umbrella. Using the wording traditional knowledge, therefore, would shift the discourse from a copyright environment to those of patent law and biodiversity rights.<sup>123</sup>

However, at times the expression 'traditional knowledge' will also be employed with a broad meaning, always intended as knowledge of a specific group.<sup>124</sup> At present, various definitions are used in different documents and in different contexts, but the use of the term 'folklore' still appears in most international sources.<sup>125</sup> New terminology, appearing recently in many documents and academic papers, is that of traditional cultural expressions (TCEs), preferred and in use by WIPO, which tries to respond to concerns of 'observers who criticize the narrowness of folklore not only for its Western born concept but also because some attributed only a partial protection to indigenous expressions while excluding traditional knowledge. However, to reiterate what is stated above, folklore in its broadest meaning comprehends also protection for all kind of expressions and, therefore, it will be used interchangeably with TCEs and folkloric expressions, meaning the whole indigenous knowledge (IK).

In an attempt to summarise and to come up with a working definition, the following description is based on the concepts used by WIPO and UNESCO<sup>126</sup> and

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<sup>122</sup> M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' [1995] 9 EIPR 442.

<sup>123</sup> *Ibid.*

<sup>124</sup> G. Dutfield *Protecting Traditional Knowledge and Folklore* Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1 (June 2003 ICTSD) at para. 2, where the author singles out that 'the two are not obviously different in meaning'.

<sup>125</sup> See as an example overall The Model Provisions for National Laws on the Protection of Folklore against Illicit Exploitation and other Prejudicial Actions' WIPO-UNESCO 1985. On this topic see also Part 4. 'What language to use from Protecting Indigenous Intellectual Property', Australia Copyright Council, September 1998.

<sup>126</sup> The Model Provisions for National Laws on the Protection of Folklore against Illicit Exploitation and other Prejudicial Actions' WIPO-UNESCO 1985.



that could, for the time being, serve as a good starting point, while keeping in mind the definition used above.

Folklore, or either 'expressions of folklore' or traditional cultural expressions (TCEs), are essential expressions of traditional cultural creativity.<sup>127</sup> These are important for preserving and promoting cultural identity, diversity and human creativity. They can be categorised in the following four groups :

- verbal expressions (such as stories, poetry and languages);
- musical expressions (such as songs and music);
- expressions by action (such as dances, plays and rituals); and
- tangible expressions (such as paintings, sculptures, pottery, woodwork, jewellery, basket weaving, textiles, carpets, musical instruments, and handicrafts).<sup>128</sup>

These groups represent the main works of folklore to be protected, and will be discussed under chapter six concerned with the international dimension of folklore.

It is also significant that works of the authors are also conceived as property of developed countries<sup>129</sup> whereas folklore is seen as a means of 'self-expression and social identity' of countries in development.<sup>130</sup> This is a questionable approach.

Is it true that developed countries have almost lost connection with the origins of their folklore? Is it that these origins are so remote that it is hard to identify their source? In this case the links between the original tradition and the final product based on it are weak and pass via many intermediary stages. The recent work is based on a previous tradition, or on some of its components. On the other hand, in developing countries there is almost always a direct link between every new work and folklore. Each of these works links up directly with the source. Additionally, in the industrialized countries, expressions of folklore are generally considered to belong to the public domain. 'This approach explains why, at least so far,

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<sup>127</sup> M. Blakeney 'Intellectual Property in the Dreamtime - Protecting the Cultural Creativity of Indigenous Peoples' [1999] WP 11/99 OIPRC Electronic Journal of Intellectual Property Rights

<sup>128</sup> UNESCO-WIPO Model Provisions that do not provide a definition but only an enumeration of the typical expressions of folklore. See also W.T. Ángeles *Folclore: Derecho a la Cultura Propia, Guía para el Docente* (1997 Instituto Interamericano de Derechos Humanos, San José de Costa Rica) p.15. Cfr. with the definition provided by G. Dutfield *Protecting Traditional Knowledge and Folklore Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1* (June 2003 ICTSD) under note 19 p.20.

<sup>129</sup> M. Ficsor 'Attempt to provide international protection for folklore by intellectual property rights' in Unesco-WIPO Forum Phuket, 1997.

<sup>130</sup> Definition provided by M. Ficsor, see *supra* p.215.

industrialized countries generally did not establish a legal protection of the manifold national or other community interest related to utilization of folklore'.<sup>131</sup>

But it is possible to take this analysis a bit further: maybe the distinction should be made not between developing and developed countries but between developing and developed communities. If we look at Australia we cannot say that this is a case of a developing country, but if we look specifically at its Aboriginal community we observe that some of their rights have been recognised only in recent years. Therefore, we can conclude that the Aboriginal community in Australia is in a developing phase as far as recognition of its rights and the affirmation of its status, is concerned.

Nevertheless, traditional and Indigenous communities are very few in developed countries - in Europe, for instance. However, this does not mean that folklore does not exist here and that Europeans do not deserve a protection for their traditional cultural works at a national and community level.

### **2.3. Folklore as Community Heritage and the Object Of Protection**

Folklore, as an expression coming from the community, is always mutable and dynamic; it is an expression in which traditional culture meets the development of the environment.<sup>132</sup> It is this dynamic character which adds to the definition of folklore, being a kind of popular heritage which is not affected by time<sup>133</sup> and becomes the patrimony of the culture to which it belongs. Therefore, folklore can be a huge container of several expressions, such as music, dances, novels and medicines through the use of traditional natural herbal remedies. In this sense, traditional knowledge can be understood as a sub-set of folklore.

The identification of the objects of folklore given in the UNESCO "Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions", formulated in 1983 but never formally adopted. Its Article 1 reads:

For the purposes of this Treaty, 'expressions of folklore' mean productions consisting of characteristic elements of the traditional artistic heritage developed and

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<sup>131</sup> H. Olsson 'Economic Exploitation of Expressions of Folklore: the European Experience', in Unesco-WIPO Forum Phuket, 1997 p.177.

<sup>132</sup> W.T. Angeles *op cit. supra* p.16. See also the Document Submitted by the European Community and its Member States to the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/3/11/Annex), WIPO, Geneva (2002), pp.1-2.

<sup>133</sup> W.T. Angeles, *op. cit. supra* p.16.

maintained by a community, or by individuals reflecting the traditional artistic expectations of their community, in particular,

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

Obviously, protected expressions must not include those that harm human dignity or contravene the most basic human rights principles. Therefore, female genital mutilations (FGMs) or child marriages, for example, as expressions of tribal and group traditions cannot find any protection under folklore, which is synonymous with positive culture.

In 2001, UNESCO came back to the definition of folklore addressing it in the context of cultural diversity.<sup>134</sup> UNESCO understood that the protection of Indigenous peoples and traditional cultures cannot put aside the recognition that their different values must be allowed to coexist. Under Chapter 3 Article 4 paragraph 3, cultural expressions are meant as all 'those expressions that result from the creativity of individuals, groups and societies, and that have cultural content'. Paragraph 4 clarifies that all the activities that 'embody or convey cultural expressions' may not necessarily bring in commercial value, are imbued with a 'specific attribute, use and purpose'. The notion of folklore/TCEs in this Convention is restricted to emphasise the necessity of protection. The Convention answers the question of why folklore should be protected, but in seeking this answer it also provides a simple but effective definition. There is no description of categories of protection but only the statement that TCEs should have a 'cultural content' and that they can be generated by groups. Hence, the answer to the question why they should be protected can be found in the Preamble to the Convention: cultural expressions and anything which convey or

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<sup>134</sup> UNESCO *Universal Declaration of Cultural Diversity* was adopted by the 31st Session of UNESCO General Conference held in Paris on 2nd November 2001. (Text available at <http://www.unesco.org>).

embody TCEs foster cultural diversity which is the cradle of all existing and recognised human rights and a platform for sustainable development. This is re-echoed in Resolution 20006/2 of the Human Rights Council where it recommends the adoption of the UN Declaration of the Rights of Indigenous Peoples. The Preamble affirms that: 'Recognizing also that respect for Indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment'.

While this UNESCO definition reports the kernel for a protection for folklore and an essential basic definition, the multiple forms of TCEs should also be examined. TCEs, in fact, consist in a bundle of diverse aspects, which should be known and addressed. Folklore is also defined by Tamayo as a new antiquity,<sup>135</sup> a result of an evolutionary process which bring together the collective values of the people, i.e. language, dance, rites, paintings, traditions, religion etc.<sup>136</sup>

Folklore is therefore a creative expression that does not belong to one particular person. It is, moreover, the creative expression of a collectiveness that has been built over centuries. Despite the fact that folklore is the proper expression of collectiveness, it is very difficult to see that a folkloric expression of the Aboriginal people in Australia will correspond to one of the Maori in New Zealand.<sup>137</sup> The form taken by any such expression may differ enormously depending on the people and the country concerned.

This could lead to the conclusion that, in light of the diversity of expressions, the protection of folklore can only be dealt with at a national level, assuming that folklore needs protection against misappropriation. However, folklore should be protected not only at a national level with specific laws related to the community involved but also at an international level where a specific protection can be established. This is necessary in the light of the international use and exploitation of certain expressions of folklore which has been growing in importance over the last decades. Such exploitation can also lead to or involve forms of misappropriation at international level.

This raises the question of whether or not folklore should be protected. Any intellectual property right is created either to encourage the introduction of new technology, intellectual and artistic creations, or to protect existing valuable

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<sup>135</sup> W.T. Angeles, *op. cit. supra* p.16.

<sup>136</sup> M. Batiste and J. Youngblood Henderson *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing Ltd Saskatoon 2000), chapter 4.

<sup>137</sup> M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' [1995] 9 EIPR 442.

contributions against unfair use. The latter example is particularly relevant given this subject. In fact, copyright provides full protection to the major contributor and it authorises the author to protect his/her work against anyone who wants to misuse or misappropriate it.<sup>138</sup>

In the case of folklore, the real contributor of the valuable creation is often hidden behind the cover of the protection that folklore gives. The economic benefit on the contrary is often reserved for someone else. For example, in developing countries, indigenous people's knowledge is often taken away from them without payment. Moreover, many Western countries are capable of elaborating on that knowledge, creating new works on the basis of the folklore and then establishing their copyright on the final work. These countries often put enormous efforts into developing the original sources and materials, but we must understand that the native communities neither see the recognition of any of their rights, nor do they receive any compensation for their contributions.

### **2.3.1. Who is the Owner of Folklore? Traditional Communities, Indigenous and Tribal Groups**

One of the most frequently asked questions is: who owns the folkloric works? As has been insightfully observed,<sup>139</sup> one can adopt a restrictive or a flexible, open approach although none of these views is completely correct and a balanced approach is required between each of them.

The more comprehensive views conceive of folklore as the property of all societies, developed or developing. Moreover, folklore is still present in industrialised society and it cannot be identified with a particular community. In this sense, folklore can be considered as being the common heritage of humankind.

However, folklore is becoming increasingly less easy to be identified and analysed in Western and industrialised society. The reasons are due to the unification of cultural processes and commodification operated at the national level, which will be described later on in this chapter. Folklore is present where communities have been separated from the common culture of these countries. These communities are either Indigenous, tribal or simply pre-existing ones that have fought fiercely, and still do, against the predominant cultural environment of the country in which they live, or they belong to a specific local area and are culturally marginalised.

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<sup>138</sup> H. Olsson 'Economic Exploitation of Expressions of Folklore: the European Experience', in Unesco-WIPO Forum Phuket, 1997 p.177.

<sup>139</sup> G. Dutfield *Protecting Traditional Knowledge and Folklore Intellectual Property Rights and Sustainable Development* UNCTAD Issue Paper No. 1 (June 2003 ICTSD) p.29.

In this thesis, the expression 'Indigenous peoples' will be employed, referring to the subjects of the protection. At times, the expressions 'traditional' and 'tribal communities' will also be used with specific reference to the common needs of Indigenous and non-Indigenous peoples, namely the right to protect their folklore. It is essential to highlight that only those communities which had developed special rules to regulate their own customs and traditions, and share 'social, cultural and economic conditions', are in need of protection.<sup>140</sup> In addition, a more restrictive approach can be added to this notion which focuses on traditional communities in terms of Indigenous peoples with a colonised connection only.<sup>141</sup> The terminology 'Indigenous knowledge' identifies only groups belonging to pre-colonised ancestors.<sup>142</sup> The use of this expression as well as the derivative, meaning 'Indigenous peoples' with a broader scope, is tentative. However, as stated in the first chapter, there is this possibility of unification in common priorities and needs. Indigenous peoples, tribal groups and local communities, with a special link to the territory that they have inhabited throughout many generations, share the specific goal of protecting and preserving their unique cultures and traditions. These communities, of course, should have special customs, customary laws and also ethnic and linguistic differences, which require cultural preservation, and should not be kept separate from the overall cultural policy of a country. Thus, not everything can be defined as folklore and not everyone can be the subject of protection. In terms of needs, the terminology should be unified. Traditional people, in the meaning just now explained, should be the beneficiaries of protection.<sup>143</sup>

Before addressing what is intended as folklore and identifying differences from the copyright instrument, it is crucial to consider that two main exigencies must be taken into account while investigating any possible protection. Any legal means

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<sup>140</sup> See definition of tribal peoples elaborated by the ILO Convention 169. This Convention will be further discussed under the chapter dedicated to the national dimension of folklore.

<sup>141</sup> The Working Document of the Commission of May 1998 adopts the Josè Martinez Cobo's definition. The UN Special Rapporteur affirms that: 'Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the society now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems' (UN Doc.No.E/CN.4/Sub.2/1986/87). The EU Commission document can be found at [http://europa.eu.int/comm/external\\_relations/human\\_rights/ip/work\\_doc98.pdf](http://europa.eu.int/comm/external_relations/human_rights/ip/work_doc98.pdf).

<sup>142</sup> G. Dutfield *Protecting Traditional Knowledge and Folklore* Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1 (June 2003 ICTSD) p.20.

<sup>143</sup> M. Blakeney 'Hans Christian Andersen and the Protection of Traditional Cultural Expressions' in *Copyright and other Fairy Tales: Hans Christian Andersen and the Commodification of Creativity* (ed. Helle Porsdan, Edward Elgar 2006).

should challenge both the rights of the Indigenous peoples to get benefit from their works of folklore as well as excluding others from getting access to these works, especially when they have a clear symbolic nature.<sup>144</sup>

## 2.4. Is Folklore the Expression of a New Right?

### 2.4.1. Folklore and Oral Transmission

When discussing folklore it should not be forgotten that most of its expressions are oral, even though they can also be shown in an aural way, as well as tacitly and visually. According to this concept, we refer to what constitutes 'culture' for all those communities where folklore is produced. It has been asserted<sup>145</sup> that folklore depends very much on the oral traditions through which the cultural identities of those people, originally living somewhere, are defined.

This also means that a proper protection of folklore has to take into account the 'intangible expressions such as stories, songs, dances.'<sup>146</sup> The concept of a culture on the basis of folklore is not considered 'normal'. We need to look at folklore from a different perspective and take into account that copyright does not normally protect intangible works.<sup>147</sup> As Amani states:

'Protection of oral culture can be effected by either conferring rights that are *sui generis* to collective communal works, or by expanding the paradigm of copyright to include protection for intangible expression. One must first recognise that the oral nature of cultural works does not deprive them of expression'.<sup>148</sup>

However, this factor makes it difficult to define the framework and specific rules for protection.<sup>149</sup>

One of the major challenges when studying folklore is the fact that many of its expressions are oral and therefore not fixed.<sup>150</sup> This is also causing great problems in

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<sup>144</sup> With regard to the right of exclusion in intellectual property see in general K.M. Lemley, 'I'll Make Him an Offer He Can't Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes' [2004] 37 Akron L. Rev. 287.

<sup>145</sup> C. Calliston 'Appropriation of Aboriginal Oral Traditions' (1995) 29 U.B.C. Law Review p.165.

<sup>146</sup> *Ibid*, p.165.

<sup>147</sup> R.P. Merges 'Intellectual Property Rights, Input Markets, and the Value of Intangible Assets' <http://www.law.berkeley.edu/institutes/bclt/pubs/merges/iprights.pdf>

<sup>148</sup> B. Amani 'Fact, Fiction or Folklore...' [1999] 13 I.P.J. p.284.

<sup>149</sup> For details on the relationship between oral expression and literacy see L. Honko 'Copyright and Folklore' paper presented at the National Seminar on Copyright Law and Matters, Mangalore University, Mangalore, Karnataka, India, on February 9, 2001 which can be found at <http://www.folklorefellows.org/netw/ffn21/copyright.html>.

applying the traditional concept of copyright, which in many Western jurisdictions requires fixation of the work to obtain protection. Without fixation, there will be no protection in many copyright systems.<sup>151</sup>

This has led to aspects of folklore being identified as 'artistic' rather than original. This terminology has been employed in a negative way, implying that indigenous cultural expressions were of lower quality when compared to traditional Western fine arts that are often written and fixed.<sup>152</sup>

With the first UNESCO recommendations on folklore adopted in 1989,<sup>153</sup> everything that is shared by a community and has a cultural and social identity is seen as folklore and, therefore, as an instrument of protection. The high content in terms of artistic value introduced by the Western culture is removed. Copyright can still play a role, but its limitations have clearly been acknowledged.<sup>154</sup>

The overall picture that emerges is one of fragmentation and limited protection, which only covers certain aspects of folklore. The main form of protection must apparently come from copyright or, in case it is not sufficient, from a new separate intellectual property instrument.<sup>155</sup>

Nevertheless, this solution is not straightforward. Indeed, numerous problems appear when one tries to protect expressions of folklore via copyright or a new separate intellectual property instrument.

When analysing copyright, it is clear that many characteristics that apply to intellectual property in general, conflict with the very nature of folklore. These elements can be summarised by the following:

- Copyright is based on the identification of the person originating the work, i.e. the individual author that needs to be identified for issues such as

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<sup>150</sup> See B. Amani 'Fact, Fiction of Folklore? It's Time the Tale Were Told ...: Parts 1 and 2', 13 [1999] IPJ pp.237-273 and 275-303.

<sup>151</sup> For a UK example see Section 3(2) Copyright, Designs and Patents Act 1988 and see L. Bently and B. Sherman, *Intellectual Property Law* (Oxford University Press 2004) pp.86-87.

<sup>152</sup> See the Report of the committee of experts before the adoption of the Recommendations on the Safeguarding of Traditional Culture and Folklore adopted by UNESCO in 1989, where the word artistic disappears and replaced by the introduction of new concepts such as tradition, cultural community.

<sup>153</sup> UNESCO *Recommendation on the Safeguarding of Traditional Culture and Folklore* (1989).

<sup>154</sup> See e.g. A. O. Amegatcher 'Protection of Folklore by Copyright – a contradiction in terms', [2002] Unesco Bulletin, Vol. XXXVI, No.2, 33 and B. Amani, 'Fact, Fiction of Folklore? It's Time the Tale Were Told ...: Parts 1 and 2', 13 [1999] IPJ pp.237-273 and 275-303.

<sup>155</sup> See B. Amani *op. cit. supra* p.253.



qualification<sup>156</sup>, whereas folklore is distinguished by the anonymity of the originator of the tradition or by the fact that the tradition is the attribute of a community.<sup>157</sup>

- Copyright confers a monopoly of exploitation on the person originating the work, i.e. copyright is an exclusive right of which the author is the first owner.<sup>158</sup> This is difficult to reconcile with the diffuse nature of folklore within an indeterminate population.<sup>159</sup>

- Copyright protects only works that are original.<sup>160</sup> Originality stays not in the idea but in its expression. The difficulty with folkloric works is to protect the cumulative creation meaning the final work based on pre-existing/old works. Often folkloric works do not meet the originality requirement imposed by copyright because they are deemed as 'derivative', and therefore unworthy of protection. However, 'creation does not occur in a vacuum'<sup>161</sup> and the concept of innovation should be expanded even though the 'bar of creativity' should be kept high to avoid protection for works of very low threshold.<sup>162</sup>

- Finally, copyright is characterised by the limitation in time of the author's exclusive right to exploit the work in question. Most expressions of folklore undoubtedly go back much further in time than the term of legal protection granted by the Berne Convention<sup>163</sup> or most national or regional laws.

The Berne Convention<sup>164</sup> can be seen to offer some protection to expressions of folklore in an indirect way. Some of the Berne application to TCEs is related to unpublished works whose author is unknown but who can be presumed to be a national of a signatory state.<sup>165</sup> The provision related to the time frame to protect anonymous works can also find application to folkloric works; protection starts from

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<sup>156</sup> See e.g. see L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) pp.114,122.

<sup>157</sup> See the paragraph 2.3.1.

<sup>158</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) p.122 and section 11 CDPA 1988.

<sup>159</sup> See the concepts of people and traditional knowledge of that people as explained above.

<sup>160</sup> L. Bently and B. Sherman *op. cit. supra* pp.88-98 and section 1 CDPA 1988. See also Copinger and Skone on Copyright 14<sup>th</sup> (ed) (1999 Sweet and Maxwell 105-170).

<sup>161</sup> G. Dutfield and U. Suthersanen 'The Innovation Dilemma: Intellectual Property and the historical legacy of Cumulative Creativity' [2004] 4 IPQ p.382.

<sup>162</sup> *Ibid* at p.379.

<sup>163</sup> L. Bently and B. Sherman 'Great Britain and the Signing of the Berne Convention in 1886' [2001] 48 J. Copyright Soc'y USA pp.311-340.

<sup>164</sup> The Berne Convention 1886.

<sup>165</sup> Article15(4) Berne Convention.

the time that the work is made available to the public.<sup>166</sup> Signatory countries are not required to protect anonymous works as it is reasonable to presume that the author has been dead for fifty years, which is certainly the case in expressions of folklore. This creates a significant problem in relation to the protection of TCEs.

Despite all this, the international community and the national legislators realised immediately that copyright was the instrument to grant protection for folkloric expressions, when compared to other options open to them. However, there is a problem in the application of copyright *tout court*, especially taking into account the current definitions and principles of copyright we use at the moment. It has been remarked critically that the actual structure of copyright belongs to the old European concept of property, which is not applicable to cultures and regions very distant from this concept and from this culture.<sup>167</sup>

It is important to bear in mind that folklore reflects a 'people's culture'<sup>168</sup> and that folklore usually belongs to communities, making of it their common heritage and their life structure. Copyright, as interpreted by the Western society, is seen as a property right intended only to protect the right of the author of the creation. The creator is seen more as a unit than as an individual or a corporate entity.<sup>169</sup> How can this concept of property be applied to an entire community sharing the creation of the work? Indigenous peoples, for example, do not distinguish solitary labour in their creations. As explained above, what really matters is the relationship during the creation process. The objects created (e.g. songs, artifacts etc) often represent a regenerative process for establishing human relations: '...The Western concept of copyright requires an identifiable author, [but] the notion of authorship does not exist in this way in many different other societies...'<sup>170</sup> Therefore, it is difficult to create a parallel between this type of ownership and one acquired through, for

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<sup>166</sup> *Supra* Article 7.

<sup>167</sup> 'A song, for example, is not a "commodity", a "good", or a form of "property", but one of the manifestations of an ancient and continuing relationship between a people and their territory. Because it is an expression of a continuing relationship between the particular people and their territory, moreover, it is inconceivable that a song, or any other element of the people's collective identity, could be alienated permanently or completely' E.I. Daes *Study on the Protection of the cultural and Intellectual Property rights of Indigenous Peoples*. E/CN.4/Sub. 21/1993/28. Sub-Commission on Prevention of Discrimination and Protection of Minorities, Commission on Human Rights, UNESCO. Working Group on Indigenous populations.

<sup>168</sup> D. Dambiec 'Protecting Indigenous Peoples' Folklore through Copyright Law' available at <http://www.tO.or.at/scl/scl19/msg02312.html>.

<sup>169</sup> See M. Batiste and J. Youngblood Henderson *Protecting Indigenous Knowledge and Heritage* (Purich Publishing Ltd 2000) p.146 and the whole of chapter 9.

<sup>170</sup> J. Smiers 'Creative Improper Property: Copyright and the Non-Western World' *New Directions in Copyright Law* (ed.) Fiona Macmillan (Edward Elgar 2005) p.8.

example, film works. In the latter case, each author is vested with the credits of the collective effort - the film. Contributions and collaboration, although they might be unified in terms of ownership (for instance, the directors and/or the authors of scripts etc.), are kept separated in the inputs provided through the creative efforts.<sup>171</sup> Therefore, copyright is an individualistic right that includes the sharing of and the participation in the protection of more individuals involved in the creation of the final work.

Moreover, the traditional concept of copyright covers the work of the author as an original creation. The resulting concept of culture is distorted by this definition. Collective efforts and works are underestimated and certain techniques are overvalued since they are the result of the authors' own intellectual involvement in a traditional copyright sense. This approach is culturally determined and, therefore, the creative endeavour is limited to a restricted number of artistic works.<sup>172</sup> The requirements, concepts and characteristics of cultural creation become limited.<sup>173</sup>

How can a Maori painting be protected by traditional copyright, then, if the use of the techniques and the final effect are not those of a work by a modern artist - such as, for example, Damien Hirst, who does not execute the work himself, but relies on employees who produce it under his direction? Can it still be considered a creative and original work of art? Is there enough originality, especially in the sense of the author's own individual creation, as is the case in quite a number of countries? Maybe one ought to distinguish between the underlying common approach and the traditional images used, on the one hand, and the input of the individual artist, on the other hand. As Ficsor puts it:

'The personality of the artist is often an important factor in folklore expressions, and individual contributions to the development and maintenance of such expressions may represent a creative source of enrichment of inherited folklore if they are recognized and adopted by the community as expressions corresponding to its traditional artistic expectations'.<sup>174</sup> In relation to the latter, copyright in a traditional sense can make a more valuable contribution to its protection.

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<sup>171</sup> This much depends on the movie agreement. See L. Bently and B. Sherman *op.cit.supra* pp.157-158. While outside the area of the present thesis, it would be an interesting study to explore how far in reality the individuals contributors have their interests adequately protected under copyright law.

<sup>172</sup> *Ibid* p.147.

<sup>173</sup> See T. Eagleton *The Ideology of the Aesthetic* (Basil Blackwell Oxford 1990).

<sup>174</sup> M. Ficsor 'Attempt to Provide International Protection for Folklore by Intellectual Property Rights' in Unesco-WIPO Forum Phuket, 1997, p.218.

Nevertheless, the same Maori painting could hold great cultural and spiritual significance to the community in which it was created.<sup>175</sup> Artefacts belonging to Indigenous cultures cannot, then, be protected by the actual definition of copyright for the simple reason that they might not meet the high standard of originality present in the actual definition of copyright in many laws.<sup>176</sup>

#### 2.4.2. 'Public Domain': a Threat or a Help for TCEs?

Before setting out the connection between folklore and the 'public domain',<sup>177</sup> it is important first to explore the origins and necessity of the public domain. This term was introduced by the French tradition, *domaine public*. Boyle points out the paradox that this wording was put in by the natural law theory, *droit d'auteur*.<sup>178</sup> However, although this seems to represent a contradiction, the public domain was actually responding to the necessity of a collective benefit. This was an ideal mechanism born in a democratic environment where rights were recognised for the benefit of the whole community.

In a common law country, the 'public domain' is, in a way, also responding to a social goal. However, the existence of the public domain can be justified to stem a monopolistic right that is no longer adding value to the society. Whilst copyright and IPRs, in general, are conceived in a 'proprietary rights culture', the public domain responds to a different logic. The increase of technology and the introduction of new rights have compromised the 'fundamental principle of balance between the public domain and the realm of property'.<sup>179</sup> 'Public domain' has also a constitutional dimension.<sup>180</sup> Copyright should grant a monopolistic right to the author only in exchange for some benefit towards society. During the 1960s and 1970s, the increase

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<sup>175</sup> Compare the following quote from Dambiec, 'Protecting Indigenous peoples' Folklore through Copyright Law' at <http://www.tO.or.at/scl/scl19/msg02312.html> : ' ...as part of this global pseudo-culture and psycho-economic exploitation many works of folklore are seen as collector's items and as forms of material wealth rather than expressions of Indigenous people's aspirations and communal heritage.'

<sup>176</sup> See E.M. Sherwood 'The Redundancy of Originality' [1995] Entertainment L Rev 94.

<sup>177</sup> J. Litman 'The Public Domain', quoted in Bragdon, Susan, 'Rights and Responsibilities for Plant Genetic Resources: Understanding the role of the public domain and private rights in the production of public goods', draft paper delivered at First Meeting of the Advisory Committee or IPGRI project on the public domain, Portland Oregon, November 14-15, 2002. See also R.J.Coombe 'Fear, Hope, and Longing for the Future of Authorship and a Revitalised Public Domain in Global Regimes of Intellectual Property' [2003] 52 DePaul L. Rev. 1171.

<sup>178</sup> J. Boyle 'The Second Enclosure Movement and the Construction of the Public Domain' [2003] 66 Law & Contemp.Probls under note 99.

<sup>179</sup> J. Boyle ' A Manifesto on WIPO and the Future of Intellectual Property' available at [www.law.duke.edu/journals/dltr/articles/2004dltr0009.html](http://www.law.duke.edu/journals/dltr/articles/2004dltr0009.html)

<sup>180</sup> See the U.S. case *Graham v John Deree Co.*, 383 U.S. 1, 5-6 (1996).

in intellectual works covered by copyright protection faced many arguments of 'public domain' versus copyright.<sup>181</sup> Knowledgeable experts on IPRs announced the opening of a public domain conference, stating that: '...the last fifteen years has seen a rise in both the importance and the strength of intellectual property rights in the world economy...'<sup>182</sup>

This theory can be more strongly enforced. In the eyes of a few, copyright becomes a 'system designed to feed the public domain', created for the future promotion of free access.<sup>183</sup> Alternative views are expressed by those who recognise the importance of both copyright and the public domain as both having a public function '[c]opyright and the public domain were born together'.<sup>184</sup> This is the correct approach, although the subject of public domain is quite complex and may require a case by case analysis according to the type of works to be accessed. What is really needed is a regulation for access to the works in the public domain.

The public domain has often been given a negative meaning: information whose use is freely accessible and permissible to anyone.<sup>185</sup> The public domain has been defined as a sort of 'public property', a concept introduced by Roman law with the intent of meaning *res nullius*, *res communes*, *res publicae*, *res universitatis* and *res divini iuris*.<sup>186</sup> It is also acknowledged that the social dimension of public domain is undoubtedly real. Circulation of works raises options for new creativity and, ultimately, further works. However, this public utility should not necessarily be seen under the umbrella of 'property', even though it is for public use. Public domain incorporates many concepts that are outside a property dimension and also distant from copyright rules.<sup>187</sup> Arguably liability categories have been thought to be applicable to the nature of this institution. If this is the case, how can access to works in the public domain be regulated? Is any limit imposed on the exercise of this right to access? Boyle answers that if property is a complex right that includes notions

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<sup>181</sup> J. Boyle 'The Second Enclosure Movement and the Construction of the Public Domain' [2003] 66 Law & Contemp.Probs p.60.

<sup>182</sup> Announcement at the Conference on Public Domain at <http://www.law.duke.edu/pd/realcast.htm>. The Conference was organised by Reichman, Lange and Boyle.

<sup>183</sup> J. Boyle 'The Second Enclosure Movement and the Construction of the Public Domain' [2003] 66 Law & Contemp.Probs p.61 recalling S.W.Lindberg and L.R. Patterson's *The Nature of Copyright : a Law of Users' Rights* (University of Georgia Press 1991).

<sup>184</sup> M. Rose 'Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain'[Winter/Spring 2003] 66 Law & Contemp. Probs. 75.

<sup>185</sup> See J. Litman 'The Public Domain' (1990) 39 Emorory L.J. 965, 1010-11.

<sup>186</sup> J. Boyle 'Foreward: the Opposite of Property?' [Winter/Spring 2003] 66 Law & Contemp. Probs. p 7.

<sup>187</sup> L. Lessig 'The Architecture of Innovation' [2002] 51 DUKE L.J. 1783-1788.

such as human rights and individual liberty and there are many 'properties', then so are there many 'public domains'.<sup>188</sup>

It is difficult, therefore, to provide a uniform and absolute definition of the public domain. It all depends on the way access to works in the public domain is regulated. A regulation is proven to be necessary by the fact that many folkloric works already in the public domain are manipulated. Hence, public domain can also respond to a proprietary logic if access to free works is regulated, not for the benefit of the society but for the benefit of private companies who are in charge of regulating access to them. The selection of works and how they should ultimately fall into the public domain is not enough. If this theory is translated to TCEs, the necessity for regulating access to these works becomes more urgent. Answers should then be provided as to whom requires access and their reasons for it. An ideal model should take into account what information Indigenous peoples are allowed to share and under which conditions.<sup>189</sup> It is necessary to select and identify specific parameters to grant or deny access to TCEs; proprietary rights behind IP cannot be the only decisive factor. Other rules can also be applied, such as those of liability regimes or those relating to human rights categories.<sup>190</sup>

The main problem arises in works of folklore already in the public domain and all those Indigenous peoples' works that cannot be covered by copyright protection.<sup>191</sup> During one of the WIPO (World Intellectual Property Organization) IGC Sessions on Traditional Knowledge and Folklore, the necessity of clarifying the ambit and the role both of the public domain and folklore was addressed. However, the group of experts failed to find any solution. The approach adopted was to combine the two matters (i.e. folklore and the public domain) and to allow folklore to benefit from the certainty of public domain intellectual property rules.<sup>192</sup> It is difficult to mediate between those who would like to expand intellectual property rules and those who would prefer to expand the public domain. Nevertheless, the

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<sup>188</sup> J. Boyle 'The Second Enclosure Movement and the Construction of the Public Domain' [2003] 66 *Law & Contemp.Probls* pp.68-69.

<sup>189</sup> D.E. Long 'Traditional Knowledge and the Fight for the Public Domain' [2006] 5 *J. Marshall Rev Intell. Prop.L.* p.326.

<sup>190</sup> This has been called as the 'balance access paradigm'. See D.E. Long, 'Traditional Knowledge and the Fight for the Public Domain' [2006] 5 *J. Marshall Rev Intell. Prop. L.* p.328.

<sup>191</sup> 'The term 'public domain' is used here in the sense in which the term is employed incopyright contexts and refers to elements of IP that are ineligible for private ownership and the contents of which are available for use by any member of the public. This conventional notion of the public domain contains: (i) IP for which the term of protection has run out; (ii) IP that has been forfeited or unclaimed'. See WIPO documents WIPO/GRTKF/IC/5/3, paras. 22-33 and 39 WIPO/GRTKF/IC/6/3 p.27.

<sup>192</sup> Annex to WIPO/GRTKF/IC/6/3 at point 18.

problem should be rephrased: how to balance the rights of the user of works in the public domain with those of the Indigenous communities? The problem arises particularly when works of Indigenous peoples are already in the public domain, mostly as a result of expropriation of Indigenous peoples' cultures. A possible solution could be that TCEs already in the public domain be recovered from the public domain, but further questions remain unanswered. It would, of course, be difficult to set criteria that establish protection for works already in the public domain, but it might be possible to regulate access to those works by imposing certain access fees and collecting shared revenues. This is particularly required when the user has access to TCEs in the public domain for economic purposes. These fees could then contribute to the benefit of the community to whom the TCEs originally belonged. However, it still questionable whether a preventive measure could avoid works of folklore falling into the public domain.

Many holders of traditional knowledge and Indigenous communities find the existence of their works in the public domain a threat because it allows the expropriation of a culture that has been handed down by generations that have preserved and protected it. In fact, the existence of Indigenous works in the public domain is threatened centrally for two main reasons. First, there are works of folklore to which copyright protection was once granted but after the passage of several years are no longer eligible for copyright protection according to the copyright laws. Second, all other works of folklore that are judged to be lacking in originality and fixation are not covered by copyright protection at all.<sup>193</sup> In both cases, works are vulnerable to misappropriation for commercial ends.

The WIPO IGC still seems to question whether or not works of folklore in the public domain should receive retrospective protection and whether copyright and other intellectual property instruments could be used to protect works of folklore.<sup>194</sup> One proposed solution is to grant a retroactive protection to those works of folklore whose protection has expired after a lapse of time and to protect *ex novo* all those works of folklore that are deprived of copyright protection because they do not meet specific requirements. There are some policy-makers who maintain that retaining the existence of works in the public domain ensures the 'greatest opportunities for creation and development'.<sup>195</sup>

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<sup>193</sup> *Ibid.*, at point 19-20.

<sup>194</sup> *Ibid.*, at point 21 where the Annex reports some ideal systems to be followed: moral rights, the preventive authorisation asked by the users to the holders of the right (i.e. the community) or a system of *sui generis* rights. None of these systems is explained in detail.

<sup>195</sup> *Ibid.*, at point 15.

However, even on this point the WIPO document WIPO/GRTKF/IC/5/3 lacks sufficient analysis. It is true that the public domain represents a source for revitalising cultures and knowledge. It is also clear that the public domain prevents the disappearance of many works of Aboriginal art and traditions, even though the Indigenous communities are often not recognised as having generated those works. According to this same document, the choice between the rights of the public, the underlying object of creation and innovation of the market is prevailing against the 'private property rights' of the Indigenous community. This can be rephrased by affirming that the rights of a vast majority are unfairly promoted over the rights of a closed community. The issues arising from the public domain are still far from clear in the wording of this document.

Nevertheless, one step further along the route of clarifying the relationship between the public domain and folklore can be found in the expression used by the Committee, which reports how impossible it is to apply *tout court* the rules of the public domain. It is more important to establish a set of rules that meet the demands of Indigenous people and local communities.<sup>196</sup> In particular, the holders of works of folklore should be able to prevent the improper use, derogatory, libellous defamatory, offensive and fallacious uses of their works as well as being able to forbid the use of some works of folklore if they represent a sacred and secret symbol for the community to whom they belong.<sup>197</sup>

After this overview of the different definitions of traditional cultural expressions or folklore and how these are perceived by the international community, we will explore their main characteristics in order to learn more about the notion of common tradition or community heritage.

#### **2.4.3. Intellectual Property and the Meaning of 'Protection'**

Another important issue examined by the document of the WIPO IGC Meeting is the link between intellectual property and folklore and what can be understood by 'protection'. Originality of creation is the magic formula for copyright protection and often when a work is copyrightable, this is because it receives two main protections: one to preserve the work of the author and the other to safeguard his/her work from anyone who might want to use it improperly or without permission.<sup>198</sup>

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<sup>196</sup> *Ibid.* See lett. c) at point 23.

<sup>197</sup> *Ibid.*

<sup>198</sup> IP protection must be distinguished from the concepts of 'preservation' and 'safeguarding.' WIPO/GRTKF/IC/5/3 p.3.



The goals of copyright protection are different from those of folklore protection: first, having as its objective the promotion of new creativity necessary for the development of the commercial market<sup>199</sup> and, second, the preservation and safeguarding of cultural heritage. The WIPO document WIPO/GRTKF/IC/5/3 stresses the importance of widening the concept of folklore protection more through the use of a proper terminology, which need not be similar to that used by copyright protection. The necessity of a correct definition of what it is intended as protection of folklore should be recognised to assure the implementation of adequate measures for folklore.<sup>200</sup> It is indubitable that these two distinct aspects of 'preservation' and 'promotion' should be identified in the 'protection' of folklore and they should become two faces of the same coin. One aspect cannot prevail over the other, otherwise some folkloric expressions might not be fully protected.<sup>201</sup>

Another important issue is the distinction to be made between protection of *stricto sensu* works of folklore, which are mainly pre-existing traditions and cultural heritage, with those works which are derived from the pre-existing traditions and cultural heritage.<sup>202</sup> The latter, according to the same WIPO document, achieve protection as literary and artistic works, while pre-existing works are left without protection.<sup>203</sup> However, the analysis cannot be limited to this assessment. In fact, not only pre-existing works lack protection but also derivative folkloric works. Often the requirement of originality, present in almost all national copyright legislation, forbids the possibility of granting these sorts of works copyright protection.<sup>204</sup> Moreover, not all can fit in the definition of 'literary and artistic works', mainly because often there is more than one identifiable author and most of the works, although derivative, are oral in nature.

Therefore, in the analysis of the WIPO in the previously quoted document, results are quite superficial. The assertion that 'contemporary, tradition-based expressions and representations of traditional cultures are generally protected by existing copyright and industrial designs law for which they are sufficiently

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<sup>199</sup> See in general N.N. Weinstock 'Market Hierarchy and Copyright in Our System of Free Expression' [2000] *Vanderbilt L Rev* 1879.

<sup>200</sup> WIPO/GRTKF/IC/5/3 p.11.

<sup>201</sup> WIPO/GRTKF/IC/5/3 p.4

<sup>202</sup> T. Janke *Minding Culture – The Protection of Traditional Cultural Expressions* study commissioned by WIPO and available at [http://www.terrijanke.com.au/fs\\_topics.htm](http://www.terrijanke.com.au/fs_topics.htm) and at <http://www.wipo.int/tk/en/studies/cultural/mindingculture/studies/finalstudy.pdf>.

<sup>203</sup> *Ibid*, pp.12- 13.

<sup>204</sup> S.S. Boyd 'Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work' [2000] 40 *Santa Clara L Rev* 325.

'original' or 'new' as required',<sup>205</sup> does not provide justice for the complexity of traditionally derived works. It is important to address the fact that tradition-based cultural expressions and their protection are a policy matter as they can stimulate and give new stimuli to society.<sup>206</sup> In fact, it is a matter of policy to decide which values to promote: those of the community whom folklore belongs to or those of the modern society and its customs and uses. While the first value is closely connected to concepts such as promotion of cultural diversity and cultural preservation, the latter incentivises the commercialisation of goods and economic development.<sup>207</sup>

#### **2.4.4. Mainstreaming Cultural Diversity for a Better World**

The promotion of cultural diversity has often been considered by the Western society as a panacea for separatism. But cultural unification, with the aim of fostering a single identity and national unification, is gradually replacing cultural diversity. Hence 'contemporary society' has neither promoted Indigenous communities nor minority groups for the fears of separatist movements. The attributes given to culture have been adopted to impose the view of the strongest on minority groups. Culture has always been interpreted by the Western world as having specific artistic connotations, whereas the Indigenous peoples perceived it differently. While Western societies focus on material creation - that is, the final object of the creation - Indigenous peoples promoted a culture based more on the process of creation than on the final result. Therefore, when defining innovation, culture has often been misused, thereby resulting in cultural oppression.<sup>208</sup> As argued:<sup>209</sup> 'a dominating group can stunt the intellectual development of a dominated group by systematically telling them that they are inferior'.

Recently, the lobbying of minorities and Indigenous peoples at the international level has helped to change this trend, which is now being directed towards the promotion, protection and preservation of cultural diversity. Cultural diversity has finally been included in development and national policies as a tool to protect alternative knowledge expressions. In fact, cultural diversity has been

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<sup>205</sup> *Ibid*, p.13.

<sup>206</sup> WIPO/GRTKF/IC/5/3 p.5.

<sup>207</sup> *Ibid*, at point 17.

<sup>208</sup> UNDP *Human Development Report* [2004] p.91 which refers to this phenomenon also in terms of cultural genocide.

<sup>209</sup> T. Hylland Eriksen *Ethnicity and Nationalism: Anthropological perspectives* (2<sup>nd</sup> London Ed. Pluto Press 2002) p.25.

recognised as a fundamental value in the establishment of peace, democracy and sustainable development.<sup>210</sup>

The UNDP *Human Development Report 2004*<sup>211</sup> is entirely devoted to enhancing the theme of cultural diversity, which expands the concept of human development and will reduce the gap between rich and poor countries.<sup>212</sup>

Policies of assimilation are slowly being replaced with policies of integration because only through the recognition of differences is it possible to avoid social fragmentation.<sup>213</sup> Multiculturalism is now seen by Western countries as the key to building healthy democracies,<sup>214</sup> although there should be a balance in promoting equality as citizens and differences as minorities. As stated, 'If the State stresses equal rights and duties, minority members may feel that the cultural distinctiveness is not been respected; that their boundaries and identities are threatened; [...] if, on the other hand, the dominant group stresses cultural differences and turns them into virtues minority members may feel that they are being actively discriminated against'.<sup>215</sup> This has been defined as the 'paradox of multiculturalism'.<sup>216</sup> Multicultural policies should take into account the necessity to balance diversity with homogeneity, meaning that minority groups should not have imposed upon them a right to be culturally diverse, but should be left free to choose how to express their cultural differences.<sup>217</sup> Concepts, such as citizenship, depart from different ethnic, religious, linguistic or cultural backgrounds. Moreover, they do not undermine or diminish the sense of community either in a strict or in a broad sense.

The UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 affirms that cultural diversity is 'a defining characteristic of humanity'. Moreover, it contributes to 'the full realization of human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights'. Similarly, this notion of culture has changed and this Convention takes into account these new waves. Here the 'internalization' of culture has been valued - culture is

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<sup>210</sup> These themes were discussed at the Second Session the Permanent Forum on Indigenous peoples, on May 2003. (E/2003/43).

<sup>211</sup> UNDP *Human Development Report* [2004].

<sup>212</sup> *Ibid* box 5.3.

<sup>213</sup> *Ibid*.

<sup>214</sup> *Ibid*, p.49.

<sup>215</sup> T. Hylland Eriksen *Ethnicity and Nationalism: Anthropological perspectives* (2<sup>nd</sup> London Ed. Pluto Press 2002) p.144.

<sup>216</sup> *Ibid*, p.155.

<sup>217</sup> *Ibid*, p.145.

not just something made out of material objects but also includes everything that is beyond the process of creation, bundling identity rights and values.<sup>218</sup>

Concerns about cultural homogeneity were due to the introduction of new technology and increased economic powers of some countries, especially the United States.<sup>219</sup>

The Convention clearly recognises the intangible and immaterial nature of many indigenous cultures in the context of cultural diversity. It, therefore, requires respect for cultural identity not only of individuals but of groups as well.<sup>220</sup>

In the Medium Term Strategy for 2002-2007, UNESCO stresses the necessity of 'preserving and promoting diversity and dialogue among cultures and civilizations',<sup>221</sup> which is foreseen within the context of a global development strategy. Including the theme of cultural diversity in development policy helps to avoid the clash of cultures and possible wars, since without pluralism there is no freedom or democracy.<sup>222</sup>

A new idea of development should encompass cultural aspects in terms of fostering ideas and feelings and not just economic powers.<sup>223</sup> The drafters of this UNESCO Convention quite rightly agree upon the fact that protecting and promoting Indigenous peoples' cultures is fundamental for achieving sustainable development. The Convention then establishes that 'cultural diversity' refers to the manifold ways in which the cultures of groups and societies find expression. These expressions are passed on within and among groups and societies. Cultural diversity is manifested also through cultural expressions, whatever means or way of expressions or technologies might be used.<sup>224</sup>

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<sup>218</sup> K. Stenou (ed) 'Unesco and the issue of cultural diversity Review and strategy, 1946-2004' study published by UNESCO in 2000 (revised version 2004) available at [http://portal.unesco.org/culture/es/file\\_download.php/47cc07ba56443cb277023a75b35b5786DivCult-BilanStrategies-ENG-sept04.pdf](http://portal.unesco.org/culture/es/file_download.php/47cc07ba56443cb277023a75b35b5786DivCult-BilanStrategies-ENG-sept04.pdf).pp.2- 3.

<sup>219</sup> *Ibid* p.9.

<sup>220</sup> *Ibid* pp.11-12.

<sup>221</sup> UNESCO Constitution in combination with objective 8 of the New Convention on Cultural Diversity as reported by K. Stenou (ed) 'Unesco and the issue of cultural diversity Review and strategy, 1946-2004' study published by UNESCO in 2000 (revised version 2004) available at [http://portal.unesco.org/culture/es/file\\_download.php/47cc07ba56443cb277023a75b35b5786DivCult-BilanStrategies-ENG-sept04.pdf](http://portal.unesco.org/culture/es/file_download.php/47cc07ba56443cb277023a75b35b5786DivCult-BilanStrategies-ENG-sept04.pdf).p.19.

<sup>222</sup> *Ibid* p.20.

<sup>223</sup> UNESCO Medium Term Plan 1984-1989 p.234 available at <http://unesdoc.unesco.org/images/0006/000675/067577eo.pdf>

<sup>224</sup> See above Chapter III, Article 4 para 1.

Examples of adherence to this formula can be found in the approach followed by the African Union (AU) and European Union (EU), which adopted as their motto 'unification through cultural diversity'.<sup>225</sup> Recently, the Convention was ratified by the European Union,<sup>226</sup> probably with the aim of speeding up the procedures related to the ratification of the EU Constitutional Treaty. The UNESCO Convention could contribute a solid international basis for strengthening the concept of cultural diversity that could constitute a model for other legislators.

## 2.5. Conclusion

At the international level, there is unanimity that certain expressions of folklore deserve protection, with the exception of all those forms undermining human dignity. On the other hand, the object and main beneficiaries of this protection are not yet well identified or defined. Too often the debate is defined in terms of Indigenous and non-Indigenous. As a consequence, rather than focusing on common denominators such as the common needs of both group, categorisation is often the cause of an impasse. The confusion is exacerbated by the use of diverse expressions to qualify folklore, which distract attention from the real problem - the dichotomy between beneficiaries and users. Objectively, there is still disagreement on what should be covered by folklore, as well as an unclear meaning of the term itself. Folklore should be understood broadly, embracing all that can be regarded as cultural expression and also traditional knowledge.

Legal protection of folklore cannot be achieved without understanding the origins of the phenomenon and to whom it is attributed. Many works of folklore are not yet known and their recognition, classification and consequential protection remains unclear.

Folklore has been defined as a dynamic expression that contains traditional elements. It belongs to all people with specific, common characteristics, such as customs and traditions. The protection of folklore is necessary since it represents the patrimony of the culture of Indigenous peoples.

For a long time, one cultural identity - the culture of the West - has been largely imposed on Indigenous peoples and minority groups. Today, awareness has been raised of the importance of protecting expressions of cultural diversity, which are often intangible and oral. This new way of understanding culture has been summarised in two UNESCO Conventions that address folklore as cultural diversity

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<sup>225</sup> This will be examined at a later stage in the thesis.

<sup>226</sup> On December 2006.

and artistic expression. The main outcome of the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions 2005 is that there is a need to contemplate cultures that differ from the 'material' Western one. Culture can be generated by individuals, as well as groups, without distinction. The protection of cultural diversity, with all its variety of cultural expressions, is aimed at protecting the intellectual cultural life of Indigenous peoples. Further, all of humanity will benefit from this as all societies will become more culturally enriched.

There is both a necessity and an urgency to protect the special knowledge of Indigenous peoples. A variety of cultural expressions demonstrate that individual communities bear vastly different characteristics. This is also reflected in the difficulty of classifying folkloric expressions. Nevertheless, some common denominators can be found in the orality and communality of most Indigenous works. However, current regimes of intellectual property protection do not reflect these qualities of traditional ways of expressing creativity and therefore are an obstacle to the promotion of cultural diversity. An economic interpretation of intellectual property posits that innovation should create further innovation. Copyright is an individualistic right: original, 'fixed' and thus born to satisfy the Western needs. It embraces values that are different from those of the Indigenous peoples. In this sense, the general characteristics of copyright conflict with the very meaning of TCEs.

Indigenous cultures have a lot to offer in terms of new processes of creation based on human relationships. Their process of creation needs to be preserved. 'Public domain' is therefore of the utmost importance, since it allows cultures to be accessible to everyone. Nevertheless, there are Indigenous cultures and their related cultural sources that need to be protected since they form the basis of their identity. Without protection granted to these sources, Indigenous communities could be harmed in their ability to innovate and therefore in their consequential development. As a consequence, the works of folklore within the public domain should always strike a balance between access and use. On the one hand, the fall into the public domain of works that need to be protected since they represent the identity of Indigenous peoples and of minority groups should be avoided. On the other hand, Indigenous peoples and minority groups should be in the position of recovering works at risk of being misused and misappropriated due to unregulated use.

In the following chapters, the analysis will move on to explore national, supranational and international levels that could potentially provide some legal means of protection. These approaches, their concepts and contents, will be discussed to show the different perspectives on protection and the possible way forward.

**Part II**

## Introduction to Part II

Part I introduced the topic of folklore and examined the main characteristics of copyright. It explained the necessity for a comparative and thematic approach in order to focus on the main issues related to the protection of TCEs. Chapter 1 and 2 focused on the characteristics of copyright and TCEs, analysing the peculiarities of folklore, i.e its communal/multiple nature and its attributions to Indigenous peoples and traditional communities. It was assessed that it is difficult to draw on common definitions either from the point of view of the object of the protection but also from the side of beneficiaries. However, the necessity of uniformity at international level imposes a need to both identify and to provide common accepted *status*, not without acknowledging the diverse experiences generated through folklore. For the sake of this thesis a comprehensive definition was adopted which takes into account many aspects of folklore such as elements introduced to regulate the life of the community, such as, for example, customary laws.

Part II builds upon Part I by looking at the experience at the national and supranational level in the field of TCEs. This is a necessary step since no protection can be achieved at an international level without first creating a consensus at national level. Two common law countries, the United States and Australia, have been chosen to show how different the approach to similar topics can be.

Chapter 3, while analysing the United States' internal approaches to copyright and the acknowledgment of indigenous rights as folklore, lays the basis for debating this copyright doctrine. The analysis of this country's economic copyright approach is instrumental in drawing attention to the political pressure that the United States' attitude builds at international level, which resulted in TRIPS. In the U.S., copyright characteristics are constitutionalised creating a very inflexible right, which can hardly accommodate emerging rights like the protection of indigenous knowledge. The attempts to protect Native Americans through the Lanham Act and the Indian Arts and Crafts Act (IACA) prove to be not just insufficient but also full of loopholes. In relation to the protection of TCEs belonging to developing countries and traditional communities the issue of protection is even more sensitive. Protectionist measures are adopted to protect U.S. works in foreign countries but very little room is left to grant protection to foreign works of folklore. As sustained 'the author concept stands as a gate through which one must pass in order to acquire intellectual property rights. At the moment, this is a gate that tends disproportionately to favor the developed countries' contributions to world science and culture. Curare, batik, myths and the dance "lambada" flow out of developing countries, unprotected by intellectual



property rights, while Prozac, Levis, Grisham and the *movie* "lambada!" flow in – protected by a suite of intellectual property laws, which in turn are backed by trade sanctions.<sup>227</sup>

In Chapter 4 the mechanisms introduced by the court system in Australia are discussed for their innovative approach to the theme of folklore. In Australia the judges preferred to intervene in the protection of folkloric works through the use of common law mechanisms adapted to folklore rather than discussing the very essence of copyright. Nevertheless, they have proven that copyright is inadequate to protect folklore. There is therefore a need to re-think copyright perhaps in terms of expanding moral rights or of creating *ad hoc* categories. In Australia, the *Milpurrurru* case demonstrated that, although copyright is a well shaped right, there are some nuances in the application, such as the requirement of originality that can be softened to allow protection for reproduction of Aboriginal works. Thus, while the U.S. is trapped in a rigid application of copyright addressed in simple economic terms, Australia is moving ahead analysing the applicability of new means of protection, taking into account the moral rights categories which could bear a communal character and which could lead to an alternative application of copyright. From the analysis of national copyright regimes it becomes clear that copyright can currently not be adapted to grant protection of folkloric works.

Chapter 5 will examine two continental/supranational approaches, namely the African Union and the European Union, which could help protect expressions of folklore regionally while awaiting internationally consolidated measures. As folklore is not merely a localised national phenomenon as the example of indigenous nomadic peoples makes clear, it is necessary to look for ways of granting protection of folklore beyond the national level. Furthermore, the strict territoriality approach of national copyright laws can be mitigated by the introduction of new supra-national elements and values. While the rules of the EU internal market are in support of the philosophy that copyright makes economic sense, which is to say that the EU legislator still promotes the copyright culture of property value for the benefit of a single author and the copyright industries, the exercise of that right encounters new limits. Under the EU Constitutional Treaty, copyright is constitutionally limited when it does not meet the goals of the internal market and when it conflicts with other important values. Also, the dominance of economic interests reflected in current copyright law is corrected through the principles of non-discrimination and the civil law theory of moral rights. Copyright still remains a

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<sup>227</sup> J. Boyle *Shamans, Software & Spleens: Law and the Construction of the Information Society* (Harvard University Press 1996) p.125.

property right but with the necessary 'added touch' of respect for human rights and cultural diversity, which come first on the scale of most important European values. The recent active behaviour of the European Commission within the WIPO IGC sessions on folklore is proof that the EU understands the necessity of balancing Western and Indigenous rights.

Both the European Union and the African Union acknowledge the importance of cultural diversity as a principle which should shape their citizens' rights. The approach to this subject diverges in forms and attributions but some objectives and results can be easily compared. On the matter of the active protection of folklore, the African Union is already embracing the path of a *sui generis* instrument of protection, however there is still very little participation and involvement of the communities as the single African countries are solely acting as contracting agencies. Nevertheless, the growing importance of application of customary laws in Africa can be seen as a corrective mechanism to take into account the traditional communities' *desiderata*.

## Chapter 3

### Protection of Folklore under Copyright Law. The United States: Do the Existing Copyright Provisions Help?

#### 3.1. Introduction

Folklore is already accepted as a global phenomenon and the importance of international means of protection cannot be underestimated. The lack, at present, of a binding international instrument for folkloric protection leaves the regulation of folklore in the hands of the national legislator, as already stated in the first chapter of this thesis and as will be demonstrated in tackling the problems of the international dimension in a later chapter.<sup>228</sup>

Many authors, experts and legislators try to offer solutions to this issue.<sup>229</sup> Historically, there was an understanding regarding the recognition of copyright law as the most suitable means of protection. Some Indigenous peoples seem to have accepted this, although with reservations.<sup>230</sup> Nevertheless, some concepts of intellectual property rights have also been accepted by Indigenous peoples.<sup>231</sup>

This chapter aims at exploring the legislative protection given to folklore at national level through the aid of copyright law, where this exists. The analysis will focus on national copyright laws of the United States, which in this chapter stands as a model to represent all the copyright legislation, especially those of common law countries like, Australia and Canada, that face the same problem of protecting

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<sup>228</sup> See P. Drahos 'Indigenous Knowledge and the Duties of Intellectual Property Owners' [1997] 11 I.P.J. pp.187-193 and C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.21.

<sup>229</sup> See chapter 1 as regards to the outlines settled for the protection of folklore and related references.

<sup>230</sup> This is a delicate topic. If many authors and Indigenous peoples themselves sees IPR as a 'Western and capitalistic' product (See D. J. Stephenson 'A Legal paradigm for Protecting Traditional Knowledge' in *Intellectual Property Rights for Indigenous Peoples*, T. Greaves Ed., (Society for Applied Anthropology 1994) p.179 and note 1 and see also D. A. Posey 'International Agreements and Intellectual Property Right Protection for Indigenous Peoples' always in the same collection of essays p.225).

<sup>231</sup> E.g. The Charter of Indigenous Peoples of the Tropical Forests: Statement of the International alliance of the Indigenous-Tribal peoples of the Tropical Forest, Penang, Malaysia, 15 February, 1992 where at Art. 44 states that '..we demand guaranteed rights to our intellectual property and control over the development and manipulation of this knowledge'. *Contra* P. Kuruk 'Protecting Folklore....' [1999] Am. Univ. L. Rev. 48 at note 187 where the author affirms that a 'concept of property' is not proper of the Indigenous communities and therefore not acceptable by them.

Indigenous communities' folklore. The reason for choosing United States as a model to illustrate the main copyright and doctrine characteristics is in line with the author's belief that the international copyright policy - especially that determined through the implementation of TRIPs enforced through bilateral negotiations -<sup>232</sup> is highly influenced by the way the Anglo-American doctrine conceives the nature of this intellectual property right. It is not a new argument that national copyright laws are influenced by international trends and developments. It is even true that countries with undeveloped economies can be damaged by the impact of international treaties imposed by the American hegemony.<sup>233</sup>

The introduction of TRIPs makes more evident than ever the dominant position assumed by the United States in the IPR field.<sup>234</sup> TRIPs is the result of a specific foreign political policy, that of the United States which was the 'dominant voice' during the agreement negotiations.<sup>235</sup> This agreement imposes on its signatory states respect for very high intellectual property standards 'at those levels approximating found in the United States, the nation with undoubtedly has the most demanding set of standards'.<sup>236</sup> The United States hegemony exercised through TRIPs is addressed to expand the capitalism rationale and therefore the relation powers through production.<sup>237</sup> The historical origin of this hegemony is well known. Recalling a passage of Michael Ryan:

'the American hegemon believed its interests and those of its allies were served by the creation of a liberal trading, rule orientated international trade regime, even if its behaviour would better be described as a 'pragmatic liberalism'...Because of the structure of the U.S. economy-a competitiveness based upon technology-intensive industries and services-the U.S. industrial policy now recommends that the GATT-based international trade regime grow to govern international economic

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<sup>232</sup> V. Allums 'Special 301: TRIPs Plus – Alive and Kicking' [2006] 5 J. Marshall Rev. Intell. Prop. L. 651. See also G.B. Dinwoodie 'Some Remarks on the Limits of Harmonization' [2006] 5 J. Marshall Rev. Intell. Prop. L. 596.

<sup>233</sup> W.W. Fisher III 'The Growth of Intellectual Property: A History of the Ownership of Ideas in the United States' in Vandenhoeck & Ruprecht (ed) *Eigentum Im Internationalen Vergleich* (1999) p.265.

<sup>234</sup> G.B. Dinwoodie 'Some Remarks on the Limits of Harmonization' [2006] 5 J. Marshall Rev. Intell. Prop. L. 596. See also H. Porsdam 'From *Pax Americana* to *Lex Americana*: American Legal and Cultural Hegemony', in *New Directions in Copyright Law* (ed. Fiona Macmillan, Edward Elgar 2005) pp.91-105.

<sup>235</sup> D.G. Richards ed. *Intellectual Property Rights and Global Capitalism: the Political Economy of the TRIPs Agreement*, (M.E. Sharpe London 2004) pp.112-140.

<sup>236</sup> *Ibid*, pp.112, 120.

<sup>237</sup> *Ibid*, p.120.

relations regarding service trade, intellectual property rights, foreign direct investment, standards harmonization, and competition and antitrust policy'.<sup>238</sup>

As a consequence of that, intellectual property has become an essential aspect of trade policymaking.<sup>239</sup> The unambiguous behaviour of United States policy in pushing towards the implementation of several bilateral agreements setting a strong protection for U.S. works abroad is quite evident.<sup>240</sup> The U.S. has the biggest copyright industries sector, which is one of the mainstays of the U.S. economy. This could be understood as the consequence of pressure from the relevant U.S. copyright industries which are trying to break into the developing world market.<sup>241</sup> Therefore, the United States pushed for a comprehensive new agreement comprising high minimum standards of protection and enforcement, and with a built-in dispute settlement mechanism, which would also incorporate key provisions of the earlier Paris, Berne and Rome Conventions;<sup>242</sup> the TRIPs Agreement. This agreement was not drafted within WIPO, the UN agency which should be in charge of all international regulations regarding intellectual property, but within GATT before WTO replaced this organisation in 1995. Following this Agreement the position of many developing countries became economically worse due to the necessity of fulfilling many obligations imposed by the new treaty.<sup>243</sup> Although TRIPs refers, in part, to the implementation of the Berne Convention (Articles 1-21), excepting Article 6 bis concerning moral rights,<sup>244</sup> they do also provide for significant change to copyright standards.<sup>245</sup> Copyright becomes a more economically oriented right

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<sup>238</sup> *Ibid*, p.127.

<sup>239</sup> N. Imparato (ed) *Capital for Our Time: The Economic, Legal, and Management Challenges of Intellectual Capital* (Hoover Institution Press Stanford, Calif. 1999). See in the particular the contribution of J.H. Barton titled 'Intellectual Property Rights and Innovation'.

<sup>240</sup> See generally [copyright.gov](http://copyright.gov); [www.usdoj.gov](http://www.usdoj.gov); [www.state.gov](http://www.state.gov) (providing additional information on protecting intellectual property). U.S. Customs and Border Protection, [www.cbp.gov](http://www.cbp.gov). U.S. Customs and Border Protection, [www.cbp.gov/xp/cgov/newsroom/news\\_releases/042006/04032006\\_5.xml](http://www.cbp.gov/xp/cgov/newsroom/news_releases/042006/04032006_5.xml).

<sup>241</sup> F. Macmillan 'Copyright and Culture: A Perspective on Corporate Power' [1998] 3 *Media and Arts L Rev* 71.

<sup>242</sup> The U.S. is not a party to the Rome Convention.

<sup>243</sup> See generally M. Blakeney *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (Sweet & Maxwell London 1996). As an example of the effect of TRIPs see Circular 38a International Copyright Relations of the United States, U.S. Copyright Office Library of Congress 101 Independence Avenue SE Washington, DC 20559-6000 [Http://www.copyright.gov](http://www.copyright.gov) This circular sets forth U.S. copyright relations of current interest with the other countries of the world.

<sup>244</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2001) p.40.

<sup>245</sup> 'Thus, most famously, the United States could elect to be part of the Berne Convention and claim compliance with its obligation in Article 6bis to provide certain forms of moral rights protection based upon a patchwork of state and federal laws. The tenuous nature of that claim, to put it politely, was only highlighted by the insistence of the United States in TRIPs negotiations that Article 6bis of

and it is driven into an international trade dimension. WTO becomes the watchdog for monitoring the effective application of TRIPs and it may authorise countries to impose sanctions on those failing to comply with dispute decisions. This has many implications as things stand. One of these is that the United States is imposing internationally a model of copyright which in part excludes the notion of copyright as understood by civil law countries and imbues it with economic value. This is the reason why throughout this thesis the mainly dominant 'economic approach' is used as term of comparison and analysis of copyright. The use of the United States copyright doctrine might appear provocative as a 'unique' model able to sketch the main characteristics and the philosophy of copyright world-wide. This approach was absolutely essential to place the accent on the way international treaties must cope with the political pressure imposed by strong economies.

An alternative perspective stresses the efforts by the United States in participating in Indigenous peoples' forum and the progress made by this country in finding a solution to the internal problems of American Indians' claims (i.e. recognition of a community ownership in folkloric work). More specifically, as it will be shown further on, the IACA provides a sort of *sui generis* law to the problem of granting a protection to folklore at least for some sort of folkloric works.

Moreover, some issues of copyright law are already well known in the American copyright doctrine as for instance the case of fair use/fair dealing. An answer to the question of whether or not intellectual property laws and copyright laws, in particular, are able to protect folklore, will be provided in this chapter. It will also examine the means of protection and enforcement. This analysis will be helpful to illustrate the relationship between copyright law and customary law (i.e. the law of the Indigenous communities) focusing on the fact that national laws '[could] significantly improve the protection available under customary law'.<sup>246</sup> Moreover, the analysis of this national dimension given to folklore will be useful in ascertaining whether valid support through national law can be achieved. This could, theoretically, help in building and developing a future global protection for folklore.

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Berne not be included within the provisions that were incorporated into the TRIPs Agreement and made subject WTO dispute resolution' reported in G.B. Dinwoodie 'Some Remarks on the Limits of Harmonization' [2006] 5 J.Marshall Rev. Intell. Prop. L. 597.

<sup>246</sup> See in general the inspiring article of P. Kuruk in 'Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions Between Individuals and Communal Rights in Africa and the United States' (hereinafter 'Protecting Folklore....') [1999] 48. Am. Univ. L. Rev p. 791 where the author states that 'rights to folkloric works could be enforced within national boundaries instead of under the limited jurisdictional confines of the local community'.

### 3.2. Folklore and Copyright Laws

As suggested in previous chapters<sup>247</sup> folklore could be protected under copyright law, which is already a means of protection for fixed and original artistic, literary and musical works.<sup>248</sup> Therefore, in principle, it seems that it could be possible to cover traditional paintings, designs, drawings and folk songs under the existing copyright category of artistic works, and dramas, dances and folktales under the category of literary works and folk songs under musical works.<sup>249</sup> The questions remain whether national copyright laws do already provide means of protection for Indigenous peoples' folklore and whether the actual notion of copyright is most suitable to cover Indigenous peoples folklore or if copyright law can be 'stretched' and enlarged to welcome new rights. There are two main problems: the object of creation and the way creation is put in place.

In trying to answer the questions above it must be remembered that among the main characteristics of folklore are the orality<sup>250</sup> of Indigenous peoples' traditions, and the collective sharing of rights associated with the *creation momentum*, a form of sociality itself.<sup>251</sup> Anthropologists studying this creative process have not yet come up with definitive answers on how this creative process is put in place, the reasons behind it and the logics of settings it up. Leach argues that: 'there is very little specific anthropological understanding of the modes in which creativity operates'.<sup>252</sup> Each Indigenous community has their own specific ways of setting up innovation. The object, whether tangible or intangible, is a mean to communicate and to put individuals in relations with each others. Again Leach observes:

'[...] We accept ritual and art as foundational in certain non-Western societies, and production as an outcome of the social relations elicited on this foundation, not the other way around.'<sup>253</sup> Creativity lies in 'a complex series of

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<sup>247</sup> See the whole of Chapter one.

<sup>248</sup> See Berne Convention for the Protection of Artistic and Literary Works, 1886.

<sup>249</sup> *Ibid.*

<sup>250</sup> This is a characteristic of Indigenous folklore generally recognised. See C. Calliston., 'Appropriation of Aboriginal Oral Traditions' [1995] 29 U.B.C. L. Rev. p.165 and B. Amani 'Fact, Fiction or Folklore? It's Time the Tale Were Told' [1999] 13 IPJ p.284. The author affirms that '...One must recognise that the oral nature of cultural works does not deprive them of expression'.

<sup>251</sup> J. Leach 'Drum and Voice: Aesthetics and Social Process on the Rai Coast of Papua New Guinea' [2002] Vol. 8 Issue 4 J. Royal Anthropological Inst. p.724.

<sup>252</sup> *Ibid.*

<sup>253</sup> J. Leach 'Drum and Voice: Aesthetics and Social Process on the Rai Coast of Papua New Guinea' [2002] Vol. 8 Issue 4 J. Royal Anthropological Inst. p.716.

negotiations and transactions as relations'<sup>254</sup> combined together to achieve the final object. The accent is shifted from the object as the ultimate goal of the creation process (Western canon) to the 'way in which persons combine or differentiate themselves'<sup>255</sup> or 'which establish credibility' (Indigenous knowledge).<sup>256</sup> For Indigenous peoples the object is a resource which helps to inter-relate. Leach, recalling the experience with the Rai Coast people, defines that specific Indigenous creation: 'Spirits and songs are seen as a resource.....as the regeneration of people and places through the work of family groups'<sup>257</sup> and any rights originated by a creation, belonging to the whole group.<sup>258</sup> There is no room for individual possession. Resources must be shared but not owned<sup>259</sup> and 'the real achievement, however, is to bring forth a form of sociality itself'.<sup>260</sup> This unitary spirit of the group is also one of the characteristics found in the sacred nature of many works of folklore. In fact, art, religion, symbolism and the same process of creation are part of a unitary process where the whole community is involved, even if distinct roles are maintained within it.<sup>261</sup> The sacred nature, the symbolism, the collective nature of Indigenous art bring along most of the problems in adhering to the copyright formula as will be assessed further on in this chapter.

It is this particular way of perceiving creation which makes Western property concepts inapplicable. The creation process is not intended to acquire, but to generate new relations or to make stronger the one already in place or to achieve social positions. As stated, Indigenous creation 'cannot be about representing social relationality at all, but about revealing its inverse, the 'ground' against which

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<sup>254</sup> M. Strathern 'Transactions: An Analytical Foray' in *Transactions and Creations: Property Debates and the Stimulus of Melanesia* E. Hirsh and M. Strathern Eds. (Berghaham Books 2004) p.14.

<sup>255</sup> J. Leach 'Modes of Creativity' in *Transactions and Creations: Property Debates and the Stimulus of Melanesia* E. Hirsh and M. Strathern Eds. (Berghaham Books 2004) p.163.

<sup>256</sup> M. Strathern 'Transactions: An Analytical Foray' in *Transactions and Creations: Property Debates and the Stimulus of Melanesia* E. Hirsh and M. Strathern Eds. (Berghaham Books 2004) p.14.

<sup>257</sup> J. Leach 'Modes of Creativity' in *Transactions and Creations: Property Debates and the Stimulus of Melanesia* E. Hirsh and M. Strathern Eds. (Berghaham Books 2004) p.155.

<sup>258</sup> See P. Kuruk 'Protecting Folklore....' [1999] 48 Am. Univ. L. Rev. under paragraph 'Social groups and rights in folklore' pp.781-82.

<sup>259</sup> J. Leach 'Modes of Creativity' in *Transactions and Creations: Property Debates and the Stimulus of Melanesia* E. Hirsh and M. Strathern Eds. (Berghaham Books 2004) p.155.

<sup>260</sup> J. Leach 'Drum and Voice: Aesthetics and Social Process on the Rai Coast of Papua New Guinea' [2002] Vol. 8 Issue 4 J. Royal Anthropological Inst. p.724.

<sup>261</sup> See C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. pp.9-10



relationality produces its forms'.<sup>262</sup> Therefore it is through production that Indigenous peoples generate social relationships.

Some anthropologists questioned themselves on the language to be used 'to capture something blurred, existing and operating to powerful effect between material and social creation?'<sup>263</sup> The majority of them propose a model of understanding Indigenous creations which departs from the concept of property. Marilyn Strathern refers to this Indigenous creativity in terms of 'transactions'<sup>264</sup>

The logics of referring to 'transactions' as opposite model to proprietary Western regime of innovation are aimed at embracing all those other regimes which are based more on human relationships than on material things: 'inter-subjectivity replaces objectivity'. As argued, 'transaction is not tied to a content... [I]t refers to a general human faculty or inclination',<sup>265</sup> while 'property implies an entity in some substantive, specific forms'.<sup>266</sup> There are no authors or owners, tangible and intangible things have the same value which is rooted in social relations and does not have an abstract content but a substantial effect.<sup>267</sup>

The problems regarding the protection of folklore can be framed as follows: from one side the Indigenous peoples' need to be recognised as the creators or 'authors' of their folkloric works and to share within the community the economic benefit that derives from this right;<sup>268</sup> on the other side the Indigenous peoples' need to control the exploitation of their culture outside the boundaries of the community especially for those works having a spiritual meaning.<sup>269</sup> Therefore, the Indigenous groups found themselves divided between, on one side, the request of sharing the existing IPRs to avoid the risk of remaining excluded from any economic benefit derived from their works; on the other side their total rejection of a system which is

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<sup>262</sup> J. Leach 'Tree Leaf Talk: a Heideggerian Anthropology.(Method and Theory)' [2004] 10 issue 3 J. Royal Anthropological Inst. 730.

<sup>263</sup> J. Leach 'Drum and Voice: Aesthetics and Social Process on the Rai Coast of Papua New Guinea' [2002] Vol. 8 Issue 4 J. Royal Anthropological Inst. 713.

<sup>264</sup> M. Strathern 'Transactions: An Analytical Foray' in E. Hirsh and M. Strathern (Eds.) *Transactions and Creations: Property Debates and the Stimulus of Melanesia* (Bergham Books 2004) p.7, 87.

<sup>265</sup> *Ibid*, p.8.

<sup>266</sup> *Ibid*.

<sup>267</sup> *Ibid*, p.11.

<sup>268</sup> *Ibid*, p.13 'Significantly, Indigenous groups are willing to participate in the Western intellectual property rights scheme from which they have been excluded and therefore disadvantaged'.

<sup>269</sup> *Ibid*, pp.14-16.

not theirs, a system where great predominance is given to commercial value and which does not include or safeguard their sacred heritage.<sup>270</sup>

In general, copyright law presents many obstacles due to the nature of such right which needs to meet specific characteristics in order to receive protection. These characteristics are mainly to be found in the individual nature of the right and in the requirements a work must meet in order to be copyrightable (i.e. the originality requirement and the fixation requirement).<sup>271</sup> These specifics are even stricter in a country with a strong copyright faith<sup>272</sup> like the United States, where the protection of folklore is not to be found in any copyright provision.<sup>273</sup> The strong copyright doctrine of the U.S. has oriented the choice of this country as a representative legislative model for other countries (e.g. common law countries in particular). This chapter intends to demonstrate that especially in a well-established copyright doctrine, where the right of the author to be recognised and protected as the sole creator is sustained, it is most difficult to accept and protect new rights and new concepts of authorship, especially when these new rights are not necessarily consistent with the economic model of copyright. In latter years almost everywhere in the world the debate on the safeguard and protection of folklore (e.g. American Indian folklore),<sup>274</sup> is increasing proportionally with the exploitation of many works of folklore in the U.S. or by companies registered in that country.<sup>275</sup> In particular we will examine how national laws are insufficient to protect Indigenous peoples' folklore despite moves towards the creation of a *sui generis* system as will be further demonstrated on referring to the IACA rules.

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<sup>270</sup> See D.J. Stephenson 'A Legal Paradigm for Protecting Traditional Knowledge' in *Intellectual Property Rights for Indigenous Peoples*, T. Greaves (Ed.) (Society for Applied Anthropology 1994) at 179 and note 1. See also J Tunney 'E.U., I.P., Indigenous People and the Digital Age: Intersecting Circles?' 20(9) [1998] EIPR p.335.

<sup>271</sup> T.Greaves *IPR: A Current Survey in Intellectual Property Rights for Indigenous People: A Sourcebook* at 3-4, Tom Greaves ed. (Society for Applied Anthropology 1994).

<sup>272</sup> Recalling the words used by Pamela Samuelson during her speech at the SERCI conference 2003, held in June at the Amherst College, Northampton, MA (USA), where she criticises the rigid U.S. copyright system and those whose belief in it is tantamount to 'religious faith'. See also P.E. Geller 'Must Copyright Be for Ever Caught between Marketplace and Authorship Norms?' in B Sherman and A Strowel (eds) *Of Authors and Origins: Essays on Copyright Law* (OUP Oxford 1994) p.159.

<sup>273</sup> P. Kuruk 'Protecting Folklore....' [1999] 48 Am. Univ. L. Rev., p.821. On the Contrary e.g. Tunisia has a special provision in the copyright statute which protects folklore.

<sup>274</sup> The U.S. are leading the international community debate in cultural property.

<sup>275</sup> See C.H. Farley *op. cit. supra* p.11 who defines this misappropriation of Indigenous folklore as 'the final blow to their civilization from the invaders'; see also P. Kuruk 'Protecting Folklore....', [1999] 48 Am. Univ. L. Rev. p.819 who correctly assesses that the problem in U.S. is not only represented by the exploitation of Indian folklore but also of African folklore.

### 3.3. United States Copyright Law and Folklore Protection.

#### 3.3.1. A Constitutionally Guaranteed Right

The United States approach is that followed by common law countries which grant a 'limited monopoly'<sup>276</sup> to the author in order to foster the progress of science and provide incentives for investment.<sup>277</sup> This is a different approach from civil law countries where protection is granted to the authors for the efforts they undertook in the creation of the work but also because they are entitled to their 'inherent natural right'.<sup>278</sup>

Many common law countries have great difficulty in internalising the provision relating to the 'moral rights'.<sup>279</sup> This is the case in the United States, which has refused to adhere to the scheme proposed under Article 6 bis of the Berne Convention and has instead adopted the Visual Artists Rights Act 1990, 17 U.S.C. § 106 A (1990), where moral rights are granted only to visual artists. Moral rights are established under the Berne Convention to protect the paternity and integrity of the work. However, although a better use of these rights could be desirable, moral rights cannot solve the problem of Indigenous community protection for folklore. In fact, they are still considered to be founded up the individualistic concept of authorship.<sup>280</sup>

Copyright law in the United States is regulated by the Copyright Act 1976<sup>281</sup> and by the power that enables the Congress to regulate copyright matters. Copyright

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<sup>276</sup> S.W. Halpern, C.A. Nard and K.L. Port *Fundamental of the United States Intellectual Property : Copyright, Patent and Trademark* (Kluwer Law International 1999) at chapter 1 § 1.

<sup>277</sup> P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the Law of Intellectual Property* (Foundation Press 1999) p.6.

<sup>278</sup> *Ibid* pp.7-8 and p.792 and ss.

<sup>279</sup> R.R. Kwall 'Preserving Personality and Reputational Interests of Constructed Personas through Moral Rights: A Blueprint for the Twenty-First Century' [2001] 38 U of Illinois L Rev 151.

<sup>280</sup> M. Ammori 'The Uneasy Case for Copyright Extension' [2002] 16 Harv. J.L. & Tech. pp.308-15 discussing moral rights policy in the U.S. See also W.J. Gordon 'Intellectual Property' *The Oxford Handbook of Legal Studies* ed. P. Can and M. Tushnet (Oxford University Press, 2003) at 637-8. At the moment available at the web site of The Boston University School of Law Working Paper Series Index: <http://www.bu.edu/law/faculty/paper>. See also M.T. Sundara Rajan, who recalls in her paper read at the SERCI conference 2003 titled 'Moral Rights and Human Rights: A New International Model' how a universal standard of moral rights is difficult and unfair to apply to 'non- Western cultures' Paper available at <http://www.serci.org>

<sup>281</sup> 'The Copyright Act, as amended from time to time, is the sole reference point for the granting and regulation of copyright' see S. W. Halpern, C. A. Nard and K. L. Port *Fundamental of the United States Intellectual Property: Copyright, Patent and Trademark*, (1999 Kluwer Law International) at 1.

in the United States is a constitutionally guaranteed right,<sup>282</sup> in the sense that it is protected by the 'Maxima Charta'<sup>283</sup> and that only the United States Congress has the power to regulate it. Copyright is protected in the United States Constitution under Article 1 §8(8) which states that:

'The Congress shall have power...to promote the Progress of Science and Useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries]'.<sup>284</sup>

This section should also be read jointly with its clause 3, which establishes the so-called 'congressional commercial power' and which states that

'The Congress shall have the power...to regulate Commerce with Foreign Nations, and among the several States, and with the Indian Tribes.'<sup>285</sup>

However controversial this formula might appear, it shows at least the intent of the U.S. Government to regulate trade with Indian tribes. This has also been described as the 'Trust Doctrine'. 'The Indian Commerce Clause extends a grant of singular authority to Congress to regulate mediation and trade with Indian tribes.'<sup>286</sup> However, the question remains whether the state should have the leading role in regulating folkloric works or whether Indian tribes should have the right to administrate their folklore and its potential commercialisation. The constitutional formula could also be seen as the breaking point for the possible introduction of a

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<sup>282</sup> Although it has been defined that 'property rights' are not created by the Constitution...[r]ather they are created and their dimensions are defined by existing rules and understandings that stem from an independent source...' Justice Stewart in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), reported in R. A. Guest 'Intellectual Property Rights and Native American Tribes', *Am. Indian L. Rev.* (1996) at 113. It is also true that 'intellectual property is not property at all' as C.C. Larkin states in 'Traps for the Unwary: Avoiding Some Common Mistakes in Intellectual Property Law', 27 *Beverly Hills B.A.J.* 89 (1993).

<sup>283</sup> See S.W. Halpern, C.A. Nard, K.L. Port *op. cit. supra* at chapter 1 § 1.

<sup>284</sup> *Ibid* at 47 where it is stated that 'The interpretation of these constitutionally required terms is crucial to the development of the law'. However, the court has recently showed to be much flexibility in adhering to this formula. See T. Brennan 'Fair Use: as Policy Instrument', paper read at the SERCI Conference 2003 and available at <http://www.serci.org> where she states, recalling the recent case *Eldred et al. v. Ashcroft* (U.S. Sup. Ct. 01-618, Jan. 15, 2003), how the extension of copyright does not constitute a violation of the constitutional formula.

<sup>285</sup> However historically only clause 8 is properly supposed to cover copyright work, clause 3 is the 'constitutional basis for federal trademark and unfair competition legislation', many courts have however relied over the years on the possibility to extend clause 3 to copyright cases to avoid the restriction contained in clause 8. see e.g. *Picard v United Aircraft Corp.*, 128 F.2d 632, 643 n. 22 9C.C.a.2 1942 reported in P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) pp.1-2.

<sup>286</sup> A.R. Riley 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' [2000] 18 *Cardozo Art & Ent. L.J.* p.205.

customary role capable of regulating the matter of folklore in its proper context, as belonging to the community which generates it.

### 3.3.1.1. The United States Copyright Act

The limited formula in the Constitution, which refers only to the protection for 'writing' or a 'discovery' has been slightly modified in the translation process into statutory law.<sup>287</sup> Protection has been granted in the Copyright Act to 'original works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright.'<sup>288</sup> The constitutional formula is then revised adding to the copyright scheme 'originality' and 'fixation'.<sup>289</sup> Therefore, to be granted copyright protection an author needs to have his or her work recognised under one of the following categories which, in the United States Copyright Act, are set out under Section 102. 'Works of authorship within the subject matter of copyright include:

- literary works;
- musical works, including any accompanying words; dramatic works, including any accompanying music;
- pantomimes and choreographic works; pictorial, graphic and sculptural works;
- motion pictures and other audiovisual works; sound recordings; architectural works.'

These categories constitute the subject matter of copyright in a way that any copyrightable work needs to fit within the notion of 'literary or artistic works' provided by this list, which is not exhaustive but does have an 'administrative function'.<sup>290</sup> Overall, this list faithfully respects the constitutional *dicta*: works

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<sup>287</sup> I.e. *Eldred et al. v. Ashcroft* (U.S. Sup. Ct. 01-618, Jan. 15, 2003).

<sup>288</sup> 17 U.S.C. § 102 (a). However, in substance the constitutional provision is respected since any works which is not *fixed* in any tangible medium (ended work in writing) is excluded from protection. See S. W. Halpern, C.A. Nard, K. L. Port, *op. cit. supra* pp. 6, 41 and 48. Before the enactment of the Copyright Act 1976, the requirement was not fixation, but publication according to the so called 'common law of copyright'. *Ibid* at 40. The problem of the lack of protection of 'life performance' in the U.S. statute has been resolved recently with the enactment of the Uruguay Round Agreements Act signed in 1994 as implementation of the GATT. The Copyright Act has been provided of the new section 1101 'Unauthorised Fixation and Trafficking in Sound Recordings and Music Videos'.

<sup>289</sup> P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines Cases and Materials on the Law of Intellectual Property* (Foundation Press 1999) p.581 where it stated that the formula has been left as much vague as possible to allow a free interpretation of the courts.

<sup>290</sup> S.W. Halpern, C.A. Nard, K.L. Port *op. cit. supra* p.4., underlying the 'administrative function' of the list of categories in order to make easy the process of registration.

protected by copyright are only those that are 'all original creative expressions fixed in a tangible medium of expression'.<sup>291</sup>

However, what the copyright legislator ignores is that the same process of categorisation is a foreign concept for Indigenous communities. The actual notion of authorship, influenced by the utilitarian scheme of property, needs to be revised<sup>292</sup> in order to satisfy the demands of change which come from society.<sup>293</sup>

### 3.3.2. Folklore: '[B]eyond the Borders of Originality'<sup>294</sup>

As already mentioned, copyright law in the United States, as in the majority of countries, is characterised by two main requirements: 'originality' and 'fixation'.<sup>295</sup> Even the originality requirement derives from a constitutional formula which establishes that 'a work is not the product of an author unless it is original'.<sup>296</sup>

For the U.S. doctrine, the originality requirement is the 'sine qua non of copyright', the essence of copyright.<sup>297</sup> Moreover, it is the originality requirement which qualifies the work and subsequently authorises the producer of this work to be named as 'author'.<sup>298</sup> But what does it mean exactly that a work must be original in order to be protected? And to what extent can folklore be considered to be 'original' enough to be granted protection through copyright law?

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<sup>291</sup> *Ibid* p.4.

<sup>292</sup> See in general the works of Bentham and Hobbes.

<sup>293</sup> '...We see intellectual property as part of our culture - it cannot be separated into categories as [Western] lawyers would want.' Ray Apoka of the North America Indian Congress, speaking at Human Rights Convention in Vienna, June 1993, reported by D. A. Posey 'International Agreements and Intellectual Property Right Protection for Indigenous Peoples' in *Intellectual Property Rights for Indigenous Peoples*, T. Greaves Ed., Society for Applied Anthropology (1994) p.234.

<sup>294</sup> C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.23 who adapted this phrase coined by J.C. Ginsburg, 'Surveying the Borders of Copyright' [1994] 41 J. Copyright Soc'y U.S.A. pp.322, 324.

<sup>295</sup> There are countries which are more or less flexible about this latter requirement.

<sup>296</sup> U.S. Constitution Art.1, § 8, cl.8.

<sup>297</sup> U.S. Supreme Court in *Feist Publications, Inc. v. Rural Telephone Services Co.*, (1991) 499 U.S. 340, 111 S. Ct. 1282, 113 L.Ed.2d 358, 18 U.S.P.Q.2d 1275. See Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property*, Foundation Press, (1999) pp.601-2.

<sup>298</sup> See M.B. Nimmer links the originality requirement to the concept of authorship, defining it as the 'essence of authorship'. M.B. Nimmer, *Nimmer on Copyright: A Treatise on the Law of Literary, Musical and Artistic Property, and the Protection of Ideas*, ch. 1 (1967). (Hereinafter Nimmer on Copyright).

The U.S. Copyright Act provides protection only to 'original works of authorship'.<sup>299</sup>

To be original a work must not be copied, but it must instead be the product of original thought, skill, or labour of the artist but it does not require absolute novelty.<sup>300</sup> Originality requires simply that the work is 'independently created' and not copied from an existing work.<sup>301</sup> This is a delicate passage in the copyright theory which defines the borders between a copy, a mere derivative work and the original work itself.

### 3.3.3. Folklore as a Derivative Work

Folklore has been defined as the common heritage of Indigenous peoples,<sup>302</sup> and this heritage is passed on from generation to generation within the Indigenous community. The art crafts, the tales, the musics are often a patrimony which belongs to the community for centuries and this implies that often many works of folklore are 'derived' from the common culture of the community itself and which the community keeps alive. Because of the 'derived' nature of many works of folklore, the copyright doctrine has tried to contain folklore within the existing category of derivative works, thus depriving it of an acknowledged content of originality and indeed removing any possibility of protection.<sup>303</sup>

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<sup>299</sup> 17 U.S.C. §102 (1994). See M.T. Sundara Rajan and her critique of the concept of originality in 'Moral Rights and Human Rights: A New International Model' presented at the SERCI conference 2003 available at the web site [www.serci.org](http://www.serci.org), where she underlines how the originality requirement is a concept relatively new also for the 'Western world which, as recently as the Renaissance, had a somewhat more flexible approach to creativity'.

<sup>300</sup> As affirmed in *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 (2d Cir. 1951). See also P. Goldstein at Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property, Foundation Press, (1999) p.581.

<sup>301</sup> *Nimmer on Copyright*, 1997 at § 1.06. See also D.S.Chisum and M.A. Jacobs, *United States, World Intellectual Property Guidebook*, 1992 p.4-86. For a critical analysis of the concept of originality see M. Sherwood Edwards 'The Redundancy of Originality' [1995] *Entertainment L Rev* 94. See also S.S Boyd 'Deriving Originality in Derivative Works: Considering the Quantum of Originality Needed to Attain Copyright Protection in a Derivative Work' [2000] 40 *Santa Clara L Rev* 325.

<sup>302</sup> *The Study on the Protection of the cultural and intellectual property of Indigenous peoples*, E/CN.4/Sub.2/1993/28 (1993) edited by Erica-Irene Daes.

<sup>303</sup> Originality is a Western concept and it does not have much value for the Indigenous communities. See A.R. Riley 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' [2000] 18 *Cardozo Arts & Ent. L.J.* p.190 where she affirms: 'The Indigenous model rejects European types of discovery, invention, naming and originality, concepts which animate modern intellectual property law'.

A closer look at the U.S. doctrine on derivative works shows the improper use of this copyright formula if applied to folklore.<sup>304</sup> Under the U.S. Copyright Act, a derivative work is defined as a 'work based upon one or more pre-existing works'<sup>305</sup> and the author of the original has the exclusive right to prepare derivative works.<sup>306</sup> A work to be defined as 'original' can also be based on a pre-existing work but 'it must demonstrate substantial, and not merely trivial, variation, in a way as a 'transformative' work'.<sup>307</sup>

Folklore, then, must meet the originality requirement although at a minimum level, to be in line with the 'sine qua non' of authorship.<sup>308</sup> It is easy to understand how this requirement causes many problems to folklore. The main problem arises in the fact that it is very difficult to ascertain if a minimum standard of originality is met in many works of folklore. In fact, it is easy to understand how the sacred nature, the symbolism of many works of folklore represents a limitation to the process of creation. Many works of folklore have an ancient and mystic nature and often they have to be recognisably reproduced to be passed on to future generations. Therefore, folklore can be described as the result of a slow process of creation,<sup>309</sup> and it must be as close as possible to the original work. Most of the time, the same 'creative input' is limited by strict rules imposed by the community which the author has to follow strictly. To understand the reason behind this limitation, it must be understood that the same process of creation works within the community, mainly for the religious meaning underlying many works of folklore.<sup>310</sup> It has, in fact, been stated that 'The work has to stay roughly as it is and individual interpretations and

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<sup>304</sup> In fact, it is opinion of the author of this piece that a folkloric work cannot be defined as simply 'derivative', but best as 'transformative' of the previous work.

<sup>305</sup> 17 U.S.C. § 101 (1994). See 587-8

<sup>306</sup> 17 U.S.C. § 106 (2) (1994).

<sup>307</sup> C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?', [1997] 30 Conn. L. Rev. p.20.

<sup>308</sup> See U.S. Supreme Court in *Feist Publications, Inc. v. Rural Teephone. Services. Co.*, (1991) 499 U.S. 340, 111 S. Ct. 1282, 113 L.Ed.2d 358, 18 U.S.P.Q.2d 1275. See P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property*, Foundation Press (1999) pp.601-2.

<sup>309</sup> C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?', [1997] 30 Conn. L. Rev. p.21. She also affirms: 'original authorship is a foreign concept to Indigenous art and culture. The production of artwork can be described as a process of reinterpretation' p.23.

<sup>310</sup> See D.A. Posey 'International Agreements and Intellectual Property Right Protection for Indigenous Peoples' in *Intellectual Property Rights for Indigenous Peoples*, Tom Greaves Ed., Society for Applied Anthropology (1994) p.234.



adaptations are not welcomed or sought after'.<sup>311</sup> Furthermore, it cannot be said that all folkloric works are mere derivative works or simply copies of an original work, e.g. when an Indigenous tale – although represented as faithfully as possible - does not use the traditional expressions of the past, due to the evolution of language and expression. In the case of a folkloric song, the change in the use of language or language structure, constitute a sort of 'creative input', which makes the 'reproduction' different from a previous tale, even if the music and the meaning are still the same.<sup>312</sup> Therefore, a distinction must be drawn between simple derivative works or mere copies of the original and transformative works that add to the original work a 'creative input'.<sup>313</sup>

### **3.3.4. The 'Creative Input' in the Reproduction: Folklore as a Transformative Work**

As asserted above, folkloric works cannot be defined as merely derivative in nature or copies of the original work. Although often derived from pre-existing works, the 'creative input' in the reproduction can make them as valuable as original works. But this does not make the protection of folklore easier under copyright law. In fact, at first this 'creative input' is not always easily identifiable because there must be an individualistic 'input' under the statutory requirement. Moreover, it is difficult to determine if a work is still 'original' although based on pre-existing work, since only the original variation from the pre-existing work is protected and not the work as a whole.<sup>314</sup> Therefore, even if a folkloric work manages to meet the originality requirement in the variation, it loses the originality requirement of the pre-existing work.<sup>315</sup> The author of a work of folklore (e.g. the storyteller of an Indigenous tale) can find protection for its interpretation or reproduction if it is 'original' enough; however, the community as a whole and the pre-existing folkloric work is left without any protection.

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<sup>311</sup> 'Derivation' and not 'deviation' from pre-existing works is allowed. 'Because of Indigenous art's function as a historical and sacred text, innovation is restricted', C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.21.

<sup>312</sup> See in general N.A. Voegtli 'Rethinking Derivative Rights' [1997] 63 Brooklyn L Rev 1213.

<sup>313</sup> See M.A. Einhorn *Media, Technology, and Copyright: Integrating Law and Economics* (Edward Elgar Publishers 2004) at Chapter 2 where he analyses the distinction between derivative and transformative as follows: derivative works that recast copyrighted material to a new medium 'that creators of original works would in general develop or license others to develop [in] traditional, reasonable, or likely to be developed markets' and transformative works that 'add something new, with a further purpose or different character, altering the first with new expression, meaning, or message.'

<sup>314</sup> C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.21.

<sup>315</sup> *Ibid* p.22.

Indeed, the originality requirement as disciplined by the statutory provision is found to be an incomplete means of protection for works of folklore, mainly because the criteria of originality are too uncertain and the result of an individualistic approach.<sup>316</sup> Moreover, the protection is left to the 'creative input' given by a single author. The statutory provision forgets that folklore belongs to the community and not to the single Indigenous artist. Also the category of transformative work, in which a creative input is observable in the variation, cannot make up for the deficiencies of the scheme. If only the new added variation is protected, all the remaining pre-existing folkloric work risks being categorised as public domain.<sup>317</sup> In conclusion one is bound to agree with the observation that in order to protect folklore, copyright should be extended 'beyond the borders of originality'<sup>318</sup> in order to become a more flexible instrument. In this way, protection could be extended to the pre-existing work for the benefit of the whole work of folklore.

### 3.3.5. The Fixation Requirement

If an obstacle exists to the protection of folklore in many countries such as in the United States, this is due to the classification of copyrightable works where only the works 'fixed in a tangible medium' are protected - the positive side of copyright - while others are excluded from this protection - the negative side of copyright.<sup>319</sup> As already stated, this statutory provision<sup>320</sup> accomplishes the constitutional

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<sup>316</sup> See M.T. Sundara Rajan and her criticisms regarding the concept of originality in 'Moral Rights and Human Rights: A new international model' presented at the SERCI conference 2003. Paper available at <http://www.serci.org>. The author questions what would the strict application of Western criteria of originality mean in a culture where reusing or adapting pre-existing works may be an important part of the creative process.

<sup>317</sup> *Ibid* at page 22. As it will be examined further on in this chapter the works in public domain are free to be copied without incurring in any infringement of copyright law and this with the effect that the pre-existing, underlying work from which the original work can derive can be 'reproduced either exactly or in modified form' C.H.Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.23. Moreover, the 'original' work which derives from a work in public domain can obtain copyright protection, while the underlying work is left without protection. But what is even worse is that even if the underlying work is copyrighted, the new work which derives from it if shows that is substantially different can be granted also copyright protection.

<sup>318</sup> C.H. Farley at page 23 *op. cit. supra* who adapted this phrase coined by J.C. Ginsburg 'Surveying the Borders of Copyright' [1994] 41 J. Copyright Soc'y U.S.A. pp.322, 324

<sup>319</sup> See generally P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) pp.582-3. Nimmer argues that the fixation requirement is not merely a statutory condition to condition to copyright, it is a constitutional necessity. See Nimmer on Copyright at § 2.03 (1998).

<sup>320</sup> 17 U.S.C. § 102.

requirement set forth under Article 1§ 8(8), which necessitates that a work needs to be 'in writing' to be protected by copyright.<sup>321</sup>

In fact, although the Berne Convention leaves the freedom to any member States to determine whether or not a work must be fixed,<sup>322</sup> the U. S. Copyright Act has adopted a strict regime of fixation.<sup>323</sup> In fact, the statutory law speaks in terms of 'original works of authorship fixed in a tangible medium of expression' precluding protection for all the works, which are not 'fixed in a tangible medium of expression'.<sup>324</sup> This means that the United States Copyright Act grants protection only to works which are 'fixed' (e.g. written) and folklore, which is often represented by oral tradition,<sup>325</sup> does not easily fit in that category. Indigenous songs and dances, for instance, may be passed on from generation to generation through memorisation, but may never be recorded in any tangible form. In essence, folklore is the antithesis of recorded culture.<sup>326</sup> Therefore, many works of folklore cannot receive protection because they cannot be fixed.<sup>327</sup> In fact, Indigenous peoples are unwilling to convert their culture which is oral, to accomplish the requirement of the Copyright Act. Orality is part of the Indigenous communities' culture and it is part of their sacred imaginary and representation of reality.

### 3.3.5.1. Protection for the 'Fixer'

The U.S. Copyright Act protects not just the author but the 'fixer', who is entitled to receive copyright protection only for its work of fixation 'in a tangible medium'. It should be emphasised that the fixer may be someone extraneous to the work and to the community from which the work originated. For example, a music band who assisted a live performance of an Aboriginal group and decide to record

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<sup>321</sup> As underlined under the paragraph 'United States Copyright: a Constitutionally Guaranteed Right', where it is stated that the constitutional dicta has been slightly modified in the statutory translation of the topic.

<sup>322</sup> Article 2 (2) of the 1887.

<sup>323</sup> D. Sanders *Authorship and Copyright* (Routledge 1992) p.149.

<sup>324</sup> Fixation in a tangible medium of expression for the U.S. Copyright Act can subsist when 'its embodiment in a copy...by or under the authority of the author, is sufficiently permanent or stable to permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration' 17 U.S.C. § 101.

<sup>325</sup> See C. Calliston and B. Amani *op. cit. supra*.

<sup>326</sup> C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.28.

<sup>327</sup> 'Denying copyright protection to works not fixed in a tangible medium' results in the devastating exclusion of an entire realm of Indigenous creations...Western law ..fails to incorporate such elements into current statutory schemes' as A.R. Riley affirms in 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' [2000] 18 Cardozo Arts & Ent. L.J. pp.195-196.

the music without asking any authorisation from the community could claim copyright.<sup>328</sup> Of course, the U.S. Copyright Act will grant copyright protection to the fixer only for its contribution to the fixation (e.g. the fact that he/her recorded the music) and will not grant to the fixer the copyright for the music itself. The permission of the real author for the use of its copyright work (in the previous case the community for its music) will therefore still be necessary and this might seem to soften the negative impact of the provision.<sup>329</sup> However, the real author of the work should have already fixed his/her work,<sup>330</sup> otherwise the work can be a copy without asking any authorisation.<sup>331</sup> This is the reason why many works of folklore cannot find protection under this particular scheme. Going back to the example proposed above, any music band assisting at a live performance of an Indigenous group can record their music without requiring authorisation and without incurring an infringement of the copyright law if the music performed by the Indigenous group is not copyrighted.<sup>332</sup>

There are authors who maintain that 'the lack of fixation may actually provide more protection to folkloric works'<sup>333</sup> because the fixation marks the beginning of the term of protection of the work and in the absence of fixation the rights cannot expire. However, it is difficult to see how in the first place the Indigenous communities could benefit from the lack of fixation if their works were to be misappropriated by the so called 'fixer' (the music recorder or the film maker) simply because the folkloric works are not usually fixed. No-fixation leads to the fact that there is no established time limit. Nevertheless, the lack of time limit could be beneficial only if a form of protection already exists for the folkloric work to prevent such misappropriation as in the case of illegal recording of Indigenous songs.

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<sup>328</sup> A.R. Riley, *Ibid* p.175 ss. where she illustrates what happened to an Ami aboriginal song 'Song of Joy', recorded without authorisation during a live performance of an aboriginal author. The band Enigma made out of it a world-wide success titled 'Return to Innocence'.

<sup>329</sup> 17 U.S.C. § 102 (a) (1994).

<sup>330</sup> 17 U.S.C. § 101 (a) (1994).

<sup>331</sup> E.g. 'Song of Joy' reported in A.R. Riley 'Recovering Collectivity : Group Rights to Intellectual Property in Indigenous Communities' [2000] 18 *Cardozo Arts & Ent. L.J.* pp.195-196.

<sup>332</sup> *Ibid*.

<sup>333</sup> C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 *Conn. L. Rev.* p.29.

Therefore, fixation remains the real obstacle to the protection of folklore which is mainly made of oral traditions.<sup>334</sup> The problem of duration is only related to the parameter of the right; therefore it has a secondary importance since the existence of a right must first be recognised. The fact that many works of folklore cannot be fixed for their orality or for their high sacral content - often these two topics are connected, poses a real dilemma. Under the United States Copyright Act, the maker of the adaptation, e.g. the 'fixer', can also become the author of a right.<sup>335</sup>

Indeed, applying the fixation requirement will leave the Indigenous communities without protection.

### **3.3.6. Copyright Parameters**

#### **3.3.6.1. The Duration of the Right**

As mentioned in the previous paragraphs, duration is part of the way in which copyright is regulated. Copyright is a right which is granted for a certain limited period and its duration is not the same worldwide while the essence of the right (originality and fixation) remains the same. The Berne Convention offers a term of protection which is for 50 years after the death of the author.<sup>336</sup> However, the U.S. Copyright Act enforced a term of copyright protection which is higher: the life of the author plus 70 years.<sup>337</sup> Special terms of protection are established for anonymous and pseudonymous works<sup>338</sup> and joint works.<sup>339</sup> This apparently long but limited term of protection represents a specific policy reason which reduces the pure

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<sup>334</sup> A.R. Riley states in 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' [2000] 18 *Cardozo Arts & Ent. L.J.* p.195 'The requirement, by definition, excludes all oral literature of Indigenous peoples from the paradigm of Western law'.

<sup>335</sup> M.T. Sundara Rajan, 'Moral Rights and Human Rights: A New International Model' presented at the SERCI conference 2003 available at the web site [www.serci.org](http://www.serci.org) where she states 'Rather, copyright law protects the 'owner' of the copyright in a work - the person who has acquired the right to reproduce and disseminate the work by purchasing it from the author. The owner of copyright may or may not be the same person as the author; in practice, it is most often the publisher....The tension between 'authors' and 'owners' in copyright law may lead to the ironic situation where authors actually become the victims of copyright legislation that is supposed to protect their rights'.

<sup>336</sup> Article 7 (1) and (2), the Berne Convention (1886).

<sup>337</sup> U.S. Copyright Act 1976, 17 U.S.C. § 302 (1994) as amended by the Soni Bono Term Extension Act 1998.

<sup>338</sup> Section 302 (c) of the U.S. Copyright Act the term in this case is of 75 years from publication or 100 years from creation in case of anonymous works.

<sup>339</sup> Copyright continues for 50 years after the death of the last surviving author. 17 U.S.C. Section 302 (b) (1994).

monopoly granted to the author in the name of the right of information and the promotion of innovation.<sup>340</sup>

At the end of this legal period the right expires. A term of protection is ill-suited for Indigenous communities seeking a perpetual protection for their folkloric works. Folklore as already said earlier on in this chapter is 'the expression of a cultural living heritage' and this cultural heritage is passed on from generation to generation. This cultural heritage is shared by all members of the community as the originator remains alive. The term of copyright protection, although long, as in the case of anonymous works,<sup>341</sup> is nonetheless limited and is therefore unable to protect in perpetuity phenomena that never ends and is not linked to the life of an individual author who represents or performs it.

### 3.3.6.2 Folklore: A Perpetual Right

In Indigenous works the 'author'<sup>342</sup> or whoever incarnates the 'author' should live as long as the community, a life that can end only when the community from which folklore is produced extinguishes itself or its culture.<sup>343</sup> This is why folklore is claimed to be a 'perpetual right' to which should be granted a perpetual protection.<sup>344</sup> This perpetual right is dictated by the same nature of works of folklore which are the result of a collective effort. If the work is the product of this collective effort to preserve and to keep alive their culture, Indigenous people need to be entitled to a sort of group-authorship. In fact, folklore is rarely attributable to a single author. The durability requirement links copyright to the life of that author, as this would mean that folklore dies 70 years after the death of the author who represented or performed the last folkloric work. Therefore, the durability requirement only protects the person who represents the artistic traditions of the community and the term of protection considerably harms the wellbeing of the community in seeking protection for its folklore. The work of the author (a creation in Indigenous work is always based on traditions) can possibly meet the originality requirement but finds another obstacle in the provision of the Copyright Act concerning the duration of the

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<sup>340</sup> See in general R C Dreyfuss, D L Zimmerman and H First (eds) *Expanding the Boundaries of Intellectual Property: Innovation Policy for the Knowledge Society* (Oxford University Press 2001). C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.18.

<sup>341</sup> Section 302 (c) of the U.S. Copyright Act.

<sup>342</sup> That could also be intended as 'collective authors'.

<sup>343</sup> This is set in the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 'the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited' (UNESCO-WIPO, 1985) p.22.

<sup>344</sup> This is the view of Indigenous communities see Farley *op. cit. supra* p.19.

right. The individualistic scheme of the durability requirement misunderstands the meaning of folklore. In simple terms, applying the durability requirement is like leaving folklore to its own destiny, so that it may be free from being exploited after the death of the last author who created, performed or represented it.

Although the provision of anonymous works extends the protection to one hundred years,<sup>345</sup> this term could never be sufficient to grant protection to folklore which is a living tradition. Imposing a time limit on the exercise of the right undermines the real sense of folklore as a timeless culture. The risk is that a number of years after the death of the last authors who represented that particular work of folklore, such work will be subsumed into the public domain with great prejudice to the existing community. The community in fact does not lose the traditions or the beliefs contained in the representation which can survive within the community as long as the community is alive as an existing sovereign entity.

In conclusion, the inadequate term of protection available for works of folklore means that many of these works are already in the public domain and are used without authorisation. There are indeed two routes to be followed. The first one is to prevent folkloric works falling into the public domain after the expiring term of protection (i.e. anonymous or pseudonymous works, the term of protection will expire fifty years after the work has been lawfully made available to the public, according to the wording of the Berne Convention). The second step is to introduce a sort of 'retroactive right'<sup>346</sup> to retrieve the many other folkloric works which have already fallen into public domain. To do so a governmental body and an Indian tribal organisation should be created to exchange views on how the legislative national dimension could meet the customary law requirements especially in terms of protection of the intellectual property of Indigenous peoples. This will help to know and to establish and to classify the folkloric works already in the public domain and to adopt the best measures to rescue those that are still belong to living Indigenous communities, especially those having religious and cultural beliefs.

Therefore, applying the fixation requirement to folklore is impossible. From the time the right is fixed, copyright is granted and attached to the life of the so called author. The author's life, plus 50 or 70 years, also marks the duration of the

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<sup>345</sup> Section 302 (c) of the U.S. Copyright Act the term in this case is of 75 years from publication or 100 years from creation in case of anonymous works.

<sup>346</sup> C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. p.18.

right. It follows that, a 'perpetual right', which justifies the nature of works of folklore as a living cultural heritage, does not exist.<sup>347</sup>

### 3.3.7. Group Rights (Collective Rights)

As already mentioned, most of the time the spiritual side and symbolism attached to folklore is kept in the hands of a few people within the community (the chiefs or community leaders) who allow some of their members to perform or to reproduce certain types of work.<sup>348</sup> The chiefs are not in a hierarchical position as could be supposed by the Western world. They are usually the 'elders' or the 'wise' of the community to whom the role of regulating the process of creation - sometimes a secret creation which has been handed down through generations - has been left. The chiefs have the 'role' of ensuring that the process of creation follows the ancient rituals and that the spirit of creation continues even although regenerated. Overall, the creation is a collective process and the work created belongs to the whole community. This is a real crucial issue in many copyright laws and in particular under the U.S. copyright doctrine, which recognises group rights with great reluctance.<sup>349</sup> As stated previously, the U.S. copyright doctrine derives from the Western concept of authorship which is an individualistic concept<sup>350</sup> and folklore is the antithesis of this concept because it is the work of the community even if sometimes represented by an individual artist.<sup>351</sup>

It can be said that under the U.S. copyright system a concept of group or community authorship has never been existing. 'Copyright law is premised on individual rights, and recognises group rights only in limited situations' as it will be

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<sup>347</sup> Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions 'the protection of the expression of folklore is not for the benefit of individual creators but a community whose existence is not limited' (UNESCO-WIPO, 1985) at 22.

<sup>348</sup> See C.H. Farley *op. cit. supra* pp.10-11.

<sup>349</sup> See A.R. Riley 'Recovering Collectivity : Group Rights to Intellectual Property in Indigenous Communities', 18 *Cardozo Arts & Ent. L.J.* 2000 p.225. See also W.J. Gordon *Intellectual Property*, Chapter 28 of *The Oxford Handbook of Legal Studies*, ed. by P. Can and M. Tushnet (Oxford University Press 2003) p.624. At the moment available at the web site of The Boston University School of Law Working Paper Series Index: <http://www.bu.edu/law/faculty/paper>, where she underlines how only recently the U.S. copyright doctrine is opening to the 'virtues of common authorship'.

<sup>350</sup> *Ibid* p.203.

<sup>351</sup> '....Such individual responsibilities should not be confused with ownership or property rights....', Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples, U.N. Economic & Social Council, Comm. On Hum. Rts., Sub-Comm. On Prevention of Discrimination & Protection of Minorities, 45<sup>th</sup> Sess., Item 14 of Provisional Agenda, E.I. Daes, Special Rapporteur, U.N. Doc. E/CN.4/Sub.2/1993/28 at p.9 (1993).



seen later on in the chapter as regards joint ownership and corporate ownership.<sup>352</sup> In fact, the United States concept of copyright, as that of many other countries, is still very much anchored to the idea of granting protection to the author of an original creation. This current copyright doctrine is still very much focused on the myth of the romantic author.<sup>353</sup> In fact, the eighteenth century philosophy recognises as copyrightable only the work of a single author with distinguished personality.<sup>354</sup> That period gave rise to the concept that has been characterised as that of the author 'genius'. This individual genius, exalted by the philosophy of the romanticism period (e.g. Kant, Hegel)<sup>355</sup> was created as a reaction against the medieval period where the work of a single author was not rewarded and the author was more the co-author of encyclopaedic works rather than the author of his own work. He was the 'master of a craft, master of a body of rules, or techniques, preserved and handed down in rhetoric and poetics, for the transmission of ideas handed down by tradition'.<sup>356</sup> The romantic author abandoned Latin as a language of expression and started to express his ideas in his own language, which led to more natural and fluent ways of expression. This is often seen as the reason why creativity and originality are becoming the key concepts of copyright in this period. Originality, in the sense of the work originating from the author, independently created by the author and creativity (minimum level of originality) are both concepts born during the romantic period. The Statute of Anne in England (1709), the first copyright Act,<sup>357</sup> uses also the rhetoric of authorship but was actually intended to benefit the book trading members of the stationer's company rather than the individuals.<sup>358</sup> If the birth of the romantic idea of authorship was necessary and natural during the

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<sup>352</sup> C.H. Farley *op. cit. supra* p.29.

<sup>353</sup> A. R. Riley *op. cit. supra* pp.179, 180, 181. See generally J. Boyle *Shamans, Software, and Spleens Law and the Construction of the Information Society* (Harvard University Press 1996).

<sup>354</sup> See in general P. Drahos *A Philosophy of Intellectual Property* (1996 Dartmouth Aldershot). See also J. Hughes 'The Philosophy of Intellectual Property' [1988] 77 *Georgetown L J* p.287.

<sup>355</sup> See the operas of the two authors respectively: I. Kant *Metaphysische Anfangsgründe der Rechtslehre*, Kants Werke 1907 and G.W.F. Hegel *Philosophy of Right* (1821), trans. T.M. Knox.

<sup>356</sup> M. Woodmansee 'On the Author Effect: Recovering Collectivity' [1992] 10 *Cardozo Arts & Ent. L.J.* at 280. The reasons behind that were that the medieval author was still rooted into the culture of the classics and the primary work was to make classics accessible to a society which was becoming every day more unaware of the Latin language and where many more regional languages were now spoken. That was the period of the *glossatores* and *commentatores* in legal history which translated the roman texts in a more modern Latin. See generally P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) pp.556-7 tracing the history of copyright.

<sup>357</sup> *Ibid.*

<sup>358</sup> M. Rose 'Nine Tenths of the Law: The English Copyright Debates and the Rhetoric of the Public Domain' [Winter/Spring 2003].66 *Law & Contemp. Probs.* p.85.

romantic period where the work of a single identifiable author begun to be appreciated after centuries of 'unknown' medieval group authorship; it is now necessary to revise this notion of romantic author and to focus the attention again on the result of collective efforts. It is necessary to re-appraise and revalidate the importance given to a joint work, applying not individualistic rules but joint rules. Moreover, the notion of a collective effort is not new, since, as observed, it applied in medieval times. New rights have been established themselves such as the rights of the Indigenous communities to see their works protected in the same way as any other Western works and these rights cannot be ignored.

In fact, if it still makes sense to attribute a specific protection to the work of a single author, it does also make sense to attribute protection to a work of group authorship since this is necessary in modern times. This is due to the expansion of the rights to be protected - thanks to an ever more modern and more technological society - which also bring rights which clearly do not or should not belong to a single individual but to groups or communities, and where it is sometimes difficult to identify the author since the work can be shared among many authors or even more radically, as in the case of folklore, can belong to an entire community. Therefore the means of protection cannot be the same as those used to cover protection for the single author and a different system or a reformed one needs to be put in place.<sup>359</sup> This problem touches upon all modern societies and the U.S. are just one of them.

### 3.3.7.1. Joint Works

A solution to folklore can nevertheless be sought in the provisions of the U.S. Copyright Act under the section covering joint works,<sup>360</sup> where the joint authors are called co-authors and they share the authorship of the work in the sense that their work merges into an 'inseparable or interdependent parts of a unitary whole'.<sup>361</sup> Under the statutory provision, however, the rights are granted only if the joint authors who are sharing the work are the ones that materially make the work, and therefore only those members of the community 'involved in the creation of the work can be joint authors'.<sup>362</sup> But folklore belongs to the community and not to the

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<sup>359</sup> P. Jaszi 'On the Author Effect: Contemporary Copyright and Collective Creativity' [1992] 10 *Cardozo Arts & Ent. L. Rev.* p.293.

<sup>360</sup> 17 U.S.C. § 201 (a) (1994).

<sup>361</sup> *Ibid.*

<sup>362</sup> P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) pp.634-39 describing the two criteria that the U.S. courts use. Nimmer's de minimis standard and Goldstein copyrightability test, the first considering copyrightable the final product of the joint work, while the latter, more extreme,

artist who represents the folkloric work. Therefore, under the Copyright Act, the community is not 'the author' and therefore it will never receive copyright protection since the provision of joint authorship will protect only the single authors to whom the whole work belongs and not the real author, i.e. the community which invested in training the author to perform the works of folklore of the community.<sup>363</sup>

### 3.3.7.2. Transfer of Rights

The problem of granting protection to the group as a whole could be solved by the transfer of rights from the artist to the community.<sup>364</sup> However, this type of provision cannot work for three main reasons:

The first reason is a conceptual one. The transfer of rights is foreign to the Indigenous people as well as the concept of alienable property. There is no need to transfer an 'individual' right that has never existed in the view of the community.

The second reason is that the Indigenous author who is representing the folkloric work can resist transferring his or her right to the community. This is due to the fact that the law grants protection to the individual and not to the community. The community cannot force or insist on the transfer of the right from the author to the community and similarly in this case it will also not be able to avoid a possible transfer from the author to a third person outside the community.

The third problem follows from the above: even a single co-author could alienate his or her rights over the work produced without the consent of the other co-authors.<sup>365</sup>

The transfer of rights as stated in the Copyright Act will possibly harm the relationship between the community and the artist who represents the community and therefore is conceptually inapplicable to folklore.

### 3.3.7.3. Works for Hire

Another provision which could be investigated in order to protect the rights of the community is the one which allows the employers to take benefits of the work

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considers copyratable the joint work which is the collection of each single copyrightable work. As it has been addressed by A.R. Riley *op.cit.supra* p.203: 'In the Western world, if groups are addressed at all, it is only as a conglomerate of individuals, each with a distinct, particularised identity'.

<sup>363</sup> 'No individual owns the work because no one individual is thought to have created Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev at note 189.

<sup>364</sup> 17 U.S.C. § 201 (d) (1994). C.H. Farley 'Protecting Folklore of Indigenous Peoples: Is Intellectual Property the Answer?' [1997] 30 Conn. L. Rev. 1 p.34.

<sup>365</sup> *Ibid*, under note 128, recalling *Nimmer on Copyright* 1997.

created by their employees. This is known in many copyright laws as the work made for hire doctrine. Under the U.S. Copyright Act a work made for hire is 'a work prepared by an employee within the scope of his/her employment'.<sup>366</sup> The problem here is also a conceptual one.<sup>367</sup> In fact, the relationship between a member of the community who performs the work and the community itself cannot be reduced to a mere employer-employee relationship, because the positions of the members within the community cannot be classified as a working relationship in the sense that the Western world is used to describing it.<sup>368</sup>

Overall, all the provisions regarding group rights are insufficient to protect the Indigenous community which is behind the process of creation. The problem is that all 'collective rights' are focusing on the protection of the individuals who under specific circumstances are connected to the group/company and not on the group as a whole or to the specific relationship linking the Indigenous peoples participating in the creation process.

### 3.3.8. Fair Use

Many copyright laws allow the unauthorised use of the copyrighted work (i.e. to copy it without incurring any infringement) in some specific cases so called defences or users' rights;<sup>369</sup> however, national legislation regulates these exceptions in different ways.<sup>370</sup> The theorisation of this doctrine made by the U.S. courts goes also under the well known name of fair use exceptions<sup>371</sup> and it has been defined as the 'most troublesome in the whole law of copyright'.<sup>372</sup> The policy reason for introducing this exception is due to mitigate the effects of the copyright protection

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<sup>366</sup> 17 U.S.C. § 101.

<sup>367</sup> B.S. Hayes 'Integrating Moral Rights into U.S. Law and the Problem of the Works for Hire Doctrine' [2000] 61 Ohio State L J p.1013.

<sup>368</sup> See M. McDonald 'Should Communities Have Rights? Reflection on Liberal Individualism' [1991] 4 Can. J.L. & Juris. At pp.217, 218 the author affirms that Indigenous peoples 'are normatively bound to each other'.

<sup>369</sup> R. Burrell 'Reining in Copyright Law: Is Fair Use The Answer' [2001] 4 I.P.Q. p.361.

<sup>370</sup> *Ibid.* The author calls it the 'free hand' of national legislator and government. (e.g. U.S. provides a more generic approach, enumerating a few number of exceptions and leaving to the discretion of the judge to decide what is 'fair' and what is excluded from this limitation.. The opinion the author expressed at pp.377, 382 is that fair use in the U.S. is a policy 'shaped by a series of high profile cases and out of court settlements matter'; and probably introduced to balance 'a more restrictive view of freedom of expression'.. On the contrary the United Kingdom for example 'provide for a larger number of much more specific exceptions' and he argues at p.361 see Chapter III, Part I of The Copyright, Design and Patents Act 1988 which consists of 57 sections enumerating all the acts that do not infringe copyright.

<sup>371</sup> *Ibid* p.361. See e.g. 17 U.S.C. § 107 (1994).

<sup>372</sup> *Dellar v Samuelson Goldwyn, Inc.*, 104 F.2d 661,662 (2d Cir. 1939).

granted to the author, limiting his/her freedom of expression/right of access to information.<sup>373</sup>

Under Section 107 'Limitations on Exclusive Rights: Fair Use', the U.S. Copyright Act allows copies of a copyrighted work in cases of criticism, news reporting, educational purposes...<sup>374</sup> Thus, it sets out a long list of 'narrowly tailored limitations'<sup>375</sup> to the right of authorship, which balance the constitutional formula, which sees copyright as useful for the 'progress of science and useful arts'. Correctly the 'fair use' has been defined as a sort of 'safety valve'<sup>376</sup> where the right of the author is not abolished but compressed, limited to safeguard more important rights.

In particular, this means that a copyrighted work may be used without any licence for comment or criticism or for an educational purpose.<sup>377</sup> The author has no power to interfere and to dictate how to use his/her work if the work is used within the scope of the exceptions. Of course, Indigenous communities acknowledge that it is one matter to represent their work for educational purposes, for example, while it is another matter to misrepresent and exploit their cultures for the purposes of economic gain.

The core issue in applying the fair use doctrine to folklore is that this will not necessarily limit the right of authorship granting protection to folklore (e.g. no longer originality requirement, fixation, durability), however it will mean leaving free room to copy Indigenous works without allowing any economic benefit to the community. The 'fair use' doctrine, as it is, does not provide any help to the Indigenous groups, but actually adds another obstacle to the already existing ones.<sup>378</sup>

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<sup>373</sup> R. Burrell *op. cit. supra* p. 377. See also S.W. Halpern, C.A. Nard and K.L. Port *Fundamental of the United States Intellectual Property: Copyright, Patent and Trademark*, Kluwer Law International (1999) p.114.

<sup>374</sup> The U.S. fair use doctrine has been defined as 'open-ended' model by R. Burrell, *op. cit. supra* at 387. At page 385 the author states that 'there is no need to identify explicitly each and every possible situation which the exception could apply, provided that the scope of the exception is known and particularised. This guarantees a certain degree of legal certainty'. See also S. W. Halpern, C.A. Nard, K. L. Port, *op. cit. supra*, p.113, defying the fair use as an application of the U.S. doctrine *rule of reason*.

<sup>375</sup> Sections 108 to 121 of the U.S.A. Copyright Act. S. W. Halpern, C.A. Nard, K. L. Port, *op. cit. supra*, p.112.

<sup>376</sup> S. W. Halpern, C.A. Nard, K. L. Port, *op. cit. supra*, p.113.

<sup>377</sup> See regarding the 'educational fair use' the Agreement on Guidelines for Classroom Copying in Not-for-Profit Educational Establishments with Respect to Books and Periodicals.

<sup>378</sup> The GATT-TRIPs Agreement under Article 13 which provides that 'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder'. Reported in Burrell, *op. cit. supra* p.384. However 'a general fair use defence is in fact compatible with the TRIPs Agreement. R. Burrell *op. cit. supra* p.385.

But this is not all. In fact, as previously stated, the priority of Indigenous communities is to protect their cultural heritage from any illegal exploitation and not simply gain economic benefit from it. Overall, Indigenous peoples are concerned with the protection of the sacred imaginary<sup>379</sup> that applying the copyright doctrine of 'fair use' will not be protected at all. Indigenous peoples' folklore is often made of secret art and symbols that cannot be 'copied' without eliminating the same nature of folklore and therefore undermining the same cultural life and existence of these communities.

### 3.4. Alternatives to Copyright

#### 3.4.1. Trademark Protection

##### 3.4.1.1. The Provisions under the Lanham Act

In order to protect folklore, a possible alternative to copyright laws could be the trademark legislation included in the U.S. Lanham Act.<sup>380</sup> The definition of trademarks and its scope and purpose of protection is defined as:

'any word, name, symbol, or device, or any combination thereof...used by a person... to identify and distinguish his or her goods, including a unique product, from those manufactured or sold by others.'<sup>381</sup>

Trademarks grant rights collectively (e.g. also to corporations) and provide perpetual protection,<sup>382</sup> but the work underlying the trademark protection must qualify as a commercial good or service.<sup>383</sup> However, as previously affirmed, some categories of Indigenous art are unable to be included under any commercial

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<sup>379</sup> See in general on the topic R. A. Guest 'Intellectual Property Rights and the Native American Tribes' [1996] *American Indian L. Rev.* and in particular p.114 where he affirms 'Although existing patent, copyright and trademark law in the United States offers significant protection and economic benefit for individual and companies, it fails to recognise and protect the unique nature of the Native American intellectual property'.

<sup>380</sup> Ch. 540, 60 Stat. 427 (codified at 15 U.S.C. §§ 1051-1127). However, each single state has also state trademark laws, statutes for state registration of trademarks' and R. A. Guest *op. cit. supra* at note 89.

<sup>381</sup> 15 U.S.C. § 1127.

<sup>382</sup> Under the Lanham Act trademarks may be renewed every ten years 15 U.S.C. para 1059.

<sup>383</sup> P. Drahos, *op. cit. supra* p.56 and note 174 recalling Section 43(a) of the Lanham Act, 15 U.S.C. para 1125(a).

qualification due to their symbolic-sacred nature which sometimes forbids disclosure.<sup>384</sup>

Also a civil action brought to protect against the infringement of trademark was narrowly construed: it was only set to provide a remedy to 'commercial parties'. In fact, Action 43 (a) (1) of the Lanham Act provides a civil course of action 'by any person who believes that he or she is likely to be damaged' by the use in commerce by another of 'any term, name, symbol, or device or any combination thereof, or any false designation of origin, false or misleading description of fact, or false representation of fact...'.<sup>385</sup> Moreover as has been correctly argued in order to recuperate damages from the infringement 'a higher standard is required wherein the tribes must demonstrate actual lost profits or decline in the market share for their products casually connected to the use of their tribal names by the companies'.<sup>386</sup>

Thus, trademark protection and the procedure regarding the infringements as established under the Lanham Act provide a limited protection for some works of folklore (e.g. any word, name, symbol, or device), but they also should be re-read in a less commercial perspective.

In many countries as in the U.S. particular laws have been issued to extend the trademark facilities to Indigenous folklore and to protect it from imitation, due to the lack of specific rules.<sup>387</sup> One of these laws is The Indian Arts and Crafts Act 1935 amended in 1994 (IACA) which has tried to implement specific rules that until now have never been enforced completely.<sup>388</sup> Nevertheless a look into these particular set of rules is necessary to consider the complex topic of extending trademark protection to Indigenous communities.

#### **3.4.1.2. The IACA Provisions: a *Sui generis* Legislation for the Protection of Traditional Knowledge**

As stated, particular trademarks for Indigenous communities were established in the U.S. by The Indian and Crafts Act (IACA) where it is possible to register as trademarks Indigenous peoples' artefacts; those are then trademarked as 'Indian'

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<sup>384</sup> R.A.Guest *op. cit. supra*. The author at page 125 states that '[N]on-Natives usually view these cultural objects only in the context of their commercial value and he adds 'Western qualification systems are out of touch with the American Indian world-view'.

<sup>385</sup> R.A.Guest, *Ibid* p.130.

<sup>386</sup> *Ibid*, p.132.

<sup>387</sup> In the U.S.A. the Indian Arts and Crafts Act 1935 Act of Aug.27, 1935, ch.748,1, 49 Stat. 891 codifies as amended at 25 U.S.C. para 305 (1994).

<sup>388</sup> P. Drahos, *op. cit. supra* p.54.

*authentic* [emphasis added] products.<sup>389</sup> As correctly observed<sup>390</sup> the denomination as 'Indian' made does not solve the problem of the conflicts of interest among the many Indian communities, to whom is granted a generic protection through the use of the trademark 'Indian authentic'. In so doing one Indian community could use the products created by another Indian community and not be sanctioned for doing so.<sup>391</sup>

Furthermore, the provision of this statute regarding the infringements procedures has never been implemented,<sup>392</sup> underlining the limits of this law. Moreover, there are no provisions related to the specific protection of songs or symbols ceremonies.<sup>393</sup>

In 1990 the IACA provisions were amended with the introduction of the Indian Arts and Crafts Board (the Board), as the authority for protecting and promoting through trademark law, the Native American Indian art. However, the Board has never been very helpful in promoting Indigenous folklore and in stimulating the registration of the Indian trademark. The reason is due to the fact that the Indigenous communities should start the legal process for registration of their products. The Board is an institution made by non Indians members and this is probably the reason why not so many initiatives are taken in favour of Indian communities. It is an authority that the Indigenous communities do not recognise and trust. Moreover, the Act grants protection only to the works of folklore which can be registered as 'Indian made'. Therefore, an unlimited number of works of folklore (i.e. dances, sacred text, oral traditions) will be cut off from any protection.<sup>394</sup> It is, therefore, possible to share the opinion of Guest who states that 'the failure of the Interior Department to promulgate regulations for the enforcement of the IACA has forced tribes to consider the merits of copyright law'.<sup>395</sup>

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<sup>389</sup> This means that every imitation of Indian products does not incur in any infringement of the IACA provisions and it is free of circulating with great prejudice for the Indian communities. See W. O. Hennessey 'Toward a Conceptual Framework for Recognition of Rights for Holders of Traditional Knowledge and Folklore', Franklin Pierce Law Center 2002 p.33. available at [www.faculty.piercelaw.edu/hennessey/RghtsfrHldrs.pdf](http://www.faculty.piercelaw.edu/hennessey/RghtsfrHldrs.pdf).

<sup>390</sup> *Ibid*, p.32.

<sup>391</sup> See the Hopi-Navajo dispute reported by W.O. Hennessey 'Toward a Conceptual Framework for Recognition of Rights for Holders of Traditional Knowledge and Folklore', Franklin Pierce Law Center 2002 pp.32-33.

<sup>392</sup> L.D. Duboff 'Protecting Native American Cultures' [Nov. 1992] OR. ST. B. BULL p.14.

<sup>393</sup> R.L. Barsh 'Grounded Visions: Native American Conceptions of Landscapes and Ceremonies' [2000] 13 St. Thomas L. Rev. pp.127, 141.

<sup>394</sup> *Ibid* at page 55, while R.A. Guest *op. cit. supra* sustains that the provisions of IACA should be implemented and further developed because IACA can at least grant a 'minimum standard' of protection for folklore Guest *op. cit. supra* pp.133 and 139.

<sup>395</sup> R.A. Guest, *op. cit. supra* p.123.



### 3.4.2. Trade Secret Law

Because of the sacred content of many works of folklore, some attempts were made to grant protection to folklore through the use of trade secrecy law. Trade secrecy laws discipline and protect everything that has a commercial value and moreover they protect entities and not individuals.<sup>396</sup>

Under the U.S. Trade Secret Act 1985<sup>397</sup> a definition of trade secret is provided as '[a] information, including a formula, pattern, compilation,...that...derives independent economic value, actual or potential, from not being generally known to the public...and [is] the subject of efforts that are reasonable under the circumstances to maintain the secrecy'.<sup>398</sup> The trade secret is also considered as 'a process or device for continuous use in the operation of the businesses.'<sup>399</sup> The main obstacle to the application of this provision is given by the fact that Indigenous communities 'ha[ve] to prove that their art constitute a trade secret and it was acquired through improper means'.<sup>400</sup> Two main requirements must be met to define a work of folklore valuable of protection as a trade secret: the first under section 757 of the Restatement of Torts where it is stated that any information should be used 'in the operation of the business'<sup>401</sup> and should have 'economic value'.<sup>402</sup>

Therefore, folklore cannot find any protection under trade secrecy laws, at least as they are currently enacted. The main problem is that the works of folklore must have an economic value, but as previously established Indigenous communities cannot translate their sacred heritage into any commercial good.<sup>403</sup> There is certainly

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<sup>396</sup> C.H. Farley, *op. cit. supra* p.56.

<sup>397</sup> See in general P. Goldstein, *op. cit. supra* at 114-172.

<sup>398</sup> Uniform Trade Secret Act S. 1(4) (i), 14 U.L.A. 542 (1985).

<sup>399</sup> Comment (b) to Restatement of Torts, Second section 757.

<sup>400</sup> C.H. Farley, *op. cit. supra* p.53.

<sup>401</sup> Comment (b) to Restatement of Torts, Second section 757.

<sup>402</sup> Uniform Trade Secret Act S. 1(4) (i), 14 U.L.A. 542 (1985). See in particular Goldstein, *op. cit. supra* p.124.

<sup>403</sup> See R.A. Guest 'Intellectual Property Rights and the Native American Tribes' [1996] *American Indian Law Review* p.115 where the author shows the different nature of NAGRA and IACA. 'NAGPRA established protection for and repatriation of Native American objects and cultural patrimony in a historical-sacred context, [while] IACA offers protection for and encourages production of native American arts and crafts in a contemporary economic context'. IACA is thought in the optic of IP while NAGRA in the optic of cultural property and protection of sacred imaginary. 'IACA seeks to expand the market for Native American artists' contemporary works by assuring the authenticity of the works'.

<sup>403</sup> UNESCO's *Draft Recommendation to Member States on the Safeguarding of Works in the Public Domain*: Item 7.5 of the Provisional Agenda, U.N: Doc. 25 C/32 (1989).

a different approach between the protection of cultural property represented by the Native American Graves Protection and Repatriation Act (NAGRA) and the IPR protection represented by IACA. NAGRA acknowledges that the sacred culture of Native Americans is 'a vital part of the ongoing life way of the United States, and as such, must be respected, protected and treated as a living spiritual entity - not as a remnant museum'.<sup>404</sup>

### 3.4.3. Public Domain

As stated in the introduction, public domain will be discussed throughout the thesis as a cross-cutting issue. The reason for including this topic in this chapter is justified by the fact that many works of folklore, especially those of American Indian origin are in the public domain. Thus becomes crucial the problem of recovering TCEs already in the public domain, as well as defining a proper set of rules for those works which are inclined to fall under public domain.<sup>405</sup> Also the works in the public domain should be valued as fostering free access and representing a stimulus for future creation. The debate should focus on regulating the access to public domain and in giving more precise guidelines of which works should fall into the public domain.<sup>406</sup> Public domain has been perceived as a threat by Indigenous peoples for many different reasons. At first the works that could fall into the public domain are only those to which copyright protection was granted and for those where protection expired due to the end of the period of duration of the right allowed by laws. This means that the works were copyrightable before falling into the public domain. It concludes that public domain works are only those of a single author. Folklore, as a collective right, will not be copyrightable before falling into the public domain. But this also means that each folkloric work, which has not been copyrighted in the past, will never find protection in the public domain, therefore, the majority of the works of folklore will be left without protection and free to be copied without licensing or authorisation asked of the Indigenous communities.

Above all, from a theoretical point of view, the public domain is the antithesis of the Indigenous people's culture. Indigenous peoples do not necessarily aim at

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<sup>404</sup> R.A. Guest *op. cit. supra* p.115 reporting a passage of R. Strickland 'Implementing the National Policy of Understanding, preserving and Safeguarding the heritage of Indian Peoples and Native Hawaiians: Human Rights, Sacred Objects, and Cultural Patrimony' [1992] 24 ARIZ. ST.L.J. pp.175, 184.

<sup>405</sup> UNESCO's Draft Recommendation to Member States on the Safeguarding of Works in the Public Domain: Item 7.5 of the Provisional Agenda, U.N: Doc. 25 C/32 (1989).

<sup>406</sup> See also W. J. Gordon 'Intellectual Property', Chapter 28 of *The Oxford Handbook of Legal Studies*, ed. by P. Can and M. Tushnet (Oxford University Press 2003) p.627. At the moment the paper is available at the web site of The Boston University School of Law Working Paper Series Index: <http://www.bu.edu/law/faculty/paper>.

integration with the laws of the country in which they live; they aim at seeking a protection for their works. The public domain will make Indigenous people pay a high price if access to works in the public domain is not regulated and if Indigenous peoples' artistic works, deprived of copyright protection, are *tout court* defined as *res nullius*, therefore to be immediately located into the public domain. Placing Indigenous peoples' works of folklore directly into the public domain turns them into freely available resources for commercial exploitation. Therefore, Indigenous people's communities will become even poorer once they lose full control over the economic benefit which could derive from the eventual commercialisation of some of their works. The way a country can regulate access to works in the public domain could benefit private companies which could make money out of works belonging to Indigenous communities.<sup>407</sup> Thus, placing TCEs into the public domain represents a danger not only in economic terms: it can lead to inappropriate use and exploitation by third parties which could mislead and distort the real meaning of these Indigenous expressions. Even storing information on TCEs on public and private databases for scientific, economic or development purposes could either increase the risk of placing these works in public domain or creating private property rights on such databases which collect the roots of Indigenous cultures. Regarding those works collected in databases particular attention should be given to the essential information to be stored. Rules should be defined for regulating access through the use of new means of communication.<sup>408</sup> In fact, not every TCE can be collected in databases (i.e. religious and secret TCEs) and therefore while creating databases particular emphasis should be given to respect the integrity and the cultural background of TCEs.<sup>409</sup>

The application of the public domain to works of folklore should take into account that while it is important to share and exchange cultures it is also important to protect them and to a) avoid that traditional information which represents important secret and religious values be disseminated without the consent of Indigenous peoples; to b) ensure that if some traditional information is made

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<sup>407</sup> It might make more sense to apply public domain protection of works of folklore in developing countries where Indigenous communities still do not have an organised set of customary laws and where their rights over their works are not totally recognised. See Drahos, *op. cit. supra* pp.51-52 and note 153.

<sup>408</sup> J. Litman 'Revising Copyright Law for the Information Age' [1996] 75 Or L Rev p.19.

<sup>409</sup> Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations Twenty-third session 18-22 July 2005 'Indigenous peoples and the international and domestic protection of traditional knowledge' Joint Statement from the Indigenous World Association and Indigenous Media Network. 13 July 2005 E/CN.4/Sub.2/AC.4/2005/CRP. Available at <http://www.ohchr.org/english/issues/Indigenous/docs/wgip23/crp3.doc>

available to the public, this is done only under restricted use and not for commercial exploitation. In fact, from one side relevance should be placed on the protection of the newly generated works to contribute to the benefit of humankind and world development, and from the other, the existence and the identities of traditional communities should not be harmed.<sup>410</sup> It is up to national policies – through the collaboration and information of Indigenous peoples groups - to regulate what can be access and the modalities of this access. In order to create harmonisation and regulate the public domain the UN Public Domain Commission was established,<sup>411</sup> which is enriching the debate on the necessity of creating international uniformity on the way works of folklore should be protected, recovered but, at times and when specific circumstances incurred, also made accessible to the public.

### 3.5. Conclusion

#### 3.5.1. National Copyright Laws are Unsuitable to Protect Folklore

The analysis of the U.S. copyright statute shows how national copyright laws of countries with a strong copyright tradition are unsuitable to protect Indigenous peoples' folklore.<sup>412</sup> These laws are drafted according to the Western concept of property which is unknown to the Indigenous communities whose relations are based on other values such as 'generosity and reciprocity'.<sup>413</sup> The copyright scheme and the connected prerequisites of originality and fixation are thought to protect the individual author and not the Indigenous community as has been explained in this chapter.<sup>414</sup> Of course, a more comprehensive set of rules should be established because copyright is not the suitable instrument of protection for the way it is conceived in modern times. The work protected by copyright is treated as the

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<sup>410</sup> *Ibid.*

<sup>411</sup> The UN Public Domain Commission was discussed during the ninth ICG session by the Music in Common WIPO/GRTKF/IC/9/14 Prov at paragraph 120.

<sup>412</sup> Mainly it can be recalled as already stated under paragraph titled 'United States Copyright: a Constitutionally Guaranteed Right' that this approach is mainly imputable to common law countries which grant a 'limited monopoly' to the author. For the civil laws approach see also note 25 in the same paragraph. To this echoes M.Torsen 'Cultural Property Protection: International and U.S. Current Affairs' 'United States intellectual property laws are generally focused on protecting the economic interests of people who author inventions and expressions of ideas'. Washington School of Law publication.

<sup>413</sup> M. Batiste and J. Youngblood Henderson *Protecting Indigenous Knowledge and Heritage*, (Purich Publishing Ltd, Saskatoon 2000) p.264.

<sup>414</sup> All these classifications are far away from the Indigenous peoples' world and their way of framing their knowledge, which indeed subordinates the right of the single holder of folkloric works for the benefit of the community. See the whole Section II of this chapter and related headings and subheadings.

product of an individualistic creation. The originality requirement should instead be sought in the underlying values that folklore represents for many Indigenous communities.

Moreover, in the United States Copyright Act, as in many other copyright laws, a category which protects a community work is absent. The existing classification of collective works in the U.S.C.A. is always referred to the individual author and not to the community as a whole.<sup>415</sup>

Furthermore, the limitations, on the rights of authorship through the use of the fair use doctrine, cannot solve the problems for folklore, because this doctrine has also been built around a notion of individualistic authorship. Many obstacles are, thus, met in trying to extend it to cover a more comprehensive notion of 'authorship', outside the existing schemes.

### **3.5.2. Could Other Intellectual Property Routes be Considered as Valid Alternatives to Protect Indigenous Peoples' Folklore?**

In the light of seeking a protection for folkloric works, means of protection both within and outside of intellectual property protection were considered. Trademark legislation grants only a partial protection, which may be suitable for a few categories of Indigenous art. Moreover, trademark protection is ill-suited because it applies economic categories to folkloric works, which are extraneous to the Indigenous peoples' world, where the life and the clan values are based on a collection of traditions, symbolism and sacred heritage.

Outside the intellectual property regime, trade secrecy law and public domain were also examined. It was ascertained that they are not valuable means of protection. The regulation of works in the public domain could lead to many problems as explained above, the major of which could be the commercial exploitation of works of folklore belonging to traditional communities or the distortion of their symbolism. In such a delicate matter, as the Indigenous peoples' heritage, the role of a national law should be limited to regulate, integrate and respect the customary law of Indigenous communities.

### **3.5.3. Could Indigenous Communities Participate in the Free Market Economy without Giving up their Values?**

One important point which should be raised in this conclusion is that Indigenous communities are divided between those that would like to adhere to the free market economic benefits and those that are refuting the concept of a system

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<sup>415</sup> See Section II under lett. g)

which is built on individualistic factors *per se*.<sup>416</sup> Some rights of the Indigenous peoples such as the right to preserve their cultural heritage, come into conflict with the right to economic development and modernisation.<sup>417</sup>

The current global society forces the sharing of some benefits and welcomes integration. However, this should not mean that in exchange for some economic benefit the preservation of a cultural heritage should be put at risk. Moreover, it should be socially and legally recognised that some of the traditional knowledge of Indigenous peoples such as sacred knowledge and religious beliefs, should be placed outside any commercialisation.<sup>418</sup> Furthermore, this does not exclude that rules, which have been well established, should work well for new emerging rights. The Indian Art and Crafts Act (IACA) 1990, which grants special trademark protection to Indian products, could be claimed to be heading in this direction. However, in paragraph a) subparagraph ii), the limits of the application of the specific trademark become clear: theoretically it excludes from the protection everything which is not strictly trademarkable, and therefore not having economic value.<sup>419</sup>

Moreover, the interference of national laws (both copyright and intellectual property laws) into Indigenous communities' matters raises concerns. Customary law should play the first role: it should identify the works of folklore to be protected. The problem is that customary law is often not codified and its rules often unknown to those outside the community. Customary laws rules are frequently of oral nature and it is impossible to measure their impact and applicability. This is why the role of national laws is indispensable. State interference in the matter of folklore should be left at an operational level. The Indigenous communities should provide for the protection of their own rights and cultures, without being deprived of the rights granted to the other citizens of the state. The UN Declaration on the Right of Indigenous Peoples<sup>420</sup> under is Article 4 affirms that:

‘Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their rights

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<sup>416</sup> See W.O. Hennessey ‘Toward a Conceptual Framework for Recognition of Rights for Holders of Traditional Knowledge and Folklore’, Franklin Pierce Law Center 2002 p.16. available at [www.faculty.piercelaw.edu/hennessey/RghtsfrHldrs.pdf](http://www.faculty.piercelaw.edu/hennessey/RghtsfrHldrs.pdf)

<sup>416</sup> *Ibid* p.32.

<sup>417</sup> *Ibid* p.15.

<sup>418</sup> And which cannot be protected as demonstrated under the Trade Secret law. See paragraph b) under Section II.

<sup>419</sup> Therefore, it could not be applicable to many works of folklore i.e. folkloric dances and music or folk tales.

<sup>420</sup> Annex to the Human Rights Council Resolution 2006/2, 29 June 2006.

to participate fully, if they so choose, in the political, economic, social and cultural life of the State'.

National laws could eventually solve the disputes between conflicting customary laws - especially regarding the disputes relating to the ownership of 'continental/supranational folklore' - or those related to Indigenous groups for the recognition and attribution of works of folklore. Nevertheless, to a certain extent, the duty of co-ordinating national legislation for the protection of the Indigenous peoples' works should be left to national laws in participation with Indigenous peoples' boards or organisations. Moreover, the procedures concerning the infringement of Indigenous peoples' 'authorship' made by non-Indigenous peoples should be left in the hands of the national legislator who must co-operate with the Indigenous authorities.

A possible solution could be to extend and amend copyright laws in order to expand their notion to accommodate new rights. The political implications of a monopoly given to the author to create economic benefit and incentives for the society should be balanced with the affirmation of other rights granted to the author outside the commercial sphere (i.e. moral rights could be extended to the whole community). Copyright law and intellectual property rights in general should embrace new rights such as Indigenous peoples' rights. A traditional work should be protected not only for its commercial value but for the historical, religious and in general, the precious nature of the work. In fact, the whole society's primary aim should be to preserve its own people's cultural heritage and life. Therefore, the correct system of protection should balance the benefit of the author/s with those granted to the public.

From a subjective point of view, this model should also uphold a new concept of authorship mainly based on a communal ownership to allow Indigenous communities to be recognised as the authentic 'author' and 'owner' of the work. From an objective perspective, folkloric expressions should be recognised as original works even though they are based on pre-existing works. The durability in the protection should be orientated towards the recognition of a 'perpetual right' to be assigned to the community within the scope of protecting its cultural heritage.

A new notion of 'authorship', a new right emerges. This right could be established based on the medieval concept of 'authorship', where the work was really the result of a group process or the outcome of 'culture-as-a-production process', and was accepted as such. This notion of authorship should be revisited and interlinked with customary practices. The question as to whether this new regime should be named 'copyright re-visited' or 'extended' or simply *sui generis* is a matter of a minor importance.

## Chapter 4

### The Influence of the Courts in Addressing the Necessity of a New Intellectual Property Regime for the Protection of Folklore. The Australian Experience

#### 4.1. Introduction

After analysing the U.S. copyright regime which, by its very structure, appears to be too rigid to foster protection for rights not constitutionally guaranteed, this chapter will look into the Australian response to accommodate TCEs protection while coping with conventional copyright laws. In the previous chapter, it was first examined whether a protection could be enforced through copyright legislation. It was highlighted that copyright characteristics (that is, originality and fixation) are incompatible with folklore protection especially as they are put into a pure economic perspective - as evidenced in the U.S.A. Furthermore, the individualistic approach of copyright prevents application to Indigenous folklore. Before moving to a supra-national approach and to the international arena, it is crucial to analyse an alternative route of protection adopted in another common law country, of which Australia is a prime example.

In the following investigation of the Australian experience the external means of protection, which are not necessarily linked to intellectual property rights, and the well known 'common law principles' will be examined. Equity, expressed at a judicial level, is one of the principles through which the Australian courts have approached TCEs. It will be asked whether these principles and legal means could help in designing a new and better concept of protection that accompanies copyright or a *sui generis* legislation.

The first section of this chapter will address the origins of and the reasons for the courts' empowerment in disengaging the national legislator from problems regarding the folklore protections for Indigenous peoples. The second section will assess in more detail the impact the 'court revolution' had on national Australian politics regarding folklore protection and the response of the Australian judiciary in seeking a possible way out from the strict application of conventional copyright in some specific cases. First the major efforts made by the Australian courts in recognising the existence of community rights on cultural objects started with the



*Mabo* case,<sup>421</sup> through the application of the native title to Aboriginal lands. Second by exporting land rights principles to Indigenous peoples' folklore protection, the Australian judiciary lays down the trend that will be followed in protecting folklore. By adding new mechanisms of protection the same scope of protection should be enlarged: the works of folklore could be finally recognised as collective values belonging to the community.<sup>422</sup>

While the Australian courts have addressed the necessity for a better system for folkloric protection, many questions remain unanswered for the national legislator. Primarily, the application of the principles of equity, as established through the Australian High Court decision in *Bulun Bulun*<sup>423</sup> - one of the first cases of copyright infringement proceedings brought by an Aboriginal artist - can work only if a 'fiduciary relationship' is established between the artist and the community.<sup>424</sup>

The chapter will, then, analyse the *Bulun Bulun* court decision and will draw the attention on how the 'fiduciary relationship' between the artist and the community can result in being legally determined and binding for the artist in a way that it will benefit his/her community. It has been acutely observed that<sup>425</sup> the commercial value of Aboriginal folklore could be undermined by the vague representation of fiduciary duty. If left undefined, then, fiduciary duties could give rise to many questionable interpretations with practical consequences that could result in public reluctance to buy a folkloric work from an Aboriginal artist in fear of incurring a copyright infringement.<sup>426</sup> However, if the fiduciary relationship is specified, a judge could have the power not only to decide about a copyright case involving Aboriginal artistic works, but could also decide to expand the concept of copyright by including the communal rights of the community over the work - which comes directly from the same fiduciary link of the author. This could, furthermore,

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<sup>421</sup> *Mabo and Others v. Queensland* (No. 2) (1992) 175 CLR 1 F.C. 92/014. There are many authors who have addressed this case as the one that 'has transformed the very foundations of Australian law' J.R. Jackville 'Legal Protection of Indigenous Culture in Australia' *Cardozo, J. Int'l & Comp. L.* (Summer 2003) p.734. Compare with L. McDonald 'Can Collective and Individual Rights Coexist?' [August 1998] 22 *Melb. U. L. Rev.* pp.317-318; A. Lokan 'From Recognition to Reconciliation: the Functions of Aboriginal Rights Law' [April 1999] 23 *Melb. U. L. Rev.* p.65.

<sup>422</sup> See M.H. Davis 'Some Realism about Indigenism' [1997] 11 *Cardozo J. Int'l & Comp. L.* p.815.

<sup>423</sup> (1998) 41 *IPR* 513.

<sup>424</sup> See A. Para Malton 'Safeguarding Native American Sacred Art by Partnering Tribal Law and Equity: an Exploration Case Study Applying the *Bulun Bulun* Equity to Navajo Sand Painting' (Winter 2004) 27 *Colum. J.L. & Arts* p.224 where the author stresses how different a case can be when the artist does not co-operate with the community.

<sup>425</sup> *Ibid* p. 230.

<sup>426</sup> *Ibid* pp.230-231.

mean that customary rules could take over the national law and regulate directly matters regarding the artist and the primary source of his/her production - the community.

Another important factor introduced by the courts for protection of Indigenous folklore is the establishment of specific sanctions, in case a folkloric work is misappropriated and commercialised. The judges of the Australian High Court argued that what should be taken into account is not only the direct infringement - the consequence of the economic loss of copyright - but also the distress caused to an Aboriginal author that could affect his/her relationship with the community he/she belongs to. In addition, *Bulun Bulun*, like other Australian Aboriginal cases brought in front of the court, was a case where only a tangible work was at issue. The court did not have to deal with intangible works, such as oral Aboriginal songs, for example.

The *Bulun Bulun* case cannot represent a definitive and long term solution to the problem of Aboriginal folkloric works of art because of its application only to tangible works of folklore, but it cannot be considered as a 'one-off' decision either. The *Bulun Bulun* approach to addressing Aboriginal misappropriation and the connection of the artist to his or her community could potentially be applicable to all cases where a tangible property is the matter of concern. The chapter will also analyse how a fiduciary relationship between the artist and the respective community can be agreed and proven. The Australian judiciary's approach could call for new reforms in the copyright law and for protection Indigenous peoples' cultural expressions. The way copyright law is presently drafted in general - and not only in the U.S.- represents an obstacle to the protection of TCEs. In reality, a notion of communal rights is not present either in the United States Copyright Act or in the Australian Copyright Act. The intrinsically individualistic nature of the copyright doctrine and the strong monopoly that the United States attach to the right of the author, makes it even a constitutionalised principle,<sup>427</sup> as has been set out above.

The affirmation of communal rights by the Australian Courts leaves unsolved some issues, such as fixation and originality requirements - even though translated into a fiduciary relationship linking the author of the work to his community. In relation to originality, the Australian High Court in *John Bulun Bulun & Anor v. R & T Textiles Pty Ltd*<sup>428</sup> did not set out precisely when an Aboriginal work is

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<sup>427</sup> The limits of copyright have been examined and commented on in the previous chapter, analysing the U.S. copyright statutory requirements. However, for a specific application of these requirements to the Australian case, see J.R. Jackville 'Legal Protection of Indigenous Culture in Australia' [Summer 2003] *Cardozo J. Int'l & Comp. L.* pp.723-728.

<sup>428</sup> (1998) 41 IPR 513.

determined to be original. Only through assessment was the particular piece of work involved in the case, by the Aboriginal artist *Bulun Bulun*, as well as *Milpurruru's*, found to meet the originality requirement.

Overall, then, a legal uncertainty endures as to how customary laws should be applied and whether a work by an Aboriginal artist could be defined as original for the purpose of meeting the copyright statutory requirement once a fiduciary relationship is established. The solutions reached by the Australian courts can only represent a partial response. Nevertheless, Australia's response has determined a new way to approach the theme of Aboriginal cultural expressions and, in particular, Aboriginal tangible art. Its courts have demonstrated to the national legislator that a need exists for legal reform to be consistent with the protection of folklore.

The second section of this chapter will build on the formulations and analyses by the Australian judiciary, and the political and legal implications of the court decisions. A possible legislative solution, based on principles and analyses formulated by the Australian judiciary, will also be discussed.

A new possible Australian legislation based on 'communal moral rights' will be examined and commented on. Concerns over the moral rights system to be extended to protect folkloric works will also be considered in this chapter, as well as the moral rights in confrontation with copyright. Fair trade rules will be discussed in this chapter together with the need for protection of folkloric works outside national boundaries.

Chapter four will conclude that a single solution might not be possible at the national level and that additional elements should be considered while protecting the 'copyright' of Indigenous peoples.

## **4.2. The Australian Way**

### **4.2.1. The 'Dreaming' and the Land: Basic Elements of Aboriginal Life**

Before analysing in detail how Australian courts have attempted to address folkloric protection, it is worth assessing initially how Australian folklore is perceived generally within the Australian context. Many authors have underlined the link between Australian Aboriginal culture and their land. It has been suggested that:

'In the Australian context, it is unlikely that the issues surrounding the protection of Australian Indigenous intellectual property can be separated from other Indigenous issues such as land rights, death in custody, self-determination or the forced separation of children from their parents and communities. Each of these

issues relates to or has an impact upon cultural identity and stamina in the face of sometimes overwhelming hostility - hostility which is often structurally embedded in the dominant, 'white', culture'.<sup>429</sup>

This assessment echoes Golvan, whose work has demonstrated how the link to the land has the same roots as Aboriginal art and cultural identity. 'There is nothing more foreign to an Aboriginal person', Golvan has observed, 'than detachment from the land for which he or she is responsible...The return to the land has served as a key impetus for their artistry'.<sup>430</sup>

Land rights are one of the priority issues to be disciplined in terms of establishing certain rights to Indigenous peoples. The outcomes of the 24th session of the Working Group on Indigenous Populations (WGIP)<sup>431</sup> definitely lean towards this direction by focusing on land attribution which is disciplined by non-Indigenous authorities, groups or individuals for military purposes.

The importance given by Aboriginal people to their land is also another relevant cultural element in the picture: the 'Dreaming', which all the community should maintain and respect.<sup>432</sup> The 'Dreaming' is what Aboriginal people indicate as folklore; the complexity of community traditions which consist of a collection of experiences, something secret and mysterious, accessible only by initiated clan members. The 'Dreaming' could be defined as the representation of life, religion, art, and cultural process of the community.<sup>433</sup> In this transfer of knowledge from clan members to the artist, Burkitt finds a 'stratification of rights'<sup>434</sup>: the rights from the community goes to the artist and from the artist to the community. This author states that in acquiring these rights, the artist obtains a custodial obligation. He affirms that: 'The creation of artwork is regarded as a community duty'.<sup>435</sup>

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<sup>429</sup> Protecting Indigenous Intellectual Property, Australian Copyright Council, September 1998 at 3.

<sup>430</sup> C. Golvan 'Aboriginal Art and the Protection of Indigenous Cultural Rights' [1992] 7 EIPR p.227. See also Bulun Bulun, a famous aboriginal artist, in his affidavit. In the *Bulun Bulun* case he states that 'My work is very closely associated with an affinity for the land.'

<sup>431</sup> Geneva, July 30 – August 4, 2006. Available at <http://www.iwgia.org/sw17057.asp>. This case constitute the basis for an expert advice presented to the *Human Rights Council*.

<sup>432</sup> See J.R. Jackville *Legal protection of Indigenous Culture in Australia* Cardozo J. Int'l & Comp. L. (Summer 2003) pp.715-716 and Colin Golvan 'Aboriginal Art and Copyright: The case for Johnny Bulun Bulun' [1989] 10 EIPR p.346.

<sup>433</sup> P. Sutton (ed.) *Dreamings: The Art of aboriginal Australia*, (The Asia Society Galleries and George Braziller/Viking New York 1988) and D. Burkitt 'Copyright Culture – The History and Cultural Specificity of the Western Model of Copyright' [2001] 2 IPQ p.181 and note 8 and 9.

<sup>434</sup> *Ibid*.

<sup>435</sup> *Ibid*.

The land gives Aboriginal peoples the input for artistic inspiration and represents something very special for them, as well as for many other Indigenous communities throughout the world. This link with the land is often seen by Western society as something different and pertaining to 'black culture'. This can result in a negative approach to the customs and traditions of Indigenous peoples, which have long been considered inferior to 'white culture'. There is now a new interpretation of Indigenous/Western, black/white cultures and the protection to Indigenous peoples' lands was the first to be regulated following these trends.<sup>436</sup> The need for systematic protection of the folklore and other cultural expressions of Indigenous peoples represents, then, a step forward in the progression from a world of dichotomies and ethnic prejudice to one based on mutual understanding and respect.

#### **4.2.2. The Australian Courts Overcome the Lack of Legislative Measures Through the Introduction of Non-Intellectual Property Mechanisms**

One of the most modern approaches to Aboriginal folklore was reared in Australia. In the 1980s and 1990s some Aboriginal associations, NGOs and other operators in the field of advocacy for Aboriginal rights and culture started to educate the public on the lack of legislative measures in the protection of Aboriginal rights. At this time the rights of Aboriginal people became more widely advocated because of the exploitation of their lands. The necessity for protection of their cultural heritage followed shortly after. The Aboriginal people became aware of their claims and rights over their lands, and gradually extended not only to the protection and recovery of properties, such land, but also to the protection of Aboriginal art, crafts and culture.

The Australian Courts have urged the national legislator to raise the issue of better protection for Aboriginal rights. They have contributed towards the creation of an important debate about the importance of building a solution which could grant justice to Indigenous peoples through the protection of their folklore.

The *Mabo* case<sup>437</sup> empowered Aboriginal communities, individual Aboriginal artists and NGOs advocating Indigenous rights, in the midst of a growing debate over issues concerning Aboriginal folklore. The case was a starting point and may be seen to draw a line between the present and the past perspective on Aboriginal rights. The court in *Mabo* ascertained the importance of regulating Aboriginal land rights through customary laws while creating a political pressure for a relevant

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<sup>436</sup>*Ibid.*

<sup>437</sup> *Mabo and Others v. Queensland (No. 2) (1992) 175 CLR 1 F.C. 92/014.*

approach towards Aboriginal rights. This decision stated that under Australian law, Indigenous people have rights to land that existed before colonisation, and are called native title.<sup>438</sup> The ruling in favour of the native title to land indefinitely excluded the application of the concept of terra nullius, which deprived Australian Aboriginal people of what was rightfully theirs.<sup>439</sup> In this case, Justice Brennan affirmed: 'Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation'.

Before Mabo, the application of customary laws was not significant (see paragraph 4.2.3, *Yumbululul v. Reserve Bank of Australia*<sup>440</sup>), while after Mabo the court made it clear that some cases concerning Aboriginal works of art should be examined in the light of Aboriginal customary rules (see, for example, *Milpururru v. R & Textiles Pty Ltd*<sup>441</sup> and *Bulum Bulum & Milpururru v. R & Textiles Pty Ltd*<sup>442</sup>).

This could implicitly lead to the creation of two separate systems: one based on national law and the other on customary law - rather than harmonising them in one policy framework.<sup>443</sup> In order to be able to work effectively, these two systems should have recognised rules and a specific field of application. The national legislator is also called to help in addressing this particular issue. Therefore, the approach of the Australian courts to folklore can be categorised into two main areas: the 'pre-Mabo' and the 'post-Mabo'.

The *Mabo* case was applied by the courts to folklore and 'Aboriginal cultural beliefs and cultural identity, such as the desecration, through mining, of traditional dreaming places...'.<sup>444</sup> As Blakeney suggests<sup>445</sup> this case could inspire a reform which would allow the introduction of a new system which takes the matter of

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<sup>438</sup> See J.R. Jackville *Legal protection of Indigenous Culture in Australia* Cardozo J. Int'l & Comp. L. [Summer 2003] p.734. See also L. McDonald *Can Collective and Individual Rights Coexist?* [1998] 22 Melb. U. L. Rev. pp.317-318; A. Lokan 'From Recognition to Reconciliation: the Functions of Aboriginal Rights Law' 1999].23 Melb. U. L. Rev 65

<sup>439</sup> The common idea was that Australia was 'discovered' by Captain Cook in 1788.

<sup>440</sup> (1991) 21 IPR 481.

<sup>441</sup> (1998) 41 IPR 513.

<sup>442</sup> *Ibid.*

<sup>443</sup> In favour of this integration between customary laws and state laws see J.R. Jackville *Legal Protection of Indigenous Culture in Australia* Cardozo J. Int'l & Comp. L. (Summer 2003) at 734.

<sup>444</sup> M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' [1995] EIPR p.442.

<sup>445</sup> *Ibid* p.445.

folklore out of the hands of the national legislator and gives full power to Aboriginal customary law.

#### 4.2.3. A Pre Mabo Case: *Yumbulul v Reserve Bank of Australia*<sup>446</sup>

The *Yumbulul v. Reserve Bank of Australia* is a case that highlights the difficulties in trying to find a solution to Aboriginal rights and to the protection of their folklore when Western and Aboriginal property rights models are compared.<sup>447</sup>

The case concerns the story of the 'Morning Star Pole' designed by the Aboriginal artist Terry Yumbulul. The work of art at issue is a design which represents a traditional belief of the sacred clan to which Yumbulul belonged: the Galpu Clan. Judge French, to whom the case was brought, stated that: '...The Morning Star Pole is imbued with the power to take the spirits of the dead to the Morning Star, which will return them to their ancestral home'.

The artwork in question was reproduced by the Reserve Bank of Australia on a commemorative ten-dollar bank note. The bank obtained legal permission to reproduce the Aboriginal design after entering into an agreement with Yumbulul's agent. The Yumbulul law suit followed two separate actions: one for the infringement of copyright and the other to ascertain if the bank director and the agent acted within the legality of their mandate. The judge stated with due care that Yumbulul could be criticised by his own community for 'permitting the reproduction of the pole by the bank'.<sup>448</sup>

Yumbulul was not successful in his action, since the agency and its director acted on his behalf and within the scope of the agency agreement. Yumbulul was recognised as the real author of the Aboriginal work of art under the Australian Copyright Act and the 'Pole' was seen as an original work to which could be granted copyright protection.<sup>449</sup> Yumbulul's attempt to see the rights of his community recognised was also dismissed.<sup>450</sup> However, Judge French significantly observed

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<sup>446</sup> (1991) 21 IPR 481.

<sup>447</sup> D. Burkitt, 'Copyright Culture – The History and Cultural Specificity of the Western Model of Copyright' [2001] 2 IPQ p.182.

<sup>448</sup> (1991) 21 IPR 482.

<sup>449</sup> See 35 (2) Australian Copyright Act. Originality is not in the idea but in the fact that 'the expression originates from the author'. However, this concept is very much different from the Aboriginal one, where the originality derives from the 'correct transmission of the Dreaming story', D. Burkitt, 'Copyright Culture – The History and Cultural Specificity of the Western Model of Copyright', [2001] 2 IPQ pp.183-184.

<sup>450</sup> Yumbulul was criticised by its community since they sustained that he should have assured that the Morning Pole was not used to distort his significance despite Yumbulul tried to assess that according to customary law he was only authorised to reproduce the design and that the only 'author' was his community, i.e. the Galpu clan in North-East Arnhem Land. See at this regard D. Burkitt,

that: 'Australia's copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and the use of works which are essentially communal in origin'.<sup>451</sup>

This is an important assertion: for the first time, a judge recognised the difficulties between the integration of federal laws on copyright and the laws of the Aboriginal communities, where two different concepts of intellectual property are compared. Western society states that only the author has rights, while an Aboriginal concept of intellectual property rights suggests authorship belongs to an entire community and not to the single artist (as outlined in the previous chapter<sup>452</sup>). Judge French also made it clear that:

'...Difficulties...arise in the interaction of traditional Aboriginal culture and the Australian legal system relating to the protection of copyright and the commercial exploitation of artistic works by Aboriginal people'.<sup>453</sup> In his conclusion French J. affirmed that: 'the question of the statutory recognition of Aboriginal communal interests in the reproduction of sacred objects is a matter for consideration by law reformers and legislators'.<sup>454</sup>

Individual property, as opposed to community sharing, are crucially outlined as two antithetical systems in some leading Australian cases.<sup>455</sup> The balance between these two approaches to creation will lay the basis for protection.

#### 4.2.4. Post *Mabo* Cases

##### 4.2.4.1. *Milpurruru v Indofurn Pty Ltd*

The *Milpurruru* case<sup>456</sup> was brought before the court after the *Mabo* case was decided. The judge affirmed not only the existence of rights on behalf of the

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'Copyright Culture - The History and Cultural Specificity of the Western Model of Copyright' [2001] 2 IPQ p.182. The community argued that the artist 'committed an offence against the ancestral heritage of the clan, which is constituted by its law, property and identity' p.182.

<sup>451</sup>(1991) 21 IPR p.490.

<sup>452</sup> See C. Golvan 'Aboriginal Art and the Protection of Indigenous Cultural Rights' [1992] 7 EIPR p.230 where the author argues that 'Only certain artists are permitted within a tribe to depict certain designs, with such rights being based on status within the tribe' [...] 'The artist would need to consult with and get permission of the tribal owners of the rights before agreeing to anyone else reproducing a design'.

<sup>453</sup> (1991) 21 IPR 482.

<sup>454</sup> *Ibid* p.492.

<sup>455</sup> At Section 16 of 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples', paper issued by the Attorney-General's Department (October 1994). The Paper is available from the Attorney-General's Department Information and Security Law Division <http://www.dcita.gov.au>

<sup>456</sup> (1995) 30 IPR 209.



community over their folkloric works and culture,<sup>457</sup> but he established a penalty for the infringement of those rights, recognising as qualified elements for compensation the artist's community belonging.<sup>458</sup>

This decision demonstrates how the penalty for the infringement can be calculated on non economic values, as in the case of the infringement of copyright. The violation of a new right, more intimately belonging to the community, is now sanctioned. This right shares the characteristics of moral rights, although the judge does not make any reference in his decision regarding this issue. The new legislation demonstrates that the Australian government is seeking to implement the protection of the rights of Indigenous peoples. The judge first addresses the need to consider the value of the loss derived from the violation and the harm suffered by the artist as a direct consequence of the suffering of the whole community.<sup>459</sup>

Indofurn Pty Ltd was a carpet importer working between Vietnam and Australia. The designs copied onto the carpets represented the work of eight Aboriginal artists, (three of whom were still alive) whose interests were represented by the Public Trustee. The art was quite famous and consisted of bark paintings, linen cuts and 'Papunya' style paintings in acrylic on canvas.<sup>460</sup> All these paintings can be found in collections of Aboriginal artists in the Australian National Gallery (ANG) and the Australian Government Printer for the Australian Information Service (AIS). The company did not have permission from the artists to copy their works onto the carpets. Therefore, the judge found that there was an infringement of the artists' copyright, since the works were all original and they were copied without permission.<sup>461</sup>

The judge acknowledged that these paintings represented sacred and religious beliefs of the Aboriginal communities to which the artists belonged. The sacred nature of these works was clear from the publications of ANG and AIS<sup>462</sup> and the judge found that this should be taken into account in determining the damages for

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<sup>457</sup> Y. Gendreau 'Rejuvenating Moral Rights Through Immemorial Claims' [2005] 19 (1) IPJ.p. 230.

<sup>458</sup> *Ibid.*

<sup>459</sup> See generally K. Puri 'Copyright Protection for Australian Aborigines in the Light of Mabo' in M.A. Stephenson and S. Ratnapala (eds) *Mabo: A Judicial Revolution*, (University of Queensland Press 1993).

<sup>460</sup> Indigenous Arts and Copyright, Australian Copyright Council, August 1999 p.45.

<sup>461</sup> *Ibid.*

<sup>462</sup> M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' [1995] EIPR p 443.

infringement of an Aboriginal work.<sup>463</sup> In addition, the judge found that 'anger and humiliation of both the artists and their communities might affect the amount of damages'.<sup>464</sup> One of the artists, Ms Marika, who belonged to the Yalgnu Clan, found that the rights and value of her community had been damaged by such unauthorised reproduction. In her affidavit she stated that: 'as an artist, whilst I may own copyright under Western law, under Aboriginal law I must not use an image or story in such a way as to undermine the rights of all the other Yalgnu'.<sup>465</sup>

Judge Frances stretched the concept of copyright infringement, which contemplates damages based on the economic loss occurred to the author, to claim not only for the direct but also for the indirect infringement - the damage caused by a 'moral' sufference. Judge Frances found an answer outside the Copyright Act 1968 applying the *Autodesk Australia Pty Ltd v. Cheung*<sup>466</sup>, where the value of the damage is calculated on the basis of other factors, such as the personal harm suffered by the artist.

It was affirmed that these works of art were reproduced through the use of stories and typical religious ceremonies belonging to Aboriginal communities. Some of the works reproduced contained errors. This could cause distress and offence to the community if they were to be circulated. The artists were afraid that through allowing, although involuntarily, the commercialisation of these items, the community could decide to punish them severely through the application of customary law punishments.<sup>467</sup>

However, Judge Frances turned to the Copyright Act and, in particular, to Section 115(4) of the Copyright Act which allows the recovery of more damages in cases of flagrant infringement. In this case, the flagrant infringement was seen in the fact that the company did not follow the advice of Mr. Horrocks, an office manager from the Aboriginal Legal Service of Western Australia Inc. After being consulted by the company, Horrocks averred that the imports would constitute a copyright infringement and that the company should have sought advice from the Aboriginal

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<sup>463</sup> 'The sacred and religious significance of these paintings, and the restrictions which Aboriginal law and culture imposes on their reproduction is only now being understood by the white community', 30 IPR 209 p.216.

<sup>464</sup> The judge applied the English case *Williams v Settle* (1960) 1 WLR 1072 pp.1086-1087. See the Indigenous Arts and Copyright, Australian Copyright Council, August 1999 at 45.

<sup>465</sup> Reported in M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' [1995] EIPR p.443.

<sup>466</sup> (1990) 17 IPR 69.

<sup>467</sup> '...sanctions, ranging from being outcast to a prohibition against further artistic reproduction' Reported in M. Blakeney 'Protecting expressions of Australian Aboriginal Folklore Under Copyright Law' [1995] EIPR p.444.

Arts Management Association Inc. (AAMA).<sup>468</sup> After further investigation, the company was notified of copyright infringement according to Articles 52 and 53 of the Trade Practices Act. The request for the immediate cessation of the company's illicit exploitation of the Aboriginal works was never carried out and the company continued in the production of the carpets. Therefore, the infringement became 'plainly deliberate and calculated'.<sup>469</sup>

The extent of the damages took into account the 'harm suffered [by the artists] in their cultural environment' and the flagrant infringement. The judge granted the artists the total sum of 230,000 \$<sup>470</sup>, 15,000 \$ given to the living individual artists.<sup>471</sup> However, communal rights were not recognised and the community was not able to recover the damages as the 'real author' of those works of art.

In this case the judge showed sensitivity to the Aboriginal society and moved away from the strict application of the copyright statute. The protection granted by the Copyright Act to Aboriginal works was found to be inadequate and it was suggested that the protection of the expressions of Aboriginal folklore should be an object of legislative reform which could consider and better protect the community to which work ultimately belonged. The debate over the recognition of Aboriginal folklore was, however, moved further with the *Bulun Bulun* case.<sup>472</sup> Here, the judge stated that the copyright provisions were far too inadequate to grant Aboriginal peoples enough protection for their folkloric works.

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<sup>468</sup> This latter association was created as a unit within the Aboriginal Arts Unit of the Australia Council to protect the rights of Aboriginal people and to help and represent Aboriginal interests in court proceedings after the Legal Aid Service stop instructed cases related to copyright matters. As observed by C. Golvan in 'Aboriginal Art and the Protection of Indigenous Cultural Rights' [1992] 7 EIPR pp.228-9 the resources of this agency are 'extremely limited' at 228.

<sup>469</sup> See note 25 M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' EIPR [1995] p.444.

<sup>470</sup> However this was reduced to 188,000 \$ after a further appeal where the judge upheld the claims of two directors of the company. The money was never recovered by the artists since the company went bankrupt. See Note 57 Copyright, Australian Copyright Council, August 1999.

<sup>471</sup> M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' [1995] EIPR p.444. Blakeney reports that for the deceased artists the judge did not grant any damage for the harm suffered because 'they were unaware of the infringement'. The 5,000 \$ which each of the estates of the deceased artists received was only a pejorative measure of the flagrancy. The community to which the artists belonged could not obtain the damages which were expecting from the deceased artists.

<sup>472</sup> (1998) 41 IPR 513.

#### 4.2.4.2. *Bulun Bulun and Milpururru v R & Textiles Pty Ltd*

*Bulun Bulun*<sup>473</sup> reinforces the process of evolution of the Australian court in embracing the issue of Aboriginal folklore.<sup>474</sup> It also adds further analysis for exploring different routes of protection.

The first issue that stands out from the *Bulun Bulun* decision is the specification of the meaning of originality as drafted in the Australian Copyright Act 1968. In this case, a work of art can be original even with a very low standard of originality: it is enough that it has a 'distinctive style'. Thus, the originality requirement can be extended to folkloric works. Therefore, originality is considered as a grey area, which can be attributed after an appropriate evaluation.

In addition, the recognition of a fiduciary relationship between the artist and the community is established. This fiduciary relationship is a close link between the artist and the community which attributes the rights to the community instead of the artist, when the latter is unable to bring an action before the court. This recourse to a common law principle while solves partially the issue of establishing a link between the artist and the community when specific circumstances arise. However, it leaves untouched the problems of copyright requirements, i.e. fixation and term of protection as well as ownership.<sup>475</sup> Nevertheless, it remains an important achievement: the community could now take the lead in claiming recognition of its rights, thus establishing a foundation for creation of collective rights. But as noted,<sup>476</sup> the fiduciary link can only find application in common law countries since this principle is not applicable to civil law countries.

While in *Yumbulul* the judge emphasised the importance that legislative reforms include the necessary rights of the Aboriginal community and its artists, his decision remained a political assertion without any immediate consequences for the artists and the community (i.e. the action was put down).

*Magpie Geese and Water Lilies at the Waterhole* is the folkloric painting on which this famous Australian Aboriginal case is based.<sup>477</sup> The *Magpie Geese and*

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<sup>473</sup> *Ibid.*

<sup>474</sup> Y. Gendreau 'Rejuvenating Moral Rights Through Immemorial Claims' [2005] 19 (1) IPJ p.231.

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid.*

<sup>477</sup> A description of this work of art is provided by C. Golvan's article 'Aboriginal Art and Copyright: The case for Johnny Bulun Bulun' [1989] 10 EIPR p.347 where the author describes the *Magpie Geese and Water Lilies at the Waterhole* as 'a design from Central Arnhemland. It depicts magpie geese and water lilies around a central waterhole with tortoises also shown. It is characterised by excellent draughtsmanship, curved flowing lines and close intertwining forms. The motifs create an

*Water Lilies* was work by Bulun Bulun, an Aboriginal artist belonging to the Ganalbingu people.<sup>478</sup> R & Textiles Pty Ltd. started to sell printed fabric on which this famous Aboriginal artwork was represented.<sup>479</sup> Bulun Bulun took action against the company for copyright infringement and, as a senior member of the offended Ganalbingu community, Milpurruru also took action against the company stating that under customary law, their community was the 'real author' of this particular works of art. The company admitted the infringement of Bulun Bulun's copyright but it retained any right for further claim against Bulun Bulun.

In this case, as well as *Milpurruru v. Indofurn Pty Ltd*<sup>480</sup>, the artist was found to suffer not only from an economic loss but also of the moral loss caused by knowing he had damaged his community.

The first problem was raised in looking at Section 32(2) of the Copyright Act, which establishes the concept of originality in artistic work. The *Maggie Geese and Water Lilies at the Waterhole* was a painting which reproduced an old Aboriginal story. Bulun Bulun specialised in reproducing such a design known for several generations. The process of recreating *The Maggie Geese and Water Lilies at the Waterhole* was not an original in the sense of an exclusive production, but, a slow and ongoing process of reproduction. However, the Copyright Act does not protect original ideas but the expression of such ideas. The question was, then, whether Bulun Bulun's expression in his work could be classified as original in the language of the copyright Act.

The judgment given by Justice Von Doussa found that Bulun Bulun's painting was original, despite the fact that the story and its setting were quite well known. The assertion is that 'originality is a matter of degree, depending on the amount of skills, judgement or labour that has been involved in making the work'<sup>481</sup> and does not matter if the work derives from a pre-existing work or if it has already been reproduced. Having solved the prerequisite for protection of originality, the judge concentrated answering three main questions:

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overall curvilinear pattern on a plain black background. The Aboriginal painted these designs on large pieces of bark which were often treated with a layer of brown or red ochre...

<sup>478</sup> He is one of the most famous Aboriginal artists living in the Arhem Land affirmed C. Golvan 'Aboriginal Art and the Protection of Indigenous Cultural Rights' [1992] 7 EIPR p.227.

<sup>479</sup> See M. Blakeney 'The Protection of Traditional Knowledge under Intellectual Property' [2000] EIPR p.254.

<sup>480</sup> (1995) 30 IPR 209. See under paragraph b) under letter i).

<sup>481</sup> *Ibid* at p.349. See D. Burkitt 'Copyright Culture – The History and Cultural Specificity of the Western Model of Copyright' [2001] 2 IPQ pp.183-84.

- Whether copyright law recognises that an Indigenous community can own copyright of a painting as a result of applying Indigenous customary law concepts of ownership
- Whether Bulun Bulun owned copyright of the painting on trust for the Ganalbingu
- Whether Bulun Bulun owned copyright of the painting in a way which means he is a fiduciary (in other words, he has to put the Ganalbingu's interests in the painting ahead of his own).<sup>482</sup>

The judge's answer to the first point was that no copyright could be granted under the Copyright Act to the community, because the community cannot be named to be the author, in terms of the copyright. The subject-matter of the artistic production must directly derive from the subject who produces the work.<sup>483</sup> Opposed to this concept, customary law considers copyright as a patrimony of the whole community. However, the judge stated that there were no provisions in the Copyright Act to 'involve the creation of rights in indigenous peoples'.<sup>484</sup>

In relation to the second question, the judge found that Bulun Bulun could not own trust-copyright in the painting because he was the only holder of the right.<sup>485</sup> The judge stated that the work was not of a sacred and secret nature which would presume that Bulun Bulun acted as a trustee of the community and of his customary law.<sup>486</sup> In fact, the artist, was authorised by the community to paint and reproduce the work.

Nevertheless, the existence of a fiduciary relationship between the artist and his/her community was confirmed by the judiciary.<sup>487</sup> Therefore, Bulun Bulun was seen as the artist who was able 'to preserve the integrity...and ritual knowledge [of his people]', a sort of fiduciary of his own community.<sup>488</sup> However, the action of the community on behalf of his representative Mulpurruru was dismissed and no

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<sup>482</sup> *Ibid.*

<sup>483</sup> Margaret West, curator of the Aboriginal Art and Museum Culture at the Northern Territory Museum of Arts and Sciences deposing in favour of Bulun Bulun affirmed that 'While many bark paintings represent traditional designs, it nevertheless remains that particular artists have their own distinctive ways of expressing the traditional designs.' Reported by Colin Golvan 'Aboriginal Art and Copyright: The case for Johnny Bulun Bulun' [1989] 10 EIPR p.348.

<sup>484</sup> (1998) 41 IPR 513 at 525.

<sup>485</sup> (1998) 41 IPR 513 at 526.

<sup>486</sup> (1998) 41 IPR 513 at 527.

<sup>487</sup> (1998) 41 IPR 513 at 531.

<sup>488</sup> (1998) 41 IPR 513 at 528.

financial reward was given to the community, since Bulun Bulun acknowledged to have acted as a fiduciary.<sup>489</sup>

Moreover, in this judgement the judge raised an important issue: in other circumstances he could have considered community rights even though no author could have been identified or the fiduciary link with the community of origin was not respected by the artist. Even in these cases, the community copyright in the folkloric work could be recognised.<sup>490</sup>

An immediate consequence of this decision was that attention given to Aboriginal matters grew enormously and the number of unauthorised copies of Aboriginal works diminished. To be optimistic, it can be said that this case has 'suggests[ed] that protection under the Copyright Act can be as valuable to Aboriginal and Torres Strait Islander artists as it is to other artists'.<sup>491</sup> However, it continues to be the case that no rights can be recognised on behalf of the community.

In the following section the attitude in policy towards Aboriginal folklore is assessed in light of the change brought by the court. In particular, some political statements are examined *in lieu* of future legislation. Therefore, the analysis will follow the steps which could lead to future legislation for the protection of intellectual property Indigenous rights.

### **4.3. The Australian Copyright Policy**

#### **4.3.1. Originality of Aboriginal Works and Communal Moral Rights**

The *Mabo* land case signifies a change of direction for the copyright legislator. Traditionally, protection of Indigenous folklore was generally sought under the Copyright Act 1968, and the Aboriginal and Torres Strait Islander Heritage Protection Act 1984. However, both statutes were unsuitable for granting protection to folklore art because they were thought to protect only Aboriginal places, objects and remains which have been stolen. By limiting the object of protection a valid protection for folkloric works could not be established.<sup>492</sup>

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<sup>489</sup> Bulun Bulun affidavit (1998) 41 IPR 513 at 531.

<sup>490</sup> Copyright, Australian Copyright Council, August 1999 at 47.

<sup>491</sup> At Section 15 of 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples', paper issued by the Attorney-General's Department (October 1994). The Paper is available from the Attorney-General's Department Information and Security Law Division <http://www.dcita.gov.au>.

<sup>492</sup> M. Blakeney 'Protecting Expressions of Australian Aboriginal Folklore under Copyright Law' [1995] EIPR p.445.

The Australian delegation participated in the Working Group of Legal Experts Workshop<sup>493</sup> (held in Noumea in June 2002 to discuss and develop a model law designed to protect the traditional knowledge and cultural expressions of Pacific Island countries) and decided that a new global society, technological breakthroughs and emerging new rights<sup>494</sup> needed a new system of intellectual property rights for Indigenous peoples.<sup>495</sup>

This decision was not particularly radical, since the Australian case law, especially after *Milpurrruru*,<sup>496</sup> mainly helped to apply pressure on public opinion for providing protection for Aboriginal cultures. During 1998-99 the WIPO-UNESCO biennium of fact finding missions<sup>497</sup> were given the mandate 'to identify and explore the intellectual property needs, rights and expectations of the holders of traditional knowledge and innovation, in order to promote the contribution of the intellectual property system to their social, cultural and economic developments'<sup>498</sup>. This initiative demonstrated how Australia is leading the world in establishing means of protection, in recognition of Indigenous peoples' cultural values. The Australian case-by-case approach, and the international pressure brought to bear by the UN with respect to intellectual property and cultural organisations, has pushed the national legislator and political units to draft effective national legislation.

Several legislative proposals have followed the case decisions that have been outlined above. Many of these proposals are evaluated in this chapter, especially those made by the Australian government and other representative Australian organisations<sup>499</sup> or authors writing on Australian intellectual property issues and the protection of Indigenous communities. The analysis will focus on some political

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<sup>493</sup> Under the supervision and sponsorship of the Secretariat of the Pacific Community (SPC), the Forum Secretariat (Forum) and UNESCO.

<sup>494</sup> The new means of technology, such as Internet, are seen as a threat to Indigenous culture, which needs to achieve a more global protection to avoid the over-growing opportunities of infringements. The new copyright system should be adequate to adjust the protection of Indigenous people folklore to new media and consequently 'maintain standards' of protection for Aboriginal culture, avoiding possible forms of Aboriginal art exploitation through the use of new technology.

<sup>495</sup> See the work drafted by the working group in the Model Law for the Protection of Traditional Knowledge and Expressions of Culture.

<sup>496</sup> (1995) 30 IPR 209.

<sup>497</sup> WIPO/ECTK/SOF/01/3.4

<sup>498</sup> The choice of Australia as a country-model was taken by the UNESCO-WIPO World Forum on the Protection of Folklore, Phuket, Thailand, April 1997.

<sup>499</sup> The Australia Council, Arts Law Centre of Australia, Viscopy Ltd - Visual Arts Copyright Collecting Agency, House of Aboriginality Multimedia Project, Copyright Council of Australia, National Association for the Visual Arts (NAVA), for example.



statements, official documents and academic proposals, and on available solutions which could be adapted to protect Aboriginal folklore.

#### 4.3.2. A New Legislation Based on Moral Rights and Collective Ownership

It is important first to examine the work carried out by The Intellectual Property Branch of the Department of Communications, Information Technology and the Arts,<sup>500</sup> which under the direction of the previous Minister of Communication Hon. Richard Alston, gave particular impetus to the recognition and protection of the Australian Aboriginal peoples.<sup>501</sup> In a press release,<sup>502</sup> titled 'Indigenous communities to get new protection for creative works', the Branch Department suggested that the reason for protection comes from the renewed interest and appreciation of Aboriginal heritage. This is a heritage that belongs to all Australians, Aboriginal and non Aboriginal, and it could potentially be the victim of unauthorised copying and exploitation, especially outside the national boundaries of Australia. This new legislation could reform the Copyright Act 1968, recognising the originality of Aboriginal works<sup>503</sup> and implementing a system of moral rights and collective ownership to attribute folkloric works to Aboriginal communities.<sup>504</sup> The combination of a system of moral rights and the recognition of the right of the community to be considered as the author gives rise to a new legislative instrument which has been defined as *communal moral rights*.<sup>505</sup> Back in 1981 the Australian Working Party on the Protection of Aboriginal Folklore had also encouraged a

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<sup>500</sup> The Department's official website is <http://www.dcita.gov.au>. Linked to Copyright Industries Section Intellectual Property Branch 'The Intellectual Property Branch in the Department of Communications, Information Technology and the Arts have a responsibility to ensure that the interests of Australian Aboriginal and Torres Strait Islander people are considered within the broader legislative and operational frameworks for intellectual property'.

<sup>501</sup> In a press release on May 2003 Hon. Alston made a very important assertion stating that 'it is the government's desire to give a better legal system to the protection of aboriginal cultural expressions', <http://www.dcita.gov.au>.

<sup>502</sup> *Ibid.*

<sup>503</sup> Under the Australian Copyright Act 1968, copyright is accorded automatically to the creator of an 'artistic work' and this applies to Australian Indigenous art. However, Colin Golvan in the Report of the Working party on the Protection of Aboriginal Folklore, Department of Home Affairs and Environment 1981, p.13 maintains that Article 32 of the Australian Copyright Act is incompatible in extending originality to Aboriginal works of art because 'aboriginal artists drawing upon pre-existing tradition'.

<sup>504</sup> *Ibid*, where it is stated that 'The Government is currently working to give effect to its election commitment to amend the moral rights regime to give Indigenous communities a means to prevent unauthorised and derogatory treatment of works that embody communal images or knowledge'.

<sup>505</sup> The Press release states that 'These [moral] rights could be independently exercised by the community and would mirror the nature and scope of the authors' moral rights as far as possible' <http://www.dcita.gov.au>.

legislation based on moral rights.<sup>506</sup> Despite this press release does not say how this system should work in practice, it is a useful policy statement to be followed at a legislative level.

### 4.3.3. A Better Trade Practice

Another important policy should be directed toward the implementation of strict codes of conduct, specifically addressed to multinational companies.<sup>507</sup>

This is an important issue in the Australian policy and many statements have been released with a focus on the need to implement a better trade practice. The official government statement records the need to sustain trade development for authentic Aboriginal art and cultural products. This could be understood as an attempt to improve the export of Aboriginal works of art while also establishing strict rules to regulate this export. Before promoting the international trade of Aboriginal works, an effective and better trade practice should be created within the country and outside the national boundaries.

The aim of the Australian government in seeking the development of a market for and the promotion of a trade in Aboriginal products within the global arena does not exclude concerns for the increase in imitation of Aboriginal works if they are commercialised.<sup>508</sup> However, the Australian Government believes that the Copyright Act 1968 provides sufficient instruments of protection to avoid the wrongful exploitation of works of folklore to take place.<sup>509</sup> It is, however, questionable that this will be the case. It is most likely that the copyright of Aboriginal works will be infringed.<sup>510</sup> The efforts to create a new model should, therefore, not be abandoned and a better link between copyright laws and fair trade laws should be explored.

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<sup>506</sup> Y. Gendreau 'Rejuvenating Moral Rights Through Immemorial Claims' [2005] 19 (1) IPJ pp.235-6.

<sup>507</sup> This is the personal opinion of the author of this chapter. Michael Blakeney speaks of 'codes of ethics' for the external users of works of folklore which could be applied to multinational companies, see See M. Blakeney 'The Protection of Traditional Knowledge under Intellectual Property' [2000] EIPR p.259.

<sup>508</sup> See <http://www.dcita.gov.au>

<sup>509</sup> Under the Australian Copyright Act 1968, copyright is accorded automatically to the creator of an 'artistic work' and this takes Australian Indigenous art into account. It is an offence under the Copyright Act to reproduce work, or portions thereof, without permission of the copyright owner.

<sup>510</sup> As a result of international treaties such as the Berne Convention, Australian artistic works of art are also protected by copyright in most other countries'. It is the worth asking why a famous Aboriginal song 'The song of Joy' has been recorded in France by national authorities and afterwards sold to a German group, Enigma, who made it a world-wide song entitled 'Return to Innocence'.

#### **4.3.4. 'Stopping the Ripoffs': the Protection of Aboriginal Art and Cultural Expressions. Can Copyright Be a Suitable Instrument of Protection?**

##### **4.3.4.1. The Premise of the Paper: Decentralised Bodies for Granting a Full Monitoring and Protection of Aboriginal Works of Art.**

'Stopping the Ripoffs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples', issued by the Australian Government, is a policy document addressing the main issues and problems arising from the protection of Aboriginal works. It addresses the need for a 'different and more appropriate legislative protection' of Aboriginal intellectual property rights.<sup>511</sup> The model sought by the drafters of this Paper is not through a separate legislation, but an amended version of the Copyright Act through the introduction of 'separate provisions' which could protect Aboriginal rights at best.<sup>512</sup> This document affirms the necessity for protection of the Aboriginal peoples and the need to establish a new set of IP rules, 'an effective intellectual property protection' (to use the language of the Report) which would finally safeguard cultural expression, often threatened in the past.<sup>513</sup>

This Paper clearly establishes the way in which the Australian Government deals with the protection of Aboriginal folklore and now this is established among the different political bodies. The body-structure consists mainly of the Aboriginal and Torres Strait Islander Commission ATSIC, the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS),<sup>514</sup> the Council for Aboriginal Reconciliation and the Office of Indigenous Affairs and the Attorney-General's Department, which has the role of implementing a valid copyright law for Aboriginal works. Many other organisations of Aboriginal folklore and agencies help the government's policy-making process, which relies on a decentralised system as the best one to guarantee the full monitoring, research and protection of Aboriginal folklore.

The paper has the scope of addressing the present limitations in the protection of Aboriginal folklore and the ability to push Indigenous peoples to participate in the forum, which involves the reform of their intellectual property rights, towards a more comprehensive reading of their values. Therefore, the paper shows its

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<sup>511</sup> As noted in the forward section of 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' under the paragraph titled 'Present Copyright Law' available from the Australian Attorney-General's Department Information and Security Law Division (Canberra: AGPS, 1994).

<sup>512</sup> *Ibid* at section 26 of the document.

<sup>513</sup> *Ibid*. The text speaks in terms of 'unacceptable exploitation of Indigenous works'.

<sup>514</sup> The role of the Commission has been seen in the paragraph above.

consultative nature<sup>515</sup> through the use of a clear and simple language. Many reforms are contemplated by this paper,<sup>516</sup> but only the amendments to the Copyright Act will be discussed. In this way, the proposal for a special trademark,<sup>517</sup> so the called 'Authentication mark', will distinguish fake Aboriginal works of art from the original ones and to avoid works of 'Aboriginal-style' or 'Aboriginal-inspired' circulating the market.<sup>518</sup> However, the introduction of this trademark will meet the same obstacles and will have the same limitations as the one met by the U.S. Indian trademark.<sup>519</sup>

#### 4.3.4.2. Copyright Law and its Limitation in Protecting Aboriginal Folklore

'Stopping the Ripoffs' suggests that the existent Australian Copyright Act can provide a 'substantial' protection. The basic principles of copyright protection under the Copyright Act 1968 are recalled using the words of this document as follows:<sup>520</sup>

- Protection [of] literary, dramatic, musical or artistic works must be in 'material form' and be original (ie, the author's own work, not copied).

- In addition to the protection of those works, copyright also protects sound recordings, films, television sound broadcasts, and published editions.

- The purpose of copyright law is principally to provide the owner of copyright with specific exclusive economic rights.

- The author/creator of a work not made in the course of employment is usually the first copyright owner.

- The copyright owner has the exclusive rights to reproduce, publish, publicly perform, broadcast, and adapt the work.

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<sup>515</sup> *Ibid* at Section 23-24.

<sup>516</sup> *Ibid* at Section 25 of the paper also looks at amendments to the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984*.

<sup>517</sup> The Aboriginal Arts Management Association (AAMA) is currently developing a certified trade mark for authentic Aboriginal and Torres Strait Islander works', reported under Section 32 of the Paper.

<sup>518</sup> See M. Blakeney in 'The Protection of Traditional Knowledge under Intellectual Property', in paragraph 'Simulation of Aboriginal Images by non-Aboriginal creators' [2000] EIPR p.254. D. Burkitt states that the risk in relation to the unauthorised copies of Aboriginal works is to pass from works of 'folklore' to 'fakelore', quoted from 'Copyright Culture – The History and Cultural Specificity of the Western Model of Copyright' [2001] 2 IPQ p.185.

<sup>519</sup> See Chapter on U.S. and Folklore at part II. Under paragraph ii) The IACA provisions: a '*sui generis*' legislation for the protection of traditional knowledge.

<sup>520</sup> 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' under the paragraph titled 'Present Copyright Law' available from the Australian Attorney-General's Department Information and Security Law Division (Canberra: AGPS, 1994).

- The term of protection for copyright works is generally the author's life plus 50 years.<sup>521</sup>

- Copyright subsists upon the creation of an original work - there is no registration or other formality required.

However, many works of folklore are excluded from this protection.<sup>522</sup> The main obstacles can be summarised as follows:<sup>523</sup>

- Protection granted by the Copyright Act refers only to single authors and not the whole community. Therefore the community cannot benefit from the economic right or the moral rights of its works.

- The Copyright Act imposes the fixation requirement for a work to be classified as copyrightable. As in many other legislation, including the Australian one, a work to be 'copyrightable' needs to be fixed in material form. Therefore, oral history and sacred knowledge of many Aboriginal works prevent them from being fixed in material form. Only a possible fixation could save these works from being misused and misappropriated. However, as discussed in chapter I, many Indigenous communities are basing their communal life on the oral history of their traditions, which is seen as the best way of expressing their art and poetry and keeping secret the knowledge of their culture within the clan members.

- Moral rights are granted to individual authors and not to a collective. Therefore, moral rights meet the limit of copyright economic right but the scope of protection needs to be extended.

- The term of protection for copyright works is the author's life plus 50 years and therefore many antique folkloric works are excluded from copyright protection as they are often found in public domain and free to be used.<sup>524</sup>

- Originality requirement. An Aboriginal work needs to be original to receive copyright protection. However, quite rightly, this is the last worry of the Australian legislator who included a lighter criterion of originality in the Copyright Act 1968.<sup>525</sup>

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<sup>521</sup> In the U.S. the term of protection is 70 years after the death of the author.

<sup>522</sup> Reported in Sections 21 and followings of 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' (Canberra: AGPS, 1994).

<sup>523</sup> *Ibid.*

<sup>524</sup> The text refers specifically to the '*rock art and cave paintings of traditional Aboriginal and Torres Strait Islander designs*' however fables, traditional stories and music and any other form of art can be easily comprehended.

<sup>525</sup> 'Australia's standard is notably low' affirms E. Adeney 'Defining the Shape of Australia's Moral Rights: a Review of the New Laws' [2001] 4 IPQ p.296.

- The Copyright and the legal language. This is a sort of sociological and anthropological issue which is addressed in S. 22 of this Paper. The legislator should take into account not only the limitations derived from the copyright application *tout court* but also the translation of the copyright categories into Indigenous peoples' language, to assure full comprehension of these categories. This is seen as 'practical limitations'<sup>526</sup> by the drafters of this Paper. Aboriginal peoples' works are expressed in a different language and they have their own rule of protection.<sup>527</sup> As observed previously, communal ownership of Aboriginal intellectual property is far from the individual ownership imposed by the *Western* world. To integrate these very different categories, Aboriginal peoples should know about Western systems of protection and the Westerners world should be willing to learn about the systems of protection in place in traditional societies. There is, after all, a real need to improve the communication between these very diverse cultures.

#### 4.3.4.3. The Proposed Amendments to the Copyright Act

The main proposals of 'Stopping the Rip-offs' concern the breaking of many of the barriers imposed by the Western concept of copyright.<sup>528</sup> In particular, the drafters of this paper find the need to extend the term of protection for Aboriginal works of art. Moreover, protection should be extended to works which are not fixed and systems of collective ownership should be explored.<sup>529</sup>

The difficulties in implementing these new elements in the copyright scheme are mainly found in the fact that many works of folklore are already in the public domain and it is almost impossible to date them with precision. Therefore, the mere extension of the term of protection could still leave uncovered the protection of many works of folklore.<sup>530</sup> Thus, a perpetual right should be created.

A system in which the community can own copyright, according to their customary law should be established. However, as expressed under Section 26 of this Paper, there are a few problems in granting a perpetual right to the community,

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<sup>526</sup> S.22 of 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples'. The drafters were particularly concerned that a lack of knowledge over the existing legal instruments of protection could prevent any actions for the infringements.

<sup>527</sup> P. Drahos in 'Indigenous Knowledge and the Duties of Intellectual Property Owners', 11 I.P.J., 1997 p.181 suggests that 'Indigenous knowledge is not pigeonholed into various kinds of scientific and cultural knowledge or legal categories, such as those to be found in copyright law (artistic work, literary work, dramatic work).'

<sup>528</sup> 'Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' *op. cit. supra* Section 26 and followings.

<sup>529</sup> *Ibid.*

<sup>530</sup> At Section 27.

since the attribution of the right of authorship should be done through its members. This is why the drafters affirm that:

The determination of the ownership of copyright in works with a perpetual copyright, particularly when claimed by a community, will be increasingly difficult as time goes by.<sup>531</sup> Therefore, the perpetual right should be attributed to the community as a juridical person and not to its community members.

#### 4.3.4.4. The Protection of Sacred-Secret Folklore

The problems relating to the protection of the secret sacred heritage of Aboriginal culture were thought to be resolved outside the copyright legislation. It is also thought that an amended version of the Aboriginal and Torres Strait Islander Heritage Protection Act could be a valid framework,<sup>532</sup> and a possible extension of the protection of the Aboriginal rights covered under that Act should be pursued. It is proposed that not only the sacred areas, objects and historical places of special significance to Indigenous cultures should be protected under the Act, but everything that the Aboriginal peoples consider as their precious knowledge. It is, however, uncertain if the amendments to the Aboriginal and Torres Strait Islander Heritage Protection Act will be extended to cover Aboriginal folklore or if it would be better to extend this protection within the copyright act, with the addition of a possible new provision.<sup>533</sup> This is a matter of policy, but it is interesting to examine a few points that can be adopted by the future legislator for the protection of folklore which have a religious or symbolic nature.

It has been proposed that the new law should take into account the role played by 'local Aboriginal communities',<sup>534</sup> which have the function of being an

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<sup>531</sup> *Ibid.*

<sup>532</sup> The Aboriginal and Torres Strait Islander Heritage Protection Act 1984 protects areas, historical places and objects which have particular significance for Aboriginal peoples. See C. Golvan "Aboriginal Art and the Protection of Indigenous Cultural Rights" [1992] 7 EIPR pp. 230-32.

<sup>533</sup> *Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples op. cit. supra* Section 29-30. "The Aboriginal and Torres Strait Islander Heritage Protection Act could be amended to afford Aboriginal and Torres Strait Islander *communities* a right of action to protect artistic works of traditional significance, with no limit on the term of protection for such works and no requirement of material form". This follows the suggestions of the *Report of the Working Party on the Protection of Aboriginal Folklore* drafted by the Department of Home Affairs & Environment in 1981. The Aboriginal and Torres Strait Islander Heritage Protection Act only provides a protection of sacred and historical aboriginal land and objects.

<sup>534</sup> See C. Golvan 'Aboriginal Art and the Protection of Indigenous Cultural Rights' [1992] 7 EIPR p.231.

intermediary between the government and the communities - i.e. a sort of representative body of the whole community.<sup>535</sup>

The 'local Aboriginal communities' have the task of advising the government on matters related to Aboriginal works in need of protection or of Aboriginal works being illegally exploited.<sup>536</sup> A relevant introduction will be given by the implementation of an arbitration procedure to include folkloric works. Therefore, if a minister's decision on Aboriginal issues conflicts with the local communities' position, the latter could ask for an arbitrator to settle the dispute.<sup>537</sup>

Moreover, the terms of protection will not be considered as in copyright (50 years after the death of the author of the work or the death of the last known author in case of anonymous works), but the 'local Aboriginal communities' will be entitled to a 'perpetual right'. In fact, Aboriginal works could be protected *per se* only for their sacred, religious, symbolic or 'traditional' value with reference to the Aboriginal communities, as has been done with their lands, objects, and historical places.

#### 4.3.4.5. The International Dimension

More challenging than the protection of folklore at national level, is the problem of the protection of TCEs outside the national boundaries.<sup>538</sup>

Australia, having adhered to the International Copyright Convention,<sup>539</sup> should also respect the provisions of this Convention that requires 'any copyright protection afforded to Australian nationals must also be afforded to the nationals of Convention countries'.

The great worry of the drafters of 'Stopping the Rip-offs' is that in granting a special copyright protection to Aboriginal peoples the Australian government should then extend this protection to any other Indigenous works of art around the world. This would not be a problem if other countries adopted the Australian approach - but what if they did not? What would happen if Australia, after the implementation of the new law protecting Aboriginal peoples' copyright, found itself bound to protect all other Indigenous peoples' works? Would it be convenient for Australia to

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<sup>535</sup> *Ibid.* The communities will have 'civil rights of action akin to copyright rights'. Therefore, they could act to enforce the copyright of Aboriginal peoples and prevent the infringements of those rights.

<sup>536</sup> *Ibid.*

<sup>537</sup> *Ibid.*

<sup>538</sup> Stopping the Rip-offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples' at Section 28 (Canberra: AGPS, 1994).

<sup>539</sup> Berne Convention 1886.



implement a new system without acquiring certainty on the fact that Aboriginal works are protected in other countries? Therefore, the drafters of this document do not show any enthusiasm for the outcomes of a new system. Their recommendations to the copyright legislator are to be prudent in tackling the matter.

#### **4.3.4.6. Moral Rights and Performers' Rights**

Special reforms are being considered for performers' rights<sup>540</sup> and moral rights and designs.<sup>541</sup> Particular importance is vested in Article 10, since the government wants a specific protection of folkloric works through the use of moral rights, as will be assessed in the following section. However, the above-mentioned Document started with the assertion that amendments to the Copyright Act could be made through 'the introduction of moral rights for authors and artists of copyright works' and not to the community as a whole. This will be discussed in the following section through the examination of the new laws on moral rights.

'Stopping the Rip-offs' holds mainly a political nature. The analysis of moral rights and their consequent application to the author and not to the community does not suggest a solution to the problem. This document is, however, a first step toward the recognition of new emerging rights which must be disciplined and protected.

### **4.4. The future *sui generis* legislation: could moral rights help?**

#### **4.4.1. Moral Rights: the 'Intimate' Rights of Authors**

Australia signed the Berne Convention in 1928 but moral rights provisions were never embraced under the Australian Copyright Act 1968. It was thought that the provisions of the rules of false attribution under Part IX of the statute would be a valid instrument of protection for the moral rights of the author.<sup>542</sup>

The reforms proposed to the Copyright Act carried out by the Copyright Law Review Committee in 1988 stated the need for introducing moral rights. Following this proposal, the legislator drafted the current law. However, before addressing the

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<sup>540</sup> The desire to extend the performers' rights to the same level of protection as literary, artistic and dramatic works is one of the primary aims of the Australian government which has also issued a Paper entitled 'Performers' Intellectual Property Rights'. Discussion Paper. Commonwealth. December 1997 available at <http://www.dcita.gov.au>.

<sup>541</sup> 'Performers' Intellectual Property Rights'. Discussion Paper. Commonwealth. December 1997 available at <http://www.dcita.gov.au> at sections 9-10-11.

<sup>542</sup> It is proper for common law countries to give a long list of what the authors rights are, as detailed as possible, especially in the description of the infringement procedures. See E. Adeney 'Defining the shape of Australia's Moral Rights: A Review of the New Laws' [2001] 4 IPQ pp.292-93.

main points of the Australian Moral Rights Act 2000<sup>543</sup> it is worth asking what moral rights are and why their recognition is essential for the author and for society? Since 2000 Australia has a new regime for the protection of the moral rights of the author within the Copyright Act 1968.<sup>544</sup> It was decided to introduce what the Berne Convention defines as the 'unassignable personal right of an author'.<sup>545</sup>

The Berne Convention established that 'every production in the literary, scientific and artistic domain' should be covered by moral rights, including films.<sup>546</sup> Moral rights must be first distinguished by copyright rights because they are not like an economic right; they are not able to be transferred or sold. They are 'personal rights...and must be attached to an individual'.<sup>547</sup> While having this individualistic character, moral rights have the positive aspect of empowering the author to be recognised as the only creator, on the other hand, those rights excludes others. In fact, the non authors do 'not enjoy the freedom of action'. This can be referred to as the negative side of moral rights.<sup>548</sup>

Moral rights can be divided into two main categories. These are the right of attribution: that the author has to be recognised as the only creator of the work; and the right of integrity: that distortion of the work of the author cannot be made without the author's consent.<sup>549</sup> The most important provisions connected to moral rights are those related to their infringements. Thus, the right of attribution and even more the right of integrity ensure that the work of the author is not manipulated and distorted. Nevertheless, a so-called principle of reasonableness is established to

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<sup>543</sup> K. Gettens 'Australia Now Has 'Moral Rights': Copyright Amendment (Moral Rights) Act 2000' [2001] 12 Ent L Rev p.129.

<sup>544</sup> Copyright Amendment (Moral Rights) Act 2000 by Parliament on 7 December 2000. A consolidated version of the Act is available at <http://www.dcita.gov.au> which incorporated the changes introduced by the Copyright Amendment (Digital Agenda) Act 2000 and the Copyright Amendment (Moral Rights) Act 2000. The law came into force 21 December 2000. See also the publication 'Moral Rights Fact Sheet' available at <http://www.dcita.gov.au/article/> See also E. Adeney 'Defining the Shape of Australia's Moral Rights: A Review of the New Laws' [2001] 4 IPQ at 291-325. See also A. Fitzgerald and F. Deffenti 'Australia: Copyright - Copyright Amendment (Moral Rights) Act 2000' [2001] 23 EIPR N35.

<sup>545</sup> Article 6bis of the Berne Convention for the Protection of Literary and Artistic Works.

<sup>546</sup> *Ibid.*

<sup>547</sup> *Ibid* p.298.

<sup>548</sup> E. Adeney 'Defining the Shape of Australia's Moral Rights: A Review of the New Laws' [2001] 4 IPQ p.291.

<sup>549</sup> L. Bently and B. Sherman *Intellectual Property Law* 2nd ed. (OUP Oxford 2004) at 231-250. Applicability of moral rights to common law jurisdiction see J. Ginsburg 'Moral Rights in a Common Law System' [1990]4 Ent LR 121.

allow the derogation of the right of integrity. Some factors, quoted in the Publication 'Moral Rights Fact Sheet', should be considered:

- The nature, purpose, manner, and context of the use of the work or film.
- Any relevant industry practice and voluntary industry code of practice.
- Whether it was made in the course of employment.
- Whether the treatment was required by law or necessary to avoid a breach of law.

Australian moral rights differ from those of the United States and the United Kingdom. Those countries limit the application of those rights to a specific subject matter, while Australia stretched their application to many works of art.<sup>550</sup> Other examples of differences between those countries are given by the treatment reserved to the works of art made for hire.

While in the United States employees are excluded from the protection granted by moral rights, in Australia the employees are recognised as the only holders of moral rights, while the employers might have the copyright on the work. This is not only a different way of treating the subject of moral rights but it is also a different way of framing a more equal legislation. Copyright can be sold or received in heritage, but moral rights are the property of the creator and are attached to the person. Having shown the main point, the new moral right legislation must now be addressed in terms of what distinguish moral rights from copyright rights and what is the similarity between the two.

#### **4.4.2. Moral Rights v. Copyright. Could Moral Rights Protect Folkloric Works?**

Moral rights only belong to the author as the primary consequence of the creation. They are individualistic rights and they cannot be applied to a collective. They can help individual artists gain damages in the illicit reproduction of their work. However, as observed in *Bulun Bulun*, Aboriginal artists are not 'holders in trust' of the right of the community. Therefore, as they are drafted as present, moral rights can offer only a partial protection. The use of these rights will avoid the repetition of cases such as *Yumbulul* or *Milpurruru*, but they will not solve the aim of the Aboriginal communities in being recognised as the 'authors' of their works. Another problem given by this legislation arises because, the current law states that

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<sup>550</sup> In the United Kingdom, moral rights are not extended to computer programmes and databases, while in the U.S., films are also excluded from the protection. See E. Adeney 'Defining the Shape of Australia's Moral Rights: A Review of the New Laws' [2001] 4 IPQ p.295.

'moral rights only apply to works made after the legislation came into force', which does not include the ancient works of folklore.

Another provision which creates an obstacle for the application of moral rights to folklore is the way in which they are disciplined and the fact that the duration of the right is attached to the author. Moral rights follow the same time limits of copyright, which is fifty years after the death of the author. This means that, for example, the *Maggie Geese and Water Lilies at the Waterhole*, fifty years after the death of Bulun Bulun, will be free not only to be copied, because copyright is expired, but to also be distorted - without asking any permission to Bulun Bulun's community whose traditions were the source of the creation. Moreover, it should not be forgotten that moral rights are applicable only on works of art which can be fixed. Therefore, literary, artistic and dramatic works fixed in a material form are covered by copyright; all the other folkloric works of art such as oral history are excluded from the protection.

#### **4.4.3. Application of Moral Rights to Indigenous Peoples**

Despite the Australian Government announcing the introduction of new legislation on moral rights for Indigenous communities by the end of 2003, a law on Indigenous peoples moral rights has not yet come into effect.<sup>551</sup> The press release stated as follows:

'The legislation would introduce Indigenous, communal moral rights in relation to a work (including an artistic work) or film based on an agreement between the author/artist and the Indigenous community. These rights could be independently exercised by the community and would mirror the scope of the authors' moral rights, as far as possible.

These proposals will provide certainty and assist users and purchasers of items to identify those works and films to which the rights are attached, and will facilitate co-operation and respect between artists, authors, film-makers and Indigenous communities.

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<sup>551</sup> Joint Media Release by Senator the Hon Richard Alston, Minister for Communications, Information Technology and the Arts, The Hon Daryl Williams AM QC MP Attorney-General, The Hon Philip Ruddock MP Minister for Immigration, and Multicultural and Indigenous Affairs available at [http://www.dcita.gov.au/Article/0,-2\\_4008-4\\_114525,00.html](http://www.dcita.gov.au/Article/0,-2_4008-4_114525,00.html). See Ian McDonald, 'Indigenous Communal Moral Rights', *Australian Intellectual Property Law Bulletin*, 16 July 2003. See also the electoral policy commitment made to Senator Aden Ridgway in parliament during the passing of the Moral Rights Bill in December 2000 reported in Intellectual Property Branch, department of Communications, Information technology and the Arts and the Copyright Law Branch, Attorney's General Department, Indigenous Communal Moral Rights Paper, Canberra, December 2003.

The legislation will provide a simple, workable and practical scheme for Indigenous communities, artists, galleries and the public. However, the Government will continue to consult in fine-tuning the new provisions’.

Despite all these good statements, the Indigenous peoples are still waiting for the application of what has been promised to them. The Exposure Draft Copyright amendment (Indigenous Communal Moral Rights Bill) was never brought to open public discussion.<sup>552</sup> Perhaps the reason for the delay of this well publicised new legislation is the requirement for an agreement between the creator and the Indigenous community, otherwise communal rights would not be applicable. The press release investigates upon the introduction of eventual agreements between the creator and the community in order to seek legal certainty in case of law claims.<sup>553</sup>

Moreover, the concept of moral rights seems far too connected with that of copyright. In this respect, the community could claim moral rights protection in front of the court, only if a copyright is violated and the author cannot be identified, or he/she does not want to pursue a legal action.<sup>554</sup> A right of attribution and a right of integrity could help, but some reforms should be introduced in the area of moral rights.

For a full protection of Aboriginal works of art, moral rights should lose their individualistic nature and they should be also applicable for works of art before the establishment of this legislation. The exercise of moral rights should not be linked to the characteristics of copyright that is duration. It should be a ‘perpetual protection’ as many works of folklore find their origins in a remote past. The ‘right of integrity’ should be extended to grant protection from commercial imitations of many Indigenous products, which are the breakthrough of new technology and the ‘principle of reasonableness’, should be limited to a few specific applications.

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<sup>552</sup> See T. Janke and R. Quiggin ‘Background Paper’ p.29 available at [http://www.ozco.gov.au/arts\\_resources/publications/icip/files/4126/icip.pdf](http://www.ozco.gov.au/arts_resources/publications/icip/files/4126/icip.pdf). See also J. Anderson ‘Indigenous Communal Moral Right: The Utility of an Ineffective Law’ 5 (30), *Indigenous Law Bulletin*, 2004.

<sup>553</sup> Ian McDonald *Indigenous Communal Moral Rights*, Australian Copyright Council, 16 July 2003 available on the Australian Copyright Council website.

<sup>554</sup> *Ibid.*

## 4.5. Conclusion

### 4.5.1. Case Law Leads the Way the National Legislator Should Follow

*Yumbul v. Reserve Bank of Australia Milpurruru, & Ors v. Indofurn Pty Ld & Ors* and *John Bulum Bulum & Anor v. R & T Textiles Pty Ltd* are the leading cases in the recognition by the courts that a better system of protection for Aboriginal works should be created.<sup>555</sup> The judges have had to rely on the common law principle of the harm suffered by the author of Aboriginal works or to the flagrant infringement in order to apply a stricter calculation of the rights' violation.

Judges have found themselves powerless in recognising communal rights for communities, despite having acknowledged that these were the real owners of the copyright of the Aboriginal works of art, according to their customary law. The provisions of the Australian Copyright Act, based on the individualistic concept of authorship, prevented any possible recognition of a right of the community.<sup>556</sup>

Nevertheless, these cases have been used by Indigenous communities to address the need for a change in the protection of their rights and, following Colin Golvan, it can be observed that:

'Not only have the cases been important in Aboriginal and cultural terms, but they have represented a willingness on the part of Aboriginal people to look to the courts to redress, in relation to matters of commercial significance, an expression of an acceptance that the courts and legal proceedings can use to commercial effect by Aboriginal people...'<sup>557</sup>

It is of primary importance to educate Aboriginal people to respect and promote their culture.<sup>558</sup> It should not be forgotten that all those cases, mentioned above, were related to works of art which could be fixed under the Copyright Act

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<sup>555</sup> M. Blakeney 'Protecting expressions of Australian Aboriginal Folklore Under Copyright Law' EIPR [1995] at 445. As Blakeney noticed in 'Milpurruru', there was no problem for an ancient Aboriginal work. In that case, it would have been impossible to find an author in the copyright sense of authorship. In 'Milpurruru' there are several representatives of the respective communities and the authors are identified. The treatment and the recovering of damages reserved to the deceased artists shows how more difficult the topic become.

<sup>556</sup> Neither there is notion of collective ownership which could be derived from other legislation. Golvan, the author reporting a note of S.P. Ladas *The International Protection of Literary and Artistic Properties* (MacMillan 1938) states that Norway and France have a way of contemplating collective ownership. Golvan's article refers to the Norwegian Scientific Society, the French 'academies, sociétés, savantes and corporations'.

<sup>557</sup> C. Golvan in 'Aboriginal Art and the Protection of Indigenous Cultural Rights' [1992] 7 EIPR pp.228-9. The author sustains at p.229 that the resources of this agency are 'extremely limited'.

<sup>558</sup> See the Matua Declaration at 1.3 quoted in M. Blakeney 'The Protection of Traditional Knowledge under Intellectual Property' EIPR [2000] p.259.

and where place of origin was not difficult to be proven. What could the judges decide for the protection of an unfixed Aboriginal work as a traditional belief? In terms of the place of origin issue, the Copyright Act is likely to be extended to cover Aboriginal works of art. For Australia this is not the main problem. Aboriginal works are considered original, albeit based on pre-existing works, depending on the way these works are expressed. It can be said that from the place of origin, the Australian coined the new terminology of 'Aboriginality'.

#### **4.5.2. The Lack of a Communal Right Can Prejudice the Community**

The lack of a communal right constitutes a problem for Indigenous communities, especially when members outside the community copy or misuse the cultural expression of the community. It is also a problem when a member of a community disagrees with the other members of the community about how a particular work should be represented. Bulun Bulun, for example, could have disagreed with the techniques to be used in painting the Aboriginal stories and traditions. There is an additional problem when Aboriginal artists start to sell paintings reproducing Aboriginal stories without the community's permission. With Bulun Bulun it was easy to identify the author and his community, but this is not always the case. The effective protection granted to unidentified Aboriginal works from copyright is difficult if not almost impossible.<sup>559</sup>

Another issue which could be attached to the lack of existing communal right is the protection time granted to Aboriginal works of art. If the protection is granted to the sole artistic reproducer of the folkloric works, the time granted for protection will expire fifty years after his death. A perpetual right would be created and this right would not be attached to the single members of the community, but to the community in a legal sense.

#### **4.5.3. Protection for Sacred-Secret Heritage**

A possible way of rectifying the problems of protecting the secret sacred heritage of Aboriginal people is the Aboriginal and Torres Strait Islander Heritage Protection Act, which could provide a valid framework of protection.<sup>560</sup> In this case, the protection for these works of folklore will be sought outside the words of the statute.<sup>561</sup> While being aware that new and more flexible procedures, for example

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<sup>559</sup> C. Golvan 'Aboriginal Art and Copyright: The case for Johnny Bulun Bulun' [1989] 10 EIPR p.353-54. With reference to the unsigned Aboriginal works the author affirms that the *Bulun Bulun* case 'indicates that copyright has its own modest role to play in this important national concern'.

<sup>560</sup> 'Stopping the Rip-offs', *op. cit. supra*, section III under subparagraph iv.

<sup>561</sup> *Ibid*, where it is affirmed that a special provision in the copyright statute might be more suitable, while another legislation could create some confusion in its application.

the arbitration procedure regarding the infringements, are examined by the legislator, it is of some dispute that the secret sacred heritage should be protected outside a more comprehensive legislation regarding all sorts of Aboriginal works of art. This could create a classification and division between diverse folkloric works without achieving any benefits for Indigenous peoples' folklore.

#### 4.5.4. A Decentralised System

A new system for the protection of folklore should also contemplate the possibility of improving the connection between Aboriginal traditions and Western traditions. The role played by customary law in regulating Aboriginal matters should also be taken into account by the national legislator.

Aboriginal peoples' traditions are very much linked with the land model which takes into account the rights of those peoples. Aboriginal peoples should be considered as the holders of the rights of their works. It is important to stress in this conclusion that a possible decentralised structure proposed by the government discussion document 'Stopping the Ripoffs' could be implemented addressing the reforms promoted by The Aboriginal and Torres Strait Islander Commission (ATSIC)<sup>562</sup> to the Aboriginal Land Rights (Northern Territory) Act 1976.

Two main reports have been drafted by John Reeves<sup>563</sup>. Despite many of his recommendations being highly criticised by the above mentioned commission, (mainly for the lack of clarity and the obscure language in which the report is drafted<sup>564</sup>) it is worth exploring few mechanisms of protection which could ameliorate the current system.

The main points of Reeves's proposal were the constitution of a new central body which could have the function of obtaining 'socio-economic advancement of the Aboriginal Territorians' and its peripheral bodies which could co-ordinate with

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<sup>562</sup> 'ATSIC is a statutory corporation established under the ATSIC Act. This is a legislation which sets out structure and functions. Geographically, it is organised around a system of zones and regions, with the Torres Strait area treated somewhat differently to everywhere else. There are 17 zones across Australia (including the Torres Strait zone) and between 1 and 4 regions within each Zone. Each of the 35 regions has an elected Regional Council while the Torres Strait area has the Torres Strait Regional Authority (TSRA). Regional Councillors elect one of their own to represent each zone, as do the members of the TSRA. Together these 17 zone Commissioners constitute the Commission known as ATSIC also commonly referred to as 'the Board'. This definition is provided on page 2 of the Aboriginal and Torres Strait Islander Commission Amendment Bill 2002, published by the Australian *Department of the Parliamentary Library, 2002* (Bills Digest No. 139 2001-02).

<sup>563</sup> Reeves' Report 'Building on Land Rights for the Next Generation' 1999.

<sup>564</sup> The most critical point is that the language of these reports is obscure and difficult to understand for Indigenous people communities. Reported on the ATSIC official web-site.



the national central body.<sup>565</sup> This decentralisation process is highly recommended by the ATSIAC which has promoted it within its organisation.<sup>566</sup>

#### 4.5.5. Moral Rights: The Community 'Intimate' Rights

One possible way forward in the protection of Aboriginal people is through the protection given by moral rights to the author, especially after the implementation of the Moral Rights Act 2000 which implemented the article 6 bis of the Berne Convention. The limits of moral rights have been analysed.<sup>567</sup> The main problem in the application of this kind of legislation is given by the fact that moral rights as copyright protect the single author and not a collective, where moral rights are not economic rights and are linked to the person or to the author.

Another limitation is that moral rights can be applied, as like copyright, only to fixed works in a material form. Time is limited in terms of the protection which should be granted to folkloric works of art and as well the recognition of rights on behalf of the community.

To use the category of moral rights and the possibility given by the application of the right of attribution and integrity,<sup>568</sup> a communal moral right should be created and the protection extended to unfixed works of art and to grant them a perpetual protection. Moral rights could be a possible instrument of protection if these amendments are implemented. The way they are currently drafted can only protect the single Indigenous artist.<sup>569</sup> The non-economic approach of moral rights could make these rights more acceptable to the Indigenous peoples and sharing some similarities with customary laws, which are based more on relations and tradition rather than on commercial values.

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<sup>565</sup> See Matua Declaration p.1.8 'Appropriate body with appropriate mechanism' See also M.Blakeney 'The Protection of Traditional Knowledge under Intellectual Property' [2000] EIPR p.259. See also Golvan discussing a proposed governmental body that could supersede the licensing and copyright operations of Aboriginal works of art. A licensing and copyright information governmental body reported in C. Golvan 'Aboriginal Art and Copyright: The case for Johnny Bulun Bulun' [1989] 7 EIPR pp.353-54.

<sup>566</sup> See the Aboriginal and Torres Strait Islander Commission Amendment Bill 2002, published by the Australian *Department of the Parliamentary Library, 2002* (Bills Digest No. 139 2001-02).

<sup>567</sup> On the doctrine of moral rights see also the interesting article of C. A. Wagner 'Motion Pictures Colorization, Authenticity and the Elusive Moral Right' [1989] 64 N.Y. U.L.Rev. p.687 and followings.

<sup>568</sup> See under section IV The future *sui generis* legislation: moral rights could help? Paragraph a) Moral rights: the 'intimate' rights of authors.

<sup>569</sup> J.R. Sackville '*Legal Protection of Indigenous Culture in Australia*'. [2002] 11 Cardozo J. Int'l & Comp L. p.727.

The resistance in coming up with a new law could come from the complexity of the issue and the related rights at stake. One relevant problem is the question of reciprocity. Australia, having adhered to the Berne Convention, should extend any new legislation for the protection of folklore to the protection of folkloric works of other countries. The point is whether Australian Aboriginal works will receive the same treatment outside the national boundaries.<sup>570</sup>

Above all, this new Aboriginal right should take into account, not only *sui generis* intellectual property forms - a sort of balance between economic rights belonging to the Western culture - but also the protection of personality.<sup>571</sup> It should also be considered that the introduction of this new right will go beyond the national dimension.

The reason the promises of the government have not been yet delivered must also be sought in the lack of consensus over the application and extension of moral rights to Indigenous peoples. As noted in the previous paragraph, the existence of an agreement between the author and the community as a requirement for the applicability of moral rights was one of the issues which slowed down the legislative process. The legislative approach was too vague and it was not able to draw moral rights applicable to a community without the intervention or the presence of the author.

A legislative response has been postponed. Whether Australia is able to pursue further the protection of Indigenous rights, is still too early to predict. What it is certain is that the courts in Australia have tried to achieve some practical measures of protection through the fine tuning of policy for the infringement of Aboriginal rights in their works of art. By advocating the necessity of well-established Indigenous peoples' rights on their lands, properties, objects, and traditions, has created the right political pressure which might lead to a change in the legislation.

The United States has strengthened the rules of the Copyright Statute and is still trying to enlarge the concept of copyright to cover works of folklore or the application of special trademarks. Whilst the Australian legislator is considering a better framework of protection for Indigenous peoples' rights to their TCEs, this thanks to the stimulus of the judiciary which introduced *sui generis* elements of protection.

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<sup>570</sup> A Government White Paper on the implementation of the Copyright, Designs and Patents Act amended in 1988 stated that 'the Government fully recognises the great cultural and national importance attached to folklore' and that folklore will be respected within and outside the national boundaries' under Part 19 p.73.

<sup>571</sup> P. Drahos 'Indigenous Knowledge and the Duties of Intellectual Property Owners' [1997] 11 I.P.J. p.180.

The difference between national approaches to folklore and its protection - between, for example, the U.S. and Australia - makes it difficult for the international legislator to draft an international agreement. This might explain the reason why the future of WIPO as the leading UN agency, which has also the task of law harmonisation in the copyright sector, is still far from being certain.<sup>572</sup>

#### **4.5.6. Conclusive Remarks on the National Approach**

National laws systems have demonstrated the limitations of IPRs applied to folklore. However, there are still instruments as trademarks, geographical indications, denomination of origin, which could be suitable for works of folklore, although particular circumstances, as already observed, must exist for them to result applicable. As already mentioned under the chapter dealing with the U.S. it is not enough to affirm that a work is 'Indian made' in order to protect all the typologies of Indian works belonging to different tribes and cultural backgrounds.

Moreover, under Chapter 3, the analysis of the copyright legislation has shown how difficult it is to protect folklore of traditional communities applying strict copyright rules. Copyright in the United States is also guaranteed at a constitutional level and protection is granted only to a single author. This monopolistic right is conceded to compensate the author for the economic benefits derived through the dissemination of the work which lead to the promotion of incentives for the progress of science and investments.

The main difficulty towards a protection for many copyright statutes is, then, constituted by the application to folklore of specific prerequisites for copyright protection as originality, fixation. Folklore is often not defined as a right to be protected at a national level and it is not recognised as a communal right. Moreover, the orality, one of the main characteristic of folklore, restrains the possibility of it being protected for the lack of fixation. Furthermore, the time limit established by copyright is inadequate to protect continually evolving TCEs. Overall, another barrier towards the application of copyright is represented by the category of originality. Many works of folklore are judged to be 'derivative' and therefore not original enough to be worthy of any protection.

The recourse to the court system in Australia shows the consequence of the inapplicability of copyright laws designed to protect values which correspond more to Western society than to Aboriginal culture. In Australia a partial recognition of Indigenous cultures and their works of folklore is derived from the application of

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<sup>572</sup> See in general D. Vaver 'Internationalizing Copyright Law: Implementing the WIPO Treaties' WP 01/99 OIPRC Electronic Journal of Intellectual Property Rights available at <http://www.oiprc.ox.ac.uk/EJWP0199.html>.

customary laws and land property. In fact, the limitations of the current law moved the magistrates to apply rules of customary law of Aboriginal peoples. After the High Court decision in *Mabo*, and in a very short time period, the protection of folklore assumed more than an exquisite academic interest. The process of recognition of that right in chief of the Aboriginal communities made by the court accelerated the response of the national legislator. In the international arena and in the intellectual property system, these court decisions paved the path for a small revolution: the engagement at a national level in providing workable solutions and examples to follow.

These examples lie outside copyright through the application of common law principles which bring in new added values and principles that overcome the obstacles of a copyright application. The Australian response has also invested in seeking a new form of communal moral rights to bypass the rigidity of the system in which economic and singles values are a tight binomial.

Indeed, the framework established in general at a national level shapes the basis for a higher and global protection. A future workable system depends upon the inter-linkage between national, supranational, and international rules. As will be demonstrated in the following chapter, the consensus over legally binding instruments of protection for works of folklore requires solid national political goodwill.

## Chapter 5

### Traditional Cultural Expressions: The Supranational Approach. The European Union and the African Union

#### 5.1. Introduction

This chapter examines two supranational organisations, the European Union and the African Union, in order to explore whether more continental entities could morally and politically provide an answer regarding the protection of TCEs. A supranational plan for the protection of folklore could result in a more tangible, positive outcome when compared to a national approach or to the more desirable, but difficult to achieve, international approach. A supranational approach follows a multi-level structure as indicated in the introductory section of the thesis. This starts from a national stage, moves to a continental/supranational stage and then, finally, to an international level. Hence, several solutions for the possible legal protection of folkloric works will be examined.

The analysis of the continental dimension is envisaged not as an exclusive route in which expressions of folklore should be protected, but as a *trait d'union* between the national and international protection of folklore. National, continental and international rules cannot work separately. Several sets of rules and disciplines should be intertwined. As previous research has shown, it is clear that a 'one-size-fits-all' solution does not work for folklore as it relates to a delicate political equilibrium.<sup>573</sup> The objective of this thesis is to demonstrate that it is impossible to follow the path of only one solution, particularly with regard to copyright laws. It is essential to explore the solution of a *sui generis* legislation, especially because it is unlikely that a sole model of protection will be adopted and implemented in a short time.<sup>574</sup>

In this chapter, the political and legal background of copyright protection as laid out at a supranational level will be examined. This analysis will consider how expressions of folklore fit into the overall picture and the effective protection of

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<sup>573</sup> Michael Blakeney's speech 'International developments in the protection of Traditional Cultural Expressions' at the conference held at AHRB Seminar, on 28<sup>th</sup> February 2005, available at <http://www.copyright.bbk.ac.uk>.

<sup>574</sup> See in general D. Posey & G. Dutfield *Beyond Intellectual Property: toward Traditional Resource Rights for Indigenous Peoples and Local Communities*, Ottawa, International Research Development Centre (1996).

binding or non-binding rules, either inside or outside an intellectual property environment. It will also question whether the above-mentioned supranational entities possess the instruments necessary to enforce some kind of protection or whether there remain technical obstacles to their implementation.

The phenomenon of multiculturalism as a component of different identities can be examined by employing Africa and Europe as case studies. The first issue is whether existing differences, as represented by Indigenous peoples pertaining to different national, cultural, religious, linguistic and ethnic backgrounds, can develop a sense of unity and peaceful harmonisation. Secondly, we must examine whether continental models provide a significant answer to the protection of artistic and cultural heritage of traditional communities.

A further question to be dealt with is whether the Africa Union (AU) and the European Union (EU) could be viewed as the best examples of supranational entities working on law harmonisation in the field of human rights, copyright and development. Could they offer 'best practices', whose values and approaches could be translated to overcome the lack of protection of TCEs? Would continentally-established entities inspire international intervention or should protection be laid down by national or supranational legislators, without considering further mechanisms of international protection? It will become apparent that none of these can be considered a solution.

This chapter builds upon existing analysis. Intellectual property rules (e.g. copyright) available at a continental/supranational level will be addressed jointly with other legislative and political mechanisms in which, either directly or indirectly, the protection of folklore could be orientated. Furthermore, this chapter will also demonstrate how the movement towards multilateralism is conceptualised not only at an international level but also at a continental/supranational level. It will suggest that this trend could help to solve those problems created by the enforcement of protection of expressions of folklore at a national level.

## **5.2. Multilateralism v. bilateralism**

### **5.2.1. The Protection of Works of Folklore in the Post-TRIPs Era**

The protection of Indigenous folklore should be considered within the framework of global trends now attached to intellectual property rights. The issue of cultural globalisation and its affect on TCEs, will be explored in depth in the chapter devoted to folklore and its international attributes. It is important to note that copyright, which embodies artistic creations, is currently influenced by international trade. There are, however, some new elements interfering with this relationship.

Copyright emerged from a strict territorial approach. An author's right to his/her creation was recognised in order to give incentives to internal economy through the 'production' of art and science.<sup>575</sup> Afterwards, copyright was attracted to the trade dimension, (see, for example, the TRIPs Agreement 1994). In between these two periods, a doctrine indicated a pure international intellectual property dimension<sup>576</sup>. Two leading examples are the Paris Convention (1883) and the Berne Convention (1886).<sup>577</sup>

Although some authors maintain that copyright and intellectual property are currently in the third stage of their historical evolution (that is: the interaction between intellectual property and trade), it can be argued that copyright and intellectual property rights in general are now celebrating a new phase, which could be called the post-TRIPs era.<sup>578</sup> The post-TRIPs era is characterised by the inclusion of elements outside intellectual property and trade circles.<sup>579</sup> In particular, the difficulty in implementing the TRIPs Agreements 1994 has necessarily stretched the debate over the impact of intellectual property in a trade dimension and in the global setting.<sup>580</sup> Issues such as sustainable development, democracy, benefit sharing and human rights have been brought into the intellectual property arena.<sup>581</sup> A push towards this new evolution was achieved thanks to the raised voices of developing countries and Indigenous communities<sup>582</sup> trying to protect their traditional

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<sup>575</sup> This was mainly the idea of copyright adopted in common law countries as the United Kingdom and the U.S..

<sup>576</sup> P. Drahos, 'The Universality of Intellectual Property Rights: Origins and Development', at para 1v page 2. Panel discussion on Intellectual Property and Human Rights Geneva, November 9, 1998 available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/drahos.pdf>

<sup>577</sup> Notwithstanding the 'national treatment' criteria, some reasons for the 'unfriendly' nature of copyright in the nineteenth century were sought. In the privileges granted to authors' books and in the transformation of that privilege by the strong protestant influence, protection was offered only to some works and authors. See M. Rose, *Authors and Owners: The Invention of Copyright*, Harvard (University Press 1994) p.15. See also L Bently and B Sherman, 'Great Britain and the Signing of the Berne Convention in 1886' [2001] 48 J. Copyright Soc'y USA p.311.

<sup>578</sup> *Ibid* at para 2 subpara iv).

<sup>579</sup> C.M. Correa *Intellectual Property Rights, the WTO and Developing Countries. The TRIPs Agreement and Policy Options* (Zed Books, Third World Network 2000) cfr. 48 K. Maskus and M Penubarti 'How Trade-Related Are Intellectual Property Rights?' [1997] vol. 39 *Journal of International Economics* pp.220-248.

<sup>580</sup> Institute for Economic Research, *Study on the Financial and Other Implications of the Implementation of the TRIPs Agreement for Developing Countries*, WIPO: Geneva, 1996.

<sup>581</sup> See chapter 8 of the Report Integrating Intellectual Property Rights and Development Policy Commission on Intellectual Property Rights London, September 2002. available at <http://www.iprcommission.org>.

<sup>582</sup> Most of them based in developing countries or poor regional area. See S. Palethorpe and S. Verhulst *Report on the International Protection of Expressions of Folklore under Intellectual Property Law*, University of Oxford Final Report, October 2000 Contract Number ETD/2000/B5-

knowledge and works of folklore.

As highlighted in the preceding chapters that reviewed the national approaches to folklore in the United States and Australia, the granting of legal protection to folklore represents not only a national problem, but also an international global one.<sup>583</sup> American and Australian legislation reviewed above demonstrated how intellectual property, in general, and copyright, more specifically, leaves Indigenous peoples' folkloric works with insufficient protection. This insufficient protection is manifested in, among other things, inadequate compensation, a loss of community rights, the misrepresentation and misappropriation of goods and practices, as well as the unauthorised public disclosure and the use of secret sacred knowledge, images and other sensitive information belonging to Indigenous communities.<sup>584</sup>

This thesis has demonstrated, in its discussion of the common law systems of Australia and U.S., that folklore protection cannot be achieved through national copyright laws only. While some aspects of national copyright can compensate for the lack of legal certainty (for example, works for hire, unpublished and anonymous works, works resulting from performances), these copyright means constitutes only a partial protection, as they cover only a few types of works. They leave many other issues uncovered, such as concerns remain for Indigenous communities' empowerment.<sup>585</sup> In this regard, provisions concerning works of hire cannot explain the communal nature of folkloric works: the community must designate its representative - the artist - and the person selected must be faithful to and respectful of the community's mandate, ideas and values. The artist is granted copyright protection for his/her work because this helps the progress of art and science.<sup>586</sup> The

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3001/E/04, available at [europa.eu.int/comm/internal\\_market/copyright/docs/studies/etd2000b53001e04\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/studies/etd2000b53001e04_en.pdf), University of Oxford. In the words of the authors 'In general, the most abundant source of folklore originates from traditional groups in both the developed world and the developing world, with particular importance of the latter.' Cfr S. Von Lewinski's approach 'The Protection of Folklore' [2002].11 *Cardozo J. Int'l & Comp. L.* 79.

<sup>583</sup> S. Palethorpe and S. Verhulst *Report On The International Protection Of Expressions Of Folklore Under Intellectual Property Law* University of Oxford, Final Report October 2000 available at [europa.eu.int/comm/internal\\_market/copyright/docs/studies/etd2000b53001e04\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/studies/etd2000b53001e04_en.pdf) Under paragraph *Folklore be1.3.2. Global and Dynamic Nature of Folklore* Folklore is universal to human culture and dynamic. It permeates all cultures and every nation.'

<sup>584</sup> P. Kuruk, 'Mutual Recognition Agreements and the Protection of Traditional Knowledge', *Commonwealth Trade Hot Topics Issue* 38 p.2. From the same author see also, 'Protecting Folklore under Modern Intellectual Property Regime: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States' [1999] 48 *American. Univ. L. Rev.* pp.770-75.

<sup>585</sup> The issue has been raised and discussed in particular under the chapters related to the national dimension of folklore.

<sup>586</sup> Section 1 clause 8 of the U.S. Constitution. The U.S. intellectual property law and policy reposes not so much on theoretical, albeit utilitarian, justifications but on pressures from industry. D.



civil law notion of copyright, with the added value of moral rights, right of attribution and integrity, does not help either. It is overly dependent upon copyright for certain aspects, such as duration.<sup>587</sup>

Do the EU and the AU add mechanisms and approaches that could contribute to a protection for folkloric works?, This chapter will consider answers to this question.<sup>588</sup>

The imbalance created by treating folklore through existing Western-based copyright rules has been further strengthened after the introduction of TRIPs Agreement.<sup>589</sup> This Agreement, strongly advocated by the economically developed world,<sup>590</sup> argues for the adoption of a strict intellectual property rights without first adapting them to the new exigencies of this technological era.<sup>591</sup> The result is that intellectual property rights can hardly cope with the new rights created by the immense spread of information and cultural globalisation. It is now time, then, to modernise them or to create *sui generis rights*<sup>592</sup> in a completely new rule setting.<sup>593</sup>

Today it is vital to explore other routes that might be available outside the copyright and intellectual property dimension. A step forward could be found through the introduction of 'common values' to modernise trade and development. These values could reinterpret and re-shape copyright laws in order to accommodate the *desiderata* of Indigenous communities' rights over their folkloric works.<sup>594</sup>

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Goldenberg 'The Long and Winding Road: A History of the Fight Over Industrial Design Protection in the United States' [1998] 45 J. Copyright Soc'y pp.21-23.

<sup>587</sup> See the Australian approach to the theme of moral rights as described in the previous chapter.

<sup>588</sup> D.E. Long, "Democratizing' Globalization: Practising the Policies of Cultural Inclusion', [2002] 10 Cardozo J. Int'l & Comp. L. p.238 the author sustains that is 'less likely' that a regional solution could be further translated in an international instrument, [either it could represent an obstacle to it].

<sup>589</sup> H. Katrak and R. Strange *The WTO and Developing Countries* (Palgrave 2004) in particular Part II. Although this book is mainly focused on biotechnology effects of IP in trade it helps to understand the impact of international trade on intellectual property. For an overall impact of trade on developing countries see also Part I 'Trade Liberalization and Developing Countries'. On the relation between IP and trade see also S.K. Sell 'Intellectual Property as a Trade issue. From the Paris Convention to GATT' [1989]. XIII *Legal Studies Forum* pp.407-442.

<sup>590</sup> In particular this was the U.S. attitude.

<sup>591</sup> W.R. Cornish *Intellectual Property, Omnipresent, Distracting, Irrelevant* (Oxford University Press 2004). At p.1 the author defines the omnipresent but distracting and irrelevant character of intellectual property in the new technological world. Of course, these adjectives uphold the dilemma and controversial nature of IPRs at the moment.

<sup>592</sup> See the European Database Directive, which introduces a *sui generis* legislation for database.

<sup>593</sup> L Bently and B Sherman *Intellectual Property Law* 2nd ed (Oxford University Press 2004) p.10.

<sup>594</sup> See P. Kuruk 'Mutual Recognition Agreements and the Protection of Traditional Knowledge', Commonwealth Trade Hot Topics Issue 38 at 11. Where the author sustains that '*MRSs can only be an alternative to the creation of a binding international instrument on traditional knowledge, as they*

Moreover, the difficulty in achieving global policy protection has been evidenced by numerous past attempts to build a legal international framework in various UN bodies (e.g. WIPO and UNESCO). These actions aimed to address international protection for works of folklore have promoted awareness on the topic of folklore rather than creating legally binding laws.

The Tunis Model Copyright Law adopted in 1976 and the Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions adopted in 1982, as well as the 1989 UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore are, however, significant attempts to address this by UN bodies. They raised the issue of the urgency for a common and valuable approach to the matter of folklore, especially with the need for 'international co-operation measures ...'<sup>595</sup> Furthermore, these non binding instruments, or 'soft laws', have also greatly contributed to creating a certain uniformity of approach. They also influenced the adoption of technical mechanisms on the national and continental levels and caused other mechanisms to be researched and pursued.<sup>596</sup> Overall, international soft laws helped to underline that folklore is intrinsically linked to the life of the Indigenous communities from whom it originates and that the community is the real author of the work. Some international instruments have also clarified that protection of folklore cannot be achieved without enforcing Indigenous peoples' 'self-determination'<sup>597</sup> and empowerment.

#### **5.2.1.1. Different Approaches to National, Bilateral and Continental Copyright: Shifting towards Continentalism? Some Philosophical and Economic Considerations**

It was outlined in the preceding section that a variety of factors could influence the debate on traditional cultural expressions from a national approach to a continental/supranational one. There is a need to strengthen the means of folkloric protection set forth by the national legislator. Much continental/supranational legislation has been inspired by international soft laws, like the one mentioned in the above paragraph, which provide basic values and principles to follow. Moreover, the

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*allow for the conclusion of flexible arrangements to facilitate the enforcement of TK rights in foreign countries, taking into account the specific interests and concerns of signatory parties'.*

<sup>595</sup> P. Kuruk 'Mutual Recognition Agreements and the Protection of Traditional Knowledge', Commonwealth Trade Hot Topics Issue 38 p.5.

<sup>596</sup> *Contra* D.E. Long "Democratizing' Globalization: Practising the policies of cultural inclusion' [2002] 10 *Cardozo J. Int'l & Comp. L.* p.238.

<sup>597</sup> 1948 Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, as well as the International Covenant on Civil and Political Rights guarantee fundamental rights relating to, among other dimensions cultural rights.

disparity in tackling the issue of folklore and different copyright devices<sup>598</sup> used at a national level has allowed continental regulation to extend its power over this topic.<sup>599</sup>

The main obstacle in a national approach regarding the protection of traditional cultural expressions is the impossibility of granting identical rights of authorship in another country. It is also difficult within a country to enforce the protection of folkloric works when there is no specific legislation in place.<sup>600</sup> Foreign folkloric works cannot be protected by applying nineteenth-century criterion of territoriality that grant copyright only to authors residing in the country.<sup>601</sup> Protection of folkloric works, which are often of a transnational nature, cannot be achieved through the adoption of territorial principles.<sup>602</sup>

The natural law theory established that the author of a creative work must be protected not on the basis of any existing legislation but because he/she has a natural relationship to his or her work.<sup>603</sup> Cultural and economic justifications were used to enforce this concept of national treatment. It was thought that an author who could not benefit from copyright protection abroad would have less incentive to create new works. Thus, the logic held that cultural diversity, either in the native country of the artist or abroad, would decline given that works could not gain access to markets outside of his/her own country without losing their copyright protection.<sup>604</sup> In reality, cultural rights were used to deflect the real reason for granting protection, which was purely economic.

National economic justification prevailed over ethical and cultural justifications. Copyright protection of foreign works was enforced only to avoid

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<sup>598</sup> P. Kuruk 'Mutual Recognition Agreements and the Protection of Traditional Knowledge', Commonwealth Trade Hot Topics Issue.38 p.3.

<sup>599</sup> The economic reasons underlying the protection of folklore have already been explained in the previous chapters.

<sup>600</sup> P. Kuruk 'Mutual Recognition Agreements and the Protection of Traditional Knowledge', Commonwealth Trade Hot Topics Issue 38 p.4-5.

<sup>601</sup> W. Patry 'Choice of Law and International Copyright' [Summer 2000] Am.J. Comp.L. p.392.

<sup>602</sup> S. Von Lewinski, 'Intellectual Property, Nationality, and Non Discrimination' at para 3 (a), available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf).

<sup>603</sup> S. Von Lewinski 'Intellectual Property, Nationality, and Non Discrimination' at para 3 (aa), *Philosophical and Ethical Justifications*, available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf).

<sup>604</sup> S. Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (Oxford University Press 1987) note 1.22 reported in Silke Von Lewinski, 'Intellectual Property, Nationality, and Non Discrimination' at para 3 (bb), *Cultural Justifications*, available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf).

international piracy.<sup>605</sup> State-centred behaviour is the force behind international copyright conventions and bilateral agreements. In fact, within the Berne Convention national treatment was finally recognised as was the economic power of some countries. This pushed many European states to agree upon bilateral agreements applying national treatment in exchange for reciprocity.<sup>606</sup>

Kuruk argues that nationality criteria could be improved and become applicable to the protection of new rights, such as traditional knowledge and folklore. The application of the 'reciprocity principle', which means that at least two countries agree in recognising and protecting Indigenous peoples folklore, could represent a valid instrument to achieve this protection. Of course, the success of the reciprocity clause depends upon the efforts made by both countries to protect cultural expressions of Indigenous peoples.<sup>607</sup>

The reciprocity principle was sanctioned by the Berne Convention (Article 5) which states, 'Authors shall enjoy, in respect of works for which they are protected under this Convention, in or may hereafter grant to their nationals, as well as the rights specially granted by this Convention,' and that in countries of the Union other than the country of origin, the rights over which their respective laws do now provide protection in the country governed by domestic law. However, it is also established that 'when the author is a national of the country of origin of the work for which he is protected under this Convention, he shall enjoy in that country the same rights as national authors'.<sup>608</sup>

Nevertheless, in practice, its implementation is barely applicable to the issue of folklore because it relies on a national and bilateral approach. Bilateral agreements, improved through the requisite of mutual recognition, could grant homogeneous protection for national and extra-national works on the basis of an agreement

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<sup>605</sup> S. Von Lewinski, 'Intellectual Property, Nationality, and Non Discrimination' at para 3 (cc), *Philosophical and Ethical Justifications*, available at [www.wipo.org/tk/en/hr/panel/discussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/panel/discussion/papers/pdf/lewinski.pdf).

<sup>606</sup> *Ibid.* The author reports the case of the economic power exercised by France on Belgium during the 19<sup>th</sup> century. See para 3 (cc) *Economic reasons and( b) national Treatment versus Material Reciprocity*.

<sup>607</sup> P. Kuruk 'Mutual Recognition Agreements and the Protection of Traditional Knowledge', Commonwealth Trade Hot Topics Issue 38, where the author sustains that the subject matter should be the same.

<sup>608</sup> This article echoes the Paris Convention 8 and the Berne Convention. 9 For example, Article 2 of the Paris Convention provides: 'nationals of any country of the Union shall, as regards the protection of industrial property, enjoy in all the other countries of the Union the advantages that their respective laws now grant, or may hereafter grant, to nationals.'

reached between two countries, even though one of the Signatory States does not have yet any laws to protect folklore.<sup>609</sup>

Enforcing the protection of folklore through bilateral agreements will mean adopting national treatment criteria.<sup>610</sup> This might be of help in protecting folklore locally, through the policy in place between two countries, who are signatories to the same agreement. Unfortunately, it will leave undressed the protection of folklore world-wide.<sup>611</sup> Its negative effects will lead to international exploitation of folklore. The same works of folklore, protected by signatory nations, will be open to exploitation in those other countries which are not signatories of the protected agreements.<sup>612</sup>

#### **5.2.1.2. The Economic Imbalance of Bilateral Agreements: From Reciprocity to National Treatment and Back to Reciprocity Again**

The application of the nationality principle was corrected by the so-called 'Most Favoured Nation Principle', introduced by the TRIPs Agreement. This device allows the application of the most favourable means of protection in all agreements signed by WTO members.<sup>613</sup> Even with the mutual recognition adjustment, doubts still remain regarding the application of bilateral trade agreements especially cases where an economic imbalance exists among signatory countries.<sup>614</sup>

Therefore, in situations of economic disparity it is very difficult to set 'most favourable national treatment and mutual recognition' rules if more precise universal criteria are not dictated. What can be considered good for one country may not be the same for another. This all depends upon the subject matter of protection selected

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<sup>609</sup> P. Kuruk 'Mutual Recognition Agreements and the Protection of Traditional Knowledge' Commonwealth Trade Hot Topics Issue 38 p.9.

<sup>610</sup> 'A nationalist approach in a global area is not longer admissible' in P. Goldstein *Copyright's Highway* (Stanford University Press 2003) pp.149-150.

<sup>611</sup> *Intellectual Property Rights and Development*, Commission on Intellectual Property Rights, The full text of the report and the executive summary can be downloaded from the Commission on Intellectual Property Rights website: <http://www.iprcommission.org>. At point 8 is reported that 'A nationalist approach in a global area is not longer admissible'.

<sup>612</sup> P. Kuruk 'Mutual Recognition Agreements and the Protection of Traditional Knowledge' Commonwealth Trade Hot Topics Issue 38 p.9 'U.S. has been reluctant to provide protection of traditional knowledge for fear it could be used by Indigenous peoples as the basis of claims for greater autonomy'.

<sup>613</sup> See Chapter 'IP in Bilateral and Regional Agreements' in *Integrating Intellectual Property Rights and Development Policy*, Commission on Intellectual Property Rights London September 2002.

<sup>614</sup> See the influence and pressure of U.S. in forcing many developed countries, where main resources of folklore and TK are based, to sign TRIPs plus. The issue is particular relevant in biotechnology, but the issue of folklore is touched upon. See L. Bently and B.Sherman, *Intellectual Property Law* (Oxford University Press 2004) at note 55, in which the authors refer of the 17 of the U.S.-Chile Agreement 'requiring implementation in Chile of standards well above those in TRIPs'.

in the agreement. If some countries do not provide any recognition for expressions of folklore, how can they endorse any possible protection?

Moreover, under the pressure of strong economies, some developing countries may adhere to values and principles that could affect their cultural heritage. Developed countries with greater economic power are able to pressure developing countries to adhere to a partial protection of folklore or to consent to the exploitation of folkloric works in exchange for remuneration without consulting Indigenous communities during the agreement negotiations.<sup>615</sup> This may be identified as the core problem that Indigenous communities face in relation to the protection of their cultural expressions: they are often not informed or represented during the negotiations and finalisation of bilateral agreement, which put their own rights at stake.

It is also disputable whether expressions of folklore should be treated as a mere 'trade object'.<sup>616</sup> If it is recognised that folklore characteristics are dynamic and that they cover beliefs and traditions, then the formula 'trade object' is hardly applicable. Therefore, while trade rules may be able to grant protection to some material works of folklore, they cannot be neither considered the only mechanisms of protection nor the most appropriate.

It could be argued that Indigenous communities' works of folklore could be better represented at a regional level rather than through bilateral agreements.<sup>617</sup> This model should take into consideration Indigenous laws and customs, which should be included in any agreement related to their traditional cultural expressions.<sup>618</sup> Participation and benefit sharing of Indigenous peoples' communities should be mainstreamed, and take into account the need of traditional IPRs.

Bilateralism is a system better suited to a past where agreements among states were signed to overcome the application of territorial principles to foreign works. In the current era of globalisation<sup>619</sup> and its associated effects on intellectual property,

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<sup>615</sup> M. Blakeney, 'The Growth of IP Capacity in Developing Countries', at 2 paper available through Fordham IP Conference, 2003, where the author affirms that 'countries are widely divergent both in development and in the institutional capacity'.

<sup>616</sup> P. Kuruk, 'Mutual Recognition Agreements and the Protection of Traditional Knowledge', Commonwealth Trade Hot Topics Issue.38 p.10.

<sup>617</sup> *Ibid.* The author sustains that 'the scope of recognised rights could be negotiated using the comprehensive regional model laws' *Contra* D. E. Long, "Democratizing' Globalization: Practising the policies of cultural inclusion' [2002] 10 Cardozo J. Int'l & Comp. L. p.238.

<sup>618</sup> See in general P. Kuruk 'African customary law and the protection of folklore' Copyright Bulletin Vol. XXXVI, No. 2, 2002 p.4. Cfr. S.Von Lewinski, 'Intellectual Property, Nationality and Non Discrimination', available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf).

<sup>619</sup> M. Waters, *Globalisation* (Routledge 1995).

international legal coverage should be sought to protect Indigenous peoples' folkloric expressions.<sup>620</sup> In the following paragraphs, two examples of supranational mechanisms will be assessed to determine whether any existing protection for works of folklore is already in place, and what mechanisms are employed to achieve it.

### **5.3. Europe - United in Cultural Diversity and Common Values: How to Fight Nationalism in Favour of Integration?**

The following section of this chapter assesses the European Union's political approach to cultural diversity and consequently to the protection, safeguard and promotion of TCEs and changes undertaken in terms of EU political behaviour over the years. Particular attention is given to the analysis of the EU Constitutional Treaty and EU development policy and those principles which are emerging from this analysis. The chapter will also explore the political implications of the new European Constitution, often termed the EU Constitutional Treaty, in order to examine the definition of common values in the context of a supranational body made up of countries with varying political, economic and human rights traditions.

The EU Constitutional Treaty was signed in Rome on 29<sup>th</sup> October 2004 by twenty four European Member States. It was designed to replace the Treaty establishing the European Community and the Treaty on the European Union.<sup>621</sup> The Preface of the EU Constitutional Treaty is clear on the impact that its provisions will have on national laws. As some authors affirmed 'more than a constitution [it] is another treaty';<sup>622</sup> a treaty that rewrites, although not in 'revolutionary' terms<sup>623</sup>, the asset of the European Union and its relationship with Member States.<sup>624</sup> It is possible that the tight 'treaty nature' of the EU Constitutional Treaty can induce

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<sup>620</sup> P. Drahos, 'The Universality of Intellectual Property Rights: Origins and Development', at para 2, subparagraphs i) and ii). Panel discussion on Intellectual Property and Human Rights Geneva, November 9, 1998 available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/drahos.pdf>.

<sup>621</sup> As stated under Part IV *General And Final Provisions* under Article IV-437 C 310/186 EN Official Journal of the European Union 16.12.2004.

<sup>622</sup> A. Albi and P. Van Elsuwege, 'The EU Constitution, National Constitutions and Sovereignty: An Assessment of a European Constitutional Order' [2004] E.L. Rev. 29 (6) p.748.

<sup>623</sup> 'While the Draft Constitution taken alone does not create revolutionary changes, it clearly goes beyond ordinary international treaties when taken together with previous steps of integration, including the treaties of Maastricht, Amsterdam and Nice' in A. Albi and P. Van Elsuwege, 'The EU Constitution, National Constitutions and Sovereignty: An Assessment of a European Constitutional Order' [2004] E.L. Rev. 29 (6) p.750.

<sup>624</sup> *Ibid.*

some countries to go back to nationalistic approaches,<sup>625</sup> but the process of unification cannot be stopped. Thus, the newly born EU Constitutional Treaty is the expression of this wish and belief.<sup>626</sup>

Moreover, the motto: 'united in the diversity,<sup>627</sup>' adopted by the European Constitutional Treaty should sweep away many nationalistic fears. It is a principle that underscores human rights and democracy<sup>628</sup> and which animates the spirit of the Charter.<sup>629</sup> The phraseology adopted by the EU constitutional legislator has more than symbolic meaning. This motto encompasses not only several national identities and cultural presences at a European level, but also makes room for other identities and traditions - for example, the Sami people in Sweden and Finland.

The EU Constitutional Treaty establishes respect, protection and promotion of cultural diversity as one of the first pillars of the EU *acquis communautaire*.<sup>630</sup> In principle, these concepts were introduced to grant protection to the many cultures and identities represented within the European Union. It is a model that is echoed in EU development policy and, therefore, is to be applicable to EU foreign policy. The importance of cultural diversity, which is the basis for sustainable development, overcomes that 'feeling of loss of local control over their destiny and a vague feeling

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<sup>625</sup> Notice the diplomatic language used by the British government in presenting the European Constitutional Treaty to the British citizens before the draft was signed: 'While not accepting every proposal in the draft Treaty, this process of reform and renewal is an opportunity, not a threat. The draft Constitutional Treaty does not in our view involve a change in the fundamental relationship between the EU and its Member States. But it does provide for modernisation, which for the Union is a necessity' in *Draft Constitution for the European Union* Issued Her, Majesty's Government Series: Command Papers Month: July Paper/Bill no.: CM 5872 ISBN: 0-10-158722-8 Publisher: The Stationery Office Date Published: 2003 in the words of Jack Straw, Secretary of State for Foreign and Commonwealth Affairs p.5.

<sup>626</sup> Observe the positive *pro* Union approach adopted by the Presidency conclusion in Laeken: 'The European Union is a success story. For over half a century now, Europe has been at peace. ....Fifty years on, however, the Union stands at a crossroads, a defining moment in its existence. The unification of Europe is near' in Annexes to Presidency Conclusions European Council Meeting in Laeken 14 and 15 December 2001 *Laeken Declaration On The Future Of The European Union*, at I. *Europe at a crossroads* reported in *Draft Constitution for the European Union* Issued by Her, Majesty's Government Series: Command Papers, July ISBN: 0-10-158722-8 Publisher: The Stationery Office, 2003 p.6.

<sup>627</sup> C 310/13, 16.12.2004 EN Official Journal of the European Union.

<sup>628</sup> It is the principle '*ut unum sint*' of the founding fathers of the Union. See *De Gasperi* EPP-ED Group Available at <http://www.epp-ed.org/Activities/docs/cd-rom/degasperi-en.pdf> p.4.

<sup>629</sup> First it appears in the Preamble of the Charter and then it is re-echoed in many other provisions. See C 310/424. The meaning of these combined words is made clear by the Draft European Decision of The European Council on The Exercise of The Presidency, which is set at the end of the Constitutional provisions EN Official Journal of the European Union 16.12.2004.

<sup>630</sup> See Preamble of the EU Constitutional Treaty.



of potential loss of identity within an even more centralised policy...'<sup>631</sup> In a way, it tries to respond to the critics of EU and those citizens who are opposed to policies of centralisation.<sup>632</sup> It should be emphasised that 'united in cultural diversity' does not mean 'cultural unification'.<sup>633</sup> On the contrary, the EU constitutional statement was introduced to avoid a debate on which national cultures or cultural values should be considered most relevant for the European citizen,<sup>634</sup> or which language should be dominant at an EU level.<sup>635</sup>

The binomial 'culture and diversity' is expressed explicitly by the EU Constitutional Treaty provisions in which 'culture reflects the common meanings of a society'<sup>636</sup> and 'diversity' is promoted to embrace all different national cultures and identities into a supra-national identity. Cultural diversity is addressed to protect each European citizen, especially those whose cultures belong to minority groups or traditional communities present within the European context.<sup>637</sup> Understanding, protection and promotion of other rights can not take place without incorporating the concept of cultural diversity within development. The EU Constitutional Treaty affirms that a rich contribution to the development of the Union can be achieved only through acknowledgment of the diverse cultures that are already present within the Union and which will follow shortly.<sup>638</sup>

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<sup>631</sup> J. Richardson 'European Union Law Essay: The European Union in the World-- A Community of Values' [November 2002] 26 Fordham Int'l L.J. pp.12-3.

<sup>632</sup> *Ibid.*

<sup>633</sup> As stated in the Preamble the Signatory States are 'convinced that, while remaining proud of their own national identities and history, the peoples of Europe are determined to transcend their former divisions and, united ever more closely, to forge a common destiny'.

<sup>634</sup> *Contra* J. Richardson 'European Union Law Essay: The European Union in the World-- A Community of Values' [November 2002] 6 Fordham Int'l L.J. p.24 the author singles out that 'the secret dream' since the beginning of the European integration process was to bypass national identities through the creation of a European identity.

<sup>635</sup> See C 310/463, regarding the Declaration on Article IV-448(2) which establishing translation of the Charter in function of '...fulfilling the objective of respecting the Union's rich cultural and linguistic diversity as set forth in the fourth subparagraph of Article I-3(3) of that Treaty. 16.12.2004 EN Official Journal of the European Union.

<sup>636</sup> C. Steiner, Esq, 'Intellectual Property and the Right to Culture', under para. 1 available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/steiner.pdf>.

<sup>637</sup> See Part II, The Charter of Fundamental Rights of the Union It places the individual at the heart of its activities, 16.12.2004 EN Official Journal of the European Union.C 310/424, EN Official Journal of the European Union 16.12.2004.

<sup>638</sup> J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 Fordham Int'l L.J. p.24. 'It has proved difficult to devise clear criteria by which to judge which tasks should be assigned to the EU level and which should remain at national or sub-national level and the Convention is likely to struggle mightily with this task'.

### 5.3.1. A New 'Old' Europe

The EU Constitutional Treaty is examined in this chapter with the purpose of emphasising recent EU principles and values. This is in spite of the fact that the Treaty was not ratified by either France<sup>639</sup> or the Netherlands<sup>640</sup> and, therefore, the ultimate impact of this version of the Treaty is questionable. However, this rejection does not necessarily mean that the Treaty is 'dead'.<sup>641</sup> On the contrary, the aftermath of the recent EU Council Summit<sup>642</sup> demonstrates that the Constitutional Treaty still has great symbolic value, since it stresses, perhaps for the first time in EU history, the fundamental importance of cultural diversity and multiculturalism.

While it may not be immediately apparent, the acceptance or rejection of a proposed Treaty is of significant importance for the protection of folklore. There are considerable political implications to the controversial approach that the EU has adopted towards Indigenous peoples, in particular with regard to the protection of minority rights.

The recent negative results in the Referendum for the approval of the EU Constitutional Treaty in two European countries - France and The Netherlands - has underlined the problem of accountability in the continental/supranational model of governance.<sup>643</sup> It illustrates the difficulty in sharing authority in areas regarded as of crucial importance to the state - for example, defence, military, and immigration policy - and that enrich national economies - for example, intellectual property.<sup>644</sup> Mr. Vanhanen, Finnish President of the EU Council, recently<sup>645</sup> affirmed that the EU

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<sup>639</sup> France votes 'no' to the European Union Constitution on June 1, 2005. Only nine EU members had ratified the Constitution by either parliamentary or popular votes: Lithuania, Hungary, Slovenia, Italy, Greece, Austria, Slovakia, Spain, and Germany.

<sup>640</sup> The Dutch rejected the EU Constitutional Treaty on May 30, 2005.

<sup>641</sup> See the BBC interview of M. Warner, where she questions if this draft can be called a constitution. 'Only countries have constitutions. Renegotiate parts of this, carve out parts as treaties, just be less ambitious.' The answer of John Bruton U.S. Ambassador to the EU is that this is not and things can not renegotiated. The process of unification has started and it cannot be stopped by nationalistic pressure groups. Reported in BBC news last updated: Tuesday, 30 May 2006, 12:06 GMT 13:06 UK see also Barroso 'Speaking Points 2006 December European Council final press conference, 15 December 2006' available at [http://ec.europa.eu/commission\\_barroso/president/pdf/speaking\\_points\\_20061215\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/speaking_points_20061215_en.pdf).

<sup>642</sup> EU Summit, December 2006.

<sup>643</sup> C. Harlow *Accountability in the European Union* (Sweet & Maxwell 2004). See also R.A.W. Rhodes *Understanding Governance: Policy Networks, Governance, Reflexivity, and Accountability* (Open University Press 1997).

<sup>644</sup> P. Craig 'Theory, 'Pure Theory' and the Values in Public Law' [2005] P.L. p.442, 447. See also J. Shaw 'Europe Constitutional Future' [2005] P.L. p.132.

<sup>645</sup> Direct Speech Press conference of the EU Summit, held in Brussels on 14, December 2006.

is still not moving ahead in the integration process and called for for more transparency and communication among member states.

The origins of the failure of the approval of the EU Constitutional Treaty should be investigated. One reason is the fears of EU citizens about an expanded European structure and the use of effective, simplified, and consolidated instruments to cope with this enlargement. There is a need for certainty, but also flexibility, which EU citizens (or, at least, the Dutch and the French)<sup>646</sup> did not recognise in existing EU institutions and mechanisms. Former British Prime Minister Tony Blair stated: 'I accept that we will need to return to the issues around the European constitution. A European Union of 25 cannot function properly with today's rules of governance.'<sup>647</sup>

The lack of faith in the EU institutions, combined with the globalisation of cultures and peoples, have provided considerable uncertainty to EU citizens. As has been perceptively observed by Burton: 'People were not against the principles laid down in the Constitutional Treaty but against the pressure of globalisation'.<sup>648</sup> The same *monitus* of alert is shared by UNESCO: 'Globalization has brought a radical change not only in the economic and technological order, but also in the mentalities and the ways of conceiving the world.'<sup>649</sup>

The citizens of 'old' Europe perceived the process of EU enlargement as one that could lead to a 'clash of cultures' among even more nationalities. The fear of losing cultural identity to homogeneity was one problem that pushed the French and the Dutch voters against the Treaty. The failure to ratify the Constitutional Treaty shows that Europe has not effectively kept citizens informed about or convinced them of the values underlying the EU Constitutional Treaty. EU authorities should have better advocated for the moral and political benefits attached to the Constitutional Treaty.

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<sup>646</sup> The European constitution did not succeed to pass since it was rejected by France and the Netherlands in referendums in May and June 2005. However, its enforcement is still pending. French European Affairs Minister Catherine Colonna said in May 2006: 'While the future of the treaty remains uncertain... the direction is clear that we keep the process open, that nothing should be done to harm the treaty, either its future or its content.'

<sup>647</sup> Mr Blair said on 2nd February that one of the problems is that the constitution should have been ratified by all 25 members to take effect.

<sup>648</sup> J. Bruton U.S. Ambassador to the EU interviewed by Margaret Warner. BBC news last updated: Tuesday, 30 may 2006, 12:06 gmt 13:06 uk

<sup>649</sup> See in general K. Stenou (ed) 'Unesco and the issue of cultural diversity Review and strategy, 1946-2004' study published by UNESCO in 2000 (revised version 2004) available at [http://portal.unesco.org/culture/es/file\\_download.php/47cc07ba56443cb277023a75b35b5786DivCult-BilanStrategies-ENG-sept04.pdf](http://portal.unesco.org/culture/es/file_download.php/47cc07ba56443cb277023a75b35b5786DivCult-BilanStrategies-ENG-sept04.pdf).

A survey undertaken by the Eurobarometer during 2004 stated that 'only one fourth of citizens in the enlarged European Union consider themselves well informed on questions relating to the draft of the future European Constitution'.<sup>650</sup> Results also stated that: 'European Union citizens consider that they have little information on the European Constitution'.<sup>651</sup>

Other significant concerns with the Constitutional Treaty regard the voting procedures at the EU level. Few vetoes can push forward a binding decision that the members of the Union are obliged to follow. This raises concerns and causes reflection over the instruments used to achieve consensus within the EU. On the issues of advocacy and lack of information, it is clear that EU citizens do not feel and are, in fact, not involved enough. When involvement does take place (i.e. referendum in France and the Netherlands), the process of drafting the Treaty was already completed with little information for the public. The result was that the populations that rejected the Constitutional Treaty felt excluded from any legislative initiatives carried out by the EU and raised questions about its democratic approach and transparency.

The negative response by France and the Netherlands has, then, much to do with this lack of comprehensive information. The desire to accede to the Union by Turkey, the only Muslim pre-accession country, and some of the countries of south-eastern Europe might have produced some feelings of insecurity in the old Europe, especially in relation to the alleged lack of respect for human rights and democratic principles. While enlargement is very much proposed as, to cite European Commission President Barroso, something: '...good for the new member states...let's not forget it is also good for current member states. Enlargement makes Europe stronger on the world stage. Enlargement is our most important tool to deliver peace and prosperity across our continent'.<sup>652</sup> It is, however, true that this positive side of integration is not strongly advocated. European citizens need to be informed why integration is positive for the EU member states and what the real benefits may be.

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<sup>650</sup> 'The Future European Constitution' FLASH EUROBAROMETER 159 Survey: January 2004 February 2004 Analytical Report: February 2004 Conducted by EOS Gallup Europe upon the request of the European Commission (Secretariat General) Survey organised and managed by and managed by Directorate-General 'Press and Communication' (Opinion Polls, Press Reviews, Europe Direct).

<sup>651</sup> 'The Future European Constitution (Wave 2)' FLASH EUROBAROMETER 159/2 Survey: June - July 2004 Analytical Report: July 2004.

<sup>652</sup> President Barroso 'Speaking Points' European Council Final Press Conference, 15 December 2006' available at: [http://ec.europa.eu/commission\\_barroso/president/pdf/speaking\\_points\\_20061215\\_en.pdf](http://ec.europa.eu/commission_barroso/president/pdf/speaking_points_20061215_en.pdf)

Furthermore, public information regarding new countries entering the EU is often not positive with the media often contributing to the creation of a 'climate of hostility'. Similarly, EU institutions do not always put enough effort into spreading a positive image of potential new member states. There is a need to highlight the contribution to be made towards multiculturalism and diversity by pre-accession countries.<sup>653</sup> Joining the EU should not only be a matter of economic integration, but also of shared and agreed values.

It is necessary to have a 'time for reflection', to use the words of Tony Blair<sup>654</sup> – a pause to reflect upon the direction the EU is willing to undertake in terms of political and structural framework the EU. On this Blair has reflected:

'I think that underneath all this, there is a more profound question, which is about the future of Europe. And in particular, the future of the European economy and how it deals with the modern pressures of globalization and technological change and how we ensure that the European economy is strong and is prosperous in the face of those challenges'.<sup>655</sup>

The following paragraphs will underline the current political climate and its moves toward the insertion of new values into the old EU. The EU Constitutional Treaty ensures that the basis for protection exists, but it is the practical application of these values which is lacking at times. A combined reading of the EU Constitutional Treaty and the recent EU development policy, as well as a more integrated and proactive and pro-positive approach in the ICG sessions held at WIPO on the theme of folklore, show that the old Europe is ready to walk on the path of social responsibility and sustainable development. Unfortunately, the pressure for harmonisation is sometimes dictated to comply by the obligations imposed on the market by international standard setters (i.e. United States through TRIPs).

In spite of the criticisms outlined above, as a supranational entity, the EU is unique in its ability to embrace new values and demands of recognition from different cultures, e.g. cultural expressions coming from developing countries and Indigenous peoples. The future of the EU relies on how this process of harmonisation of rights and cultures will be handled. The EU will survive only if cultures significantly different to those of the 'founding fathers' are integrated and

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<sup>653</sup> See in general *UNESCO Universal Declaration of Cultural Diversity* was adopted by the 31st Session of UNESCO General Conference held in Paris on 2nd November 2001. (Text available at <http://www.unesco.org>).

<sup>654</sup> 'Blair spells out Europe concerns' Last Updated: Tuesday, 7 February 2006 12:31 [http://newsvote.bbc.co.uk/mpapps/pagetools/email/news.bbc.co.uk/1/hi/uk\\_politics/4688730.stm](http://newsvote.bbc.co.uk/mpapps/pagetools/email/news.bbc.co.uk/1/hi/uk_politics/4688730.stm).

<sup>655</sup> *Ibid.*

respected. This platform of respect and mutual recognition will confirm to the role that Europe, as a supranational entity, is willing to play in this 'changed world'.<sup>656</sup>

### 5.3.1.1. Shared Values for Cultural Diversity

The concept of 'united in the diversity' encompasses a series of other values that are recognised as 'universal, common values', such as human dignity, freedom, democracy, peace, justice, rule of law, equality, solidarity and sustainable development.<sup>657</sup> The pages of the EU Constitutional Treaty recall these principles repeatedly. They are identified both as the Union's values and objectives.<sup>658</sup> In particular, sustainable development, peace and security are strongly stressed. Moreover, they are essential to harmonise several cultural representations within the EU. It should be again underlined that common values and harmonisation do not mean uniformity and standardisation. On the contrary, they indicate that it is possible to create a 'peaceful future',<sup>659</sup> notwithstanding differences among peoples.

In addition, the protection of cultural diversity is defined broadly in the EU. Title III Equality of the EU Constitutional Treaty includes the protection of religion and linguistic backgrounds.<sup>660</sup> In particular, Section III is dedicated to enabling, promoting and developing cultures and cultural diversity. Different cultural backgrounds are connected to the common history of Europe.<sup>661</sup> It is due to this historical path and 'common values' that the European Union was created.<sup>662</sup> As

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<sup>656</sup> These words were included in the Annexes to Presidency Conclusions European Council Meeting in Laeken 14 and 15 December 2001 Laeken Declaration On The Future Of The European Union, at I. *Europe at a crossroads* reported in *Draft Constitution for the European Union* Issued by Her Majesty's Government Series: Command Papers, ISBN: 0-10-158722-8 Publisher: The Stationery Office, July 2003 p.6.

<sup>657</sup> 16.12.2004 EN Official Journal of the European Union C 310/3 and C 310/424 EN Official Journal of the European Union 16.12.2004.

<sup>658</sup> Part I, Title I, Article 1-2 and 1-3, C 310/11, 16.12.2004 EN Official Journal of the European Union.

<sup>659</sup> Draft European Decision Of The European Council On The Exercise Of The Presidency C 310/424 EN Official Journal of the European Union 16.12.2004 and 16.12.2004 EN Official Journal of the European Union C 310/41.

<sup>660</sup> TITLE III, art. II, 82. This article has been based on article 6 of the treaty on European Union and on Article 151 (1) and (4) of the EC Treaty.

<sup>661</sup> Section 3 *Culture* Article III-280 Para 1. C 310/125 and 2 (a).

<sup>662</sup> See Alcide De Gasperi's speech to the Consultative Assembly of the Council of Europe, Strasbourg, 10 December 1951. 'What path must we take in order to maintain that which is noble and human in national strengths, whilst coordinating them in the search for a supranational civilisation that can balance them, represent them and make them part of an unstoppable tide of progress? We can achieve this only by imbuing national strengths with the common ideals of our history and by allowing them to operate in the sphere of the variety of magnificent experience of common European civilisation. We can achieve this only by creating a meeting point where these experiences can come together so that we may take the best of them and thus create new ways of living together, inspired by

such, Section III promotes the 'conservation and safeguarding of cultural heritage of European significance'.

Globalisation also influences the way in which cultural diversity is perceived. Cultural diversity is no longer a matter for nationalism. It is becoming a global issue through technological information, which involves the trade dimension.<sup>663</sup>

The provisions regarding the promotion of cultural diversity are set forth under Art. 280-III, para 5 (a) of the EU Constitutional Treaty. It is significant because it mentions the need for a framework of laws to establish uniform cultural categories within the Union in total respect of national laws.<sup>664</sup> The EU external relations principles underlining cultural diversity were drafted consequently.<sup>665</sup> Moreover, it has been argued that mainstreaming cultural diversity outside the EU boundaries will contribute to the improvement of internal relationships among Member States besides ameliorating relationships with countries outside the Union.<sup>666</sup>

In highlighting cultural diversity also outside the boundaries of the Union, the EU Constitutional Treaty makes explicit reference to the policies of freedom and non-discrimination, sustainable development and mutual respect among people, since the existence of these values depends upon 'fair trade' and the 'eradication of poverty'.<sup>667</sup> In particular, the introduction of a section in the EU Constitutional Treaty dedicated to enhancing and preserving cultural diversity outside the European Union shows the transnational and global dimension of cultures.

The words of the Constitutional Treaty leave little room for misinterpretation. The concept is clear - the protection of cultural diversity world-wide is necessary for sustainable development, and the future of the Union and its members. This can only be achieved through fair trade and the alleviation of poverty. In an era of globalised information, this is not an easy task. Minority groups and communities, who are at risk of losing their immense cultural heritage due to illegal exploitation of their

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the aim of greater liberty and greater social justice. It is on the basis of this association of national sovereignty, founded on democratic constitutional institutions, that these new ways can flourish' in Hans-Gert Poettering 'Alcide De Gasperi: The lessons of a founding father for Europe in the 21st century' at 4. EPP-ED Group Available at <http://www.epp-ed.org/Activities/docs/cd-rom/degasperien.pdf>.

<sup>663</sup> P. Drahos 'The Universality of Intellectual Property Rights: origins and development', Panel discussion on Intellectual Property and Human Rights Geneva, November 9, 1998 available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/drahos.pdf>.

<sup>664</sup> *Ibid*.

<sup>665</sup> J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 Fordham Int'l L.J. p.34.

<sup>666</sup> *Ibid* at 34-35.

<sup>667</sup> C 310/12 EN Official Journal of the European Union 16.12.2004.

works and resources, should be protected. Traditional communities own a rich cultural patrimony, the preservation of which depends upon worldwide sustainable development.<sup>668</sup>

### 5.3.1.2. Protection of Religion and Beliefs

One of the main difficulties in protecting folklore is the focus that Western countries have placed on belonging to a particular religious faith and a particular race. Religions have often been manipulated to foster nationalistic behaviour and discrimination against minority cultures and beliefs. Discrimination on religious and ethnic grounds is all too often the basis for conflict and war and has been a relentless characteristic of European history. A climate of intolerance cannot be present in today's Europe. The EU Constitutional Treaty cannot be used as a pretext to promote one particular culture. It is for this reason that those in favour of the insertion of the phrase 'Christian values' within the Constitutional Treaty were defeated.

A relevant part of Indigenous cultural heritage is forged with spiritual and sacred meaning. Too often, this peculiar aspect is ignored or marginalised while addressing Indigenous peoples' issues in relation to folklore. Under the EU Constitutional Treaty, there are provisions that are innovative in terms of the meaning given to religion and sacred knowledge. The Constitutional Charter seems to stress the importance of a secular supranational faith, which protects Western religions as well as other religious beliefs.

Article I-52 of the EU Constitutional Treaty protects religious organisation and non-confessional churches. Title I, article 10 (1) recognises the freedom of thought, conscience and religion in general. Under paragraph 2, particularly, religion or belief, practise and observance are also covered.<sup>669</sup>

This article is linked with the preceding one regarding human dignity and which is the basis for all fundamental rights. It is also linked to the following article<sup>670</sup> which is concerned with freedom of expression and information.

The necessity of encompassing protection for new religious and beliefs, which have entered the EU as a result of migration, has also generated the provisions laid down under Part III of the Constitutional Treaty (i.e. Equality rights), particularly those regarding non discrimination<sup>671</sup> in which protection of beliefs is linked to the

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<sup>668</sup> See UNDP *Human Development Report* 2004 pp.36, 44.

<sup>669</sup> See chapter one 'Definitions'.

<sup>670</sup> C 310/42 e C 310/424 EN Official Journal of the European Union 16.12.2004.

<sup>671</sup> Title III Equality, Article 21 (2) EN Official Journal of the European Union 16.12.2004.



protection of diverse ethnicity and national minorities.<sup>672</sup> While the foundations of the old Europe are deeply focusing on Christian values, it is now necessary to leave room for other values brought in by new inhabitants, which are consequently shaping the New Europe and its cultural diversity.

### **5.3.1.3. Sharing Sovereignty between National and Supranational Dimension: The Subsidiarity and Proportionality Principles**

As mentioned in the previous paragraphs, the EU's supranational identity is the result of a '...a highly integrated supranational organisation',<sup>673</sup> whose members have recognised at the head of the Community, the power to act on their behalf in many legislative and political instances.<sup>674</sup> In this context, the EU Constitutional Treaty is examined for its new symbolism while introducing the issue of cultural diversity as one of the pillars of the new EU.<sup>675</sup> Previously, other European Treaties elaborated and disciplined principles as EU sovereignty in conjunction with the principles of subsidiarity and proportionality. These principles mean that the EU has submitted to the will of the European citizens as it is affirmed in all national constitutions.<sup>676</sup>

The EU subsidiarity principle implies an adherence to the European Human Rights Convention,<sup>677</sup> which means that EU legislators are bound to national regulations in all those matters in which national laws have exclusive competencies.<sup>678</sup> Therefore, the 'Community should legislate only to the extent

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<sup>672</sup> *Ibid* and p.22.

<sup>673</sup> A. Albi and P. Van Elsuwege, 'The EU Constitution, National Constitutions And Sovereignty: An Assessment Of a European Constitutional Order', E.L. Rev. 29 (6) [2004] pp.751, 757.

<sup>674</sup> Protocol on the Application of the principles of subsidiarity and proportionality C 310/207 EN Official Journal of the European Union 16.12.2004.

<sup>675</sup> See TITLE III Union Competencies Article I-11 Fundamental principles 1. The use of Union competencies is governed by the principles of subsidiarity and proportionality C 310/14 EN Official Journal of the European Union 16.12.2004.

<sup>676</sup> A. Albi and P. Van Elsuwege, 'The EU Constitution, National Constitutions And Sovereignty: An Assessment Of a European Constitutional Order', under paragraph 'Sovereignty and EU membership in national constitutions' [2004] E.L. Rev. 29 (6) p.744.

<sup>677</sup> C 310/424 EN Official Journal of the European Union 16.12.2004.

<sup>678</sup> TITLE III Union Competencies Article I- 3 C 310/14 EN Official Journal of the European Union 16.12.2004.

necessary,<sup>679</sup> as well as distribute powers equally among different political organs involved in the legislative framework.<sup>680</sup>

There are some areas of EU influence that cross borders and in which responsibility is shared with Member States, for example, in the case of competition law (exclusive competence) and intellectual property (shared competence). To understand how these set of rules are intertwined is of tremendous importance to understanding EU trade policies. European competition rules are established to regulate the internal market within the Union's boundaries. Externally, they regulate EU commercial policy through international agreements.<sup>681</sup> The principle of proportionality gives freedom to member states to have not exclusive, but rather shared competence on those matters, such as (a) internal market; (c) economic, social and territorial cohesion; (d) freedom, security and justice; and in the areas of development co-operation and humanitarian aid.<sup>682</sup>

It significant that, in these areas, the effort of the European legislator is concentrated in expanding the *dominium* of the Union. In particular, the area of intellectual property has become more a matter of exclusive EU competence rather than shared competence, sweeping away the issue of territoriality.<sup>683</sup> This is in response to the theory of harmonisation. Although for copyright it might be difficult to reach this level since it is a right that has 'philosophical, historical and political entrenchment'.<sup>684</sup> The principle of proportionality is also mitigated through the introduction of the 'flexibility clause'.<sup>685</sup> This is a safety valve granting the European Union direct and immediate power of intervention. Only in cases where

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<sup>679</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) at note 105 page 18 referring to the Protocol on the Application of the Principle of Subsidiarity and Proportionality. See also J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' 26 *Fordham Int'l L.J.* 12, November [2002] p.26.

<sup>680</sup> *Ibid.*

<sup>681</sup> As reported respectively under letter b), e) and para. 2 or Article I-13 Areas of exclusive competence, 16.12.2004 EN Official Journal of the European Union C 310/15 -C 310/16 and Chapter VI International Agreements Article III-323 see para 2. Agreements concluded by the Union are binding on the institutions of the Union and on its Member States. See also in relation to international treaties related to IP Bently and Sherman, *Intellectual Property Law*, Oxford University Press [2004] p.23.

<sup>682</sup> Article I-14 C 310/16 EN Official Journal of the European Union 16.12.2004.

<sup>683</sup> L. Bently and B. Sherman *Intellectual Property Law* (Oxford University Press 2004) p.10 para 4. Regional Influences, assessing the great influence on UK law of European IP Directives. See comments of W.R. Cornish, R.M Hilty, A. Kur, J. Drexler 'Procedures and remedies for enforcing IPRs: the European Commission's proposed Directive' [2003] 10 *EIPR* 447.

<sup>684</sup> G.B. Dinwoodie 'Some Remarks on the Limits of Harmonization' [2006] 5 *J.Marshall Rev. Intell. Prop. L.* p.604.

<sup>685</sup> Article I-18 EN Official Journal of the European Union 16.12.2004.

the EU Constitutional Treaty 'has not provided necessary powers'<sup>686</sup> to those matters that are 'shared competencies' with member states, could the 'flexibility clause' work. The following paragraphs will demonstrate how the principles of EU sovereignty are applied to IPRs in general.

#### **5.3.1.4. The EU Commitments: Sustainable Development and Market Economy - Where is the Balance?**

The European Union cannot repudiate its origins and the origins of the Union laid down the fundamental idea that the European Community could be united and functionally and politically operative only if a single competitive common market is in place.<sup>687</sup> Overall, the European Constitutional Treaty favours trade liberalisation that would benefit a market economy by balancing sustainable development with competition rules.<sup>688</sup> In fact, provisions of trade liberalisation and a united and competitive market economy should be read jointly with European concepts of the 'social market economy,'<sup>689</sup> especially with reference to traditional communities.<sup>690</sup> To provide a well-balanced formula in a world where globalisation threatens principles, like solidarity and developmental aid<sup>691</sup> should be mainstreamed to create a European trade based on respect of human rights standards.

The EU Constitutional Treaty clearly expresses the desire that cultural diversity should not be threatened either in Europe or elsewhere,<sup>692</sup> and for this

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<sup>686</sup> Para 1. Article I-18 EN Official Journal of the European Union 16.12.2004.

<sup>687</sup> 'A common market is the product of a political decision to promote trade competition without trade interposition of legal and fiscal barriers' W.R.Cornish and M. Llewlyn, *Intellectual Property*, Fifth Ed, (Sweet & Maxwell 2003) p.42. J.Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 Fordham Int'l L.J. p.20, 'regarding the process of national deregulation the author sustains 'Within the last decade, economic policies in Europe have swung decisively away from an interventionist model and towards a reliance on competition within open markets to generate economic growth and prosperity'.

<sup>688</sup> Article III-119 in which the promotion of sustainable development is applied to environment. See also articles II-178, III-179 III 222. J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 Fordham Int'l L.J. p.30.

<sup>689</sup> Article III-221 refers to the economic cohesion. C 310/98 EN Official Journal of the European Union 16.12.2004.

<sup>690</sup> This principle is present in other articles of the EC Treaty, art. 158, O.J. C 340/3, at 250 (1997), 37 I.L.M. at 112 (ex art. 130a) reported in J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 Fordham Int'l L.J. ] p.22 and note 28, where the author sustains how the concept of solidarity placed in the market economy is 'fundamentally different' from the U.S. model. 'The same principle of solidarity is codified in Title XVII of the EEC Treaty, where Article 158 commits the Union to 'aim at reducing disparities between the levels of development of the various regions and the backwardness of the least favored regions or islands, including rural areas.'

<sup>691</sup> *Ibid.*

<sup>692</sup> *Ibid.*

reason the rule of law plays a great role in firmly regulating fostering cultural diversity through sustainable economic development.<sup>693</sup> A competitive market and economic cohesion to aggregate in a sole market in poor regions of the Union and of the world<sup>694</sup> should be balanced by sustainable development, respect and the safeguarding of traditional cultures.

#### **5.4. Intellectual Property Protection in Constitutional Provisions and in the European Policy Framework among Free Movement Of Goods, Internal Market and Rules of Competition**

##### **5.4.1. Intellectual Property in the EU Constitutional Treaty: Non Discrimination and Natural Law**

This section assesses whether the policy adopted by the European Union can be considered effective to tackle the problems of Indigenous peoples' lack of legal protection for their works of folklore.

Recent Copyright Directives and EU Communications have demonstrated the EU's intent to streamline a discipline of copyright in a fashion similar to patents and trademarks.<sup>695</sup> However, as previously stated, this is not an easy task since copyright raises more issues and concerns for harmonisation than, for example, a trademark does. Lucas sustains that harmonising copyright law in Europe is 'like eating Irish stew or football' - that is to say, either you like the idea of harmonisation or you dislike it.<sup>696</sup> Copyright harmonisation means giving up some of the philosophical approaches beyond the concept of the right to copyright protection, which is still perceived differently in common law and civil law.

However, a common framework for copyright laws in Europe is necessary to avoid instruments diverging prejudicially towards the consolidation of a well established EU *acquis communautaire*.<sup>697</sup> Even though we might be still talking about a utopia, the problem with harmonisation of copyright law should be studied and

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<sup>693</sup> These principles are underlined by J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 Fordham Int'l L.J. pp. 14-15-16, where the author defines rule of law and market economy as the priority values 'standing and supporting the same essence of the European Community'. Nevertheless, human rights and cultural diversity cannot be considered a secondary value.

<sup>694</sup> Section 3 *Economic, Social And Territorial Cohesion* Article III-220 C 310/98 EN Official Journal of the European Union 16.12.2004.

<sup>695</sup> See EU Commission Communication on Management of Copyright July 2004.

<sup>696</sup> A. Lucas 'Updating copyright law in the enlarged Union', available at [http://europa.eu.int/comm/internal\\_market/copyright/docs/conference/2004-dublin/lucas\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/conference/2004-dublin/lucas_en.pdf).

<sup>697</sup> *Ibid* pp.1,3.

mechanisms established to overcome these diverse positions. It is indisputable that reforms should also encompass a new concept of ownership, which can mediate between economic and natural law theories, plus accommodate new rights. It is still unclear whether authors and owners of copyright works would benefit from this harmonisation or whether it will prejudice their status<sup>698</sup> as it will depend on which doctrine will dominate.

It would be unrealistic to assert that the approach adopted at the EU level will not be influenced by the U.S. copyright doctrine, since this is the dominant approach in the trade arena. Copyright harmonisation will build on the notion that copyright is essential to foster science and investments, not just at a national but also at an EU level.<sup>699</sup> Therefore, it will become crucial to balance it with rules of free movement and competition.<sup>700</sup> The lack of equilibrium or eventual disproportion in these matters often undermines the efforts to create a positive internal market<sup>701</sup> and this is applicable to copyright and IPRs, in general, as well as to other matters.

It should also be noted that the EU-level debate has always considered whether intellectual property can help to unify the internal market. Often, intellectual property rights have gone beyond their boundaries (e.g. monopoly rights given to foster science and investments). Copyright and IPRs have often come into conflict with competition rules or with human rights provisions<sup>702</sup> (e.g. discrimination on the grounds of nationality).<sup>703</sup> Sometimes, the exercise of the right on behalf of the author should be limited or 'compressed' until the situation which caused the conflict is cleared and when other important rights are no longer in danger.<sup>704</sup>

As previously stated, the European concept of copyright combines common and civil law principles. In particular, the recognition of an author's rights (*droit d'auteur*) slightly change the copyright formula, which includes principles of human

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<sup>698</sup> *Ibid* p.2 reporting the case of joint works, in some countries considered as collaborative works and in some others as collective works.

<sup>699</sup> 'There is no manna from heaven. Resources cost money to produce. They must be paid for if they want to be produced.' L. Lessig, *The Future of Ideas*, (Vintage 2002 ) p.13.

<sup>700</sup> W.R. Cornish and M. Llewlyn *Intellectual Property*, Fifth Ed, (Sweet & Maxwell 2003) p.41.

<sup>701</sup> *Ibid*, p.42.

<sup>702</sup> *Ibid*, p.43.

<sup>703</sup> *Ibid*. See the EU case C-92/92 *Phil Collins v. Imtrat Handels*. For a brief analysis of the case see S. Von Lewinski, 'Intellectual Property, Nationality, and Non Discrimination' at para 2 b). available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf).

<sup>704</sup> This theory exercise-exhaustion of copyright has always been at the centre of a hot debate. When exceptions to copyright are layed out, the question is whether copyright still exists and it is only its exercise, its function which is compressed or the right is abolished.

rights and which more precisely defines the author's right as something derived from natural law.<sup>705</sup>

Even though influences are inevitable, the U.S. and the EU continue to have two distinguishable approaches to copyright. Different concepts are at the basis of the EU and the U.S. copyright doctrine. In the United States, a monopolistic right is granted to the author in order to promote the 'progress of science and investments'.<sup>706</sup> While in Europe, the influence of civil law countries has made the economic impact of copyright more palatable through the introduction of moral rights (e.g. rights of attribution and integrity). As argued<sup>707</sup>, the constitutional basis for copyright in Europe lies on diverse foundations in comparison with the U.S. as there is no parallelism with the constitutionalised U.S. copyright principle. 'As a "natural right" based on a mix of personality and property interests, copyright in continental Europe has its constitutional basis, if at all, either in provisions protecting rights of personality or in those protecting property'.<sup>708</sup> The EU copyright has more than an economic connotation - it is the right of the creator to be recognised as author.<sup>709</sup>

Principles of non-discrimination are applied to protect the copyright of foreign works and, in particular, of foreign authors. No authors can be discriminated against on the basis of nationality. The natural law theories coming from continental Europe are strong enough to influence the EU. Natural law philosophy applied to copyright confirms that protection should be granted to foreign authors not on the basis of any legislation but because 'by nature they should benefit everywhere from their natural property'.<sup>710</sup>

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<sup>705</sup> S. Von Lewinski 'Intellectual Property, Nationality, and Non Discrimination' at para 2 i) and note 2. available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf).

<sup>706</sup> C. Steiner Esq 'The Constitution of the U.S.A. encourages cultural development and dissemination by promoting the progress of Science and Useful Arts' at para 2. <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/steiner.pdf>.

<sup>707</sup> P. Bernt Hugenholtz 'Copyright and Freedom of Expression in Europe' in *Expanding the Boundaries of Intellectual Property* ed. R. Breyfuss, D. Zimmerman, H. First (Oxford University Press 2004).

<sup>708</sup> *Ibid.*

<sup>709</sup> P. Drahos 'the Universality of Intellectual Property Rights: origins and development', at para 1v page 2. Panel discussion on Intellectual Property and Human Rights Geneva, November 9, 1998 available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/drahos.pdf> where the author operates a distinction between the term 'copyright' proper of common law countries and with pure economic connotations and the 'copyright' in civil law system where is given relevance to the author's personality.

<sup>710</sup> S. Von Lewinski 'Intellectual Property, Nationality, and Non Discrimination' at para 3 (aa) available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf) Philosophical and ethical justifications. The author recalls the ALAI decision in 1878 made by the Funding Congress

The EU Constitutional Treaty is not about the application of generic principles of non-discrimination. This mirrors the provisions under the EC Treaty.<sup>711</sup> In fact, it enforces specific and punctual provisions that are less generic than those of the EU Treaty and that do not focus on establishing a valuable internal market.<sup>712</sup> The principle of non-discrimination already present in the EC Treaty and applied by the ECJ has been strengthened in the EU Constitutional Treaty in order to 'realise an even growing integration within the European Union'.<sup>713</sup> Another issue at the EU level is the expansion of copyright to incorporate newly emerging rights. The provisions established under the Constitutional Treaty in relation to cultural diversity could contribute highly to this expansion. As Peter Drahos states in relation to IPRs, 'its early historical links to the idea of monopoly and privilege, the scope of its subject matter continues to expand. The twentieth century has seen new or existing subject matter added to present intellectual property systems.'<sup>714</sup>

#### 5.4.2. Copyright as Property Right?

As set out in the preceding paragraphs, copyright in the EU is '...constitutionally limited...'<sup>715</sup> It may be limited for the benefit of the common market or because it comes into conflict with other fundamental rights. These provisions seem to favour the concept that copyright is not the most important right to be protected. Thus, when the exercise of other rights is prejudiced or are in conflict with it, the right of the author could be sacrificed.<sup>716</sup> It is disputable whether Indigenous communities could benefit from this approach. It could be said that a less strong copyright accomplishes the *desiderata* of many developing countries and

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'The right of the author in his works constitutes, not a concession by the law, but one of the forms of property which the legislation must protect'. As the author notices the recall to principle of natural law stands clear in this declaration.

<sup>711</sup> Article 7 (a) of the EC Treaty aims to create an equilibrium within the internal market between free movement of goods, competition and intellectual property, only trying to regulate this system, which if no regulation is provided, could harm considerably the EU economy. Article 6 of the EC Treaty which is about generic application of non discrimination as fundamental human rights principles is immediately applicable. See S. Von Lewinski, 'Intellectual Property, Nationality, and Non Discrimination' at para 2 b) available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf)

<sup>712</sup> *Ibid.*

<sup>713</sup> *Ibid.*

<sup>714</sup> P. Drahos 'The Universality of Intellectual Property Rights: origins and development', at 1. Panel discussion on Intellectual Property and Human Rights Geneva, November 9, 1998 available at <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/drahos.pdf>

<sup>715</sup> *Ibid* p.105.

<sup>716</sup> This does not mean that the right cedes to exist, but simply that its exercise is forbidden until the conflict situation is over. This process is known as the theory exercise/exhaustion.

Indigenous communities. But how is it possible to draw a line between which rights should prevail and in which cases?

In the EU Constitutional Treaty, there are provisions which characterise copyright as a Western based concept. These provisions contribute to copyright's 'negative image' in the eyes of traditional communities.<sup>717</sup> In general, the EU Constitutional Treaty protects the right to private property<sup>718</sup> and in this respect copyright is protected as a personal although proprietary right.<sup>719</sup> As well as the right to private property, the intervention of law and the state should be limited only to those cases in which private property is at risk<sup>720</sup> or in cases where there is a public interest.<sup>721</sup>

Copyright as intellectual property is considered a 'special kind of property'<sup>722</sup> and both rights come within the same article.<sup>723</sup> It has already been assessed that Indigenous peoples do not view their works in terms of 'property'. There are two main reasons why this concept cannot be applied to Indigenous communities. Firstly, the Western concept of property is characterised by its individualistic nature, unconceivable to Indigenous communities, who live commonly. Secondly, many works of traditional art cannot fall under the notion of 'property', even if 'intellectual' (these include Indigenous beliefs, sacred representations, to name a few examples). Attributing 'property' to these categories undermines the meaning of

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<sup>717</sup> See P.Sirenelli's different perspective, 'European copyright: roadblock or opportunity?' at 1, herein the author singles out that 'Nevertheless, copyright is experiencing a what I would call a growth crisis. Copyright has a negative image: no longer is it seen as a sacrosanct property right, but rather is accused of undermining public freedoms'. Available at [http://europa.eu.int/comm/internal\\_market/copyright/docs/conference/2004dublin/miyet\\_en.pdf](http://europa.eu.int/comm/internal_market/copyright/docs/conference/2004dublin/miyet_en.pdf). Cfr P. Drahos, 'the Universality of Intellectual Property Rights: origins and development', at para 1 page 2. Panel discussion on Intellectual Property and Human Rights Geneva, November 9 1998 available <http://www.wipo.int/tk/en/activities/1998/humanrights/papers/pdf/drahos.pdf>.

<sup>717</sup> *Ibid* at 1.

<sup>718</sup> Article II-77 C 310/45.

<sup>719</sup> See C. Steiner, Esq, at para 2 under supra ii) Visual Artists Rights Act (VARA), in which the author examine the change in the American concept of copyright after the introduction of VARA, which helps to define the relationship between the owner of the work and the creator of it. The U.S.A. VARA legislation provides a limited range of protection for the creator. The owner of the work in fact cannot 'alter or mutilate the work'. In this sense the notion of U.S. copyright is becoming more similar to the European one, in which moral rights of the author are recognised'. Available at <http://www.wipo.int/tk/en/hr/paneldiscussion/papers/pdf/steiner.pdf>.

<sup>720</sup> Article II-77 (1).

<sup>721</sup> C 310/446.

<sup>722</sup> On the debatable attribute of property to intellectual property see S. Vaidhyathan *Copyright and Copywrongs, 'The rise of Intellectual Property and how it Threatens Creativity'* (New York University Press 2001) p.11.

<sup>723</sup> Article II-77 (2) C 310/45.



folklore. However, the annex of the Charter Constitution mitigates the proprietary character given to copyright and IPRs, in general affirming that an IPR should be protected as a human right.<sup>724</sup> Therefore, copyright has two main characteristics: it is a property right but it is also a human right or a 'humanised' right.

Property rights are a legal recognition of a situation -the physical possession of and control over goods - whereas copyright is not based on a *de facto* situation. It is rather an artificially created right put in place by the legislator to regulate competition at the innovative and creative level and to provide the indispensable incentive to foster further creation.<sup>725</sup> It is clear that the exact content of copyright law must reflect the attempt to provide an adequate level of competition both at the innovation/creation stage and at the production level.

Cornish sustains that '...[the] proprietary nature of intellectual property has been precisely in order to secure that the rights should be exclusive, wide-ranging and subject to very limited exceptions. Perhaps the chief reason for so long eschewing 'property', at least as a generic term for intellectual property, was this. If property was not quite theft, then at least it was monopoly'.<sup>726</sup>

The monopolistic proprietary nature of intellectual property in general moves the European legislator to introduce elements of correction. Therefore, principles of non discrimination<sup>727</sup> and moral rights intervene to change the shape of copyright. It is still a proprietary right but it is also a right in development. This 'deformed' copyright could be stretched in the future to include Indigenous peoples' folkloric works and the kind of protection sought by communities from whom folklore has originated.

#### 5.4.3. Copyright or *Sui Generis*? - The European Model

Europe's copyright traditions are strong. It is the land where the copyright idea was born<sup>728</sup> and became internationally recognised.<sup>729</sup> Europe includes *in se* the two

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<sup>724</sup> Reference is made in the charter at the Article 1 of the Protocol to the ECHR. See C 310/436 C 311/436 EN Official Journal of the European Union 16.12.2004.

<sup>725</sup> A. Narciso, 'IMS Health or the Question Whether Intellectual Property Still Deserves a Specific Approach in a Free Market Economy' [2003] 4 I.P.Q. p.446.

<sup>726</sup> W.R. Cornish *Intellectual Property, Omnipresent, Distracting, Irrelevant* (Oxford University Press 2004) p.2.

<sup>727</sup> S. Von Lewinski 'Intellectual Property, Nationality, and Non Discrimination' p.6, available at [www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf](http://www.wipo.org/tk/en/hr/paneldiscussion/papers/pdf/lewinski.pdf) The author defines it as 'one of the basic human rights'.

<sup>728</sup> Statute of Anne in England (1709). See generally P. Goldstein tracing the history of copyright in *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) pp.556-7.

main copyright traditions, the continental and common law systems, as well as the different legislation in place at the Member States level, even where some similarities exist.

Despite the many traditional communities which live and practise their culture in the European context, the European legislator has never attempted to enforce community rights on works of folklore.<sup>730</sup> Moreover, the fear of separatist movements within several European countries - the Basque movement in Spain, for example - has denied an EU level of recognition of traditional communities.<sup>731</sup> More progressive countries have introduced forms of protection within their national laws<sup>732</sup>. Some have tried to reach a compromise: the protection of expressions of folklore is achieved through the preservation of culture, which incidentally, rather than expressly, includes expressions of folklore.<sup>733</sup>

The European Union is silent in regard to direct means of protection to be adopted in favour of Indigenous peoples' folklore. However, the main issue is whether it recognises the existence of a right on behalf of the community. On some aspects, the European policy is in favour of recognising a communal right to the traditional artistic production '[traditional artists] which represents....their contribution to the life of the community they belong to'.<sup>734</sup> However, can the individualistic approach, which lays at the origin of any right in the EU,<sup>735</sup> cope with

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<sup>729</sup> The Berne Convention 1886.

<sup>730</sup> M. Ficsor, *Indigenous Peoples and Local Communities: Exploration of Issues Relating to Intellectual Property Protection of Expressions of Traditional Culture ('Expressions of Folklore')*, a paper presented at the WIPO Conference of July 7, 1999. See also S. Palethorpe and S. Verhulst *International Protection of Expressions of Folklore under Intellectual Property Law* University of Oxford Report on the International Protection of Expressions of Folklore under Intellectual Property Law October 2000 p.39.

<sup>731</sup> In fact it is not a case that all European traditional communities embraced independentist movement e.g. Basques, the Catalonians, the Scots. See Michael Blakeney's speech 'International developments in the protection of Traditional Cultural Expressions' at the conference held at AHRB Seminar, on 28<sup>th</sup> February 2005 available at <http://www.copyright.bbk.ac.uk>.

<sup>732</sup> H. Olsson 'Economic Exploitation of Expressions of Folklore: The European Experience', UNESCO-WIPO Forum Phuket, 1997.

<sup>733</sup> S. Palethorpe and S. Verhulst *International Protection of Expressions of Folklore under Intellectual Property Law* University of Oxford Report on the International Protection of Expressions of Folklore under Intellectual Property Law October 2000 p.40.

<sup>734</sup> Written submission on folklore from the European Community and its Member States for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore Geneva, 13-21 June, 2002 p.2.

<sup>735</sup> Observe the definition given by A. De Gasperi at the speech to a round table organised by the Council of Europe in Rome, 13 October 1953. 'a unity that he saw as already present in people's minds, but lacking in material expression: 'Europe will exist, and none of the glory and happiness of each nation will be lost. It is precisely in a wider society, in a more powerful harmony, that the individual can assert himself and fully express his own genius'.

the recognition of community rights like Indigenous peoples rights to TCES? At the origin of the WIPO ICG Sessions, EU policy was mostly oriented to consider all expressions of folklore as being part of the public domain. Thus, they could become freely accessible and benefit overall European culture and society, its integration and sense of unity.<sup>736</sup>

The more active participation of the European Commission (hereafter referred to as the EC) at the ICG sessions on 'Traditional Knowledge and Folklore' has not necessarily changed this point of view. It welcomed the establishment of the WIPO voluntary fund.<sup>737</sup> Moreover, the strong EC intellectual property tradition keeps the EU legislator from becoming engaged in promoting binding instruments of protection for TCEs, especially those which could bring in some *sui generis* rights.<sup>738</sup> Those soft laws could take the form of guidelines, statements or recommendations. The opinion of the EC is that insisting on common denominators rather than touching upon well-established IPRs should be the way forward. This tough approach is expressed by the delegation of Austria on behalf of the EC. The reference to the fact that an international policy should be included as a priority under the objectives of the WIPO/GRTKF/9/4 says a lot in terms of compromise with the well established principles of competition and market value of which IP is an important sector. The adherence to the need of protection for Indigenous peoples' folklore cannot put at risk this equilibrium and balance of rights already achieved by the EU. Therefore, the current position of the EC delegation at the WIPO ICG on the theme of folklore is to concentrate more on the 'actual need of the community',<sup>739</sup> without touching upon the issue of international legal protection. Furthermore, the fear of criticism and confusion regarding an already consolidated system is beyond the statement that '[...] the International intellectual property system should not be interfered with to the detriment of the legal certainty already agreed upon.'<sup>740</sup>

Before exploring alternative IPRs means of protection, non IPRs instruments should also be investigated upon with particular attention to those rules against unfair competition and laws of blasphemy.<sup>741</sup> The EC expressly states that the

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<sup>736</sup> Written submission on folklore from the European Community and its Member States for the 3rd WIPO Intergovernmental Committee on Genetic Resources, Traditional Knowledge and Folklore Geneva, 13-21 June, 2002 p.2.

<sup>737</sup> WIPO/GRTKF/9/15Prov. at paragraph 66.

<sup>738</sup> WIPO/GRTKF/9/15Prov. at paragraph 79 and 87.

<sup>739</sup> WIPO/GRTKF/9/14Prov at paragraph 101.

<sup>740</sup> WIPO/GRTKF/9/14Prov at paragraph 116.

<sup>741</sup> *Ibid.*

outcome of the eight ICG session does not correspond to the wishes of many WIPO Member States. The *sui generis* system could compromise a delicate equilibrium and it might not achieve the necessary results of protection. For the EC not a single solution can be reached.<sup>742</sup> In the EU TCEs are in the public domain. This is a crucial issue which has its own independent impact. As already stressed, recovering works from the public domain and to providing them with some kind of protection would be costly. In addition, sustaining why these costs while the public domain guarantees the fundamental food for new creativity?

The EC position is that the best solution is the free use of works of folklore, a free access which could accommodate the needs of and be a benefit to those communities to whom the works of folklore belong.<sup>743</sup> However, the EC still does not provide solutions on how this system could actually be put in place in order to work effectively. On WIPO ICG Sessions the EC is insisting on the importance of substantive criteria to be attached to the ICG Committee outcomes.<sup>744</sup>

While a *sui generis* right is still to be explored, but in principle not excluded, the EC concentrated its efforts in trying to make copyright a more modern right, able to protect some folkloric works. The proprietary logic of seeking a strong - in an economic sense - copyright for the benefit of the market and competition is now slowly shifting towards new values which should also be preserved. The EU Constitutional Treaty, even though not in force, has played a great role. Although sometimes EU policy appears confused in terms of which value, market or cultural diversity, should prevail, the recent changes in EC behaviour at the WIPO ICG sessions are a hope that the Constitutional Treaty motto 'united in the diversity' and all the provisions put in place to maintain cultural diversity within the European Union will now be taken into serious consideration.

The fact that this recognition is *de facto* ongoing, can be conceived in the EU's assertion that 'authentic expressions of folklore have become inherently better known and of higher economic value'.<sup>745</sup> It is also relevant to stress that works of folklore share many elements with human rights, which are embodied in the same folkloric nature. Thus, IPRs instruments should not only be the ones applicable to folklore.

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<sup>742</sup> WIPO/GRTKF/9/14Prov at paragraph 2.

<sup>743</sup> *Ibid.*

<sup>744</sup> WIPO/GRTKF/9/15Prov.

<sup>745</sup> *Ibid* p.2.

The EU Constitutional Treaty, even though does not grant any right to independence and self determination of communities within its member states - this is arguably due to states fears of separatism such as in Spain – it does provide political support to the recognition of different cultures, either of European or migrant communities. The impact of these democratic principles cannot be ignored while examining the position of the EC on the issue of folklore in the WIPO ICG.<sup>746</sup>

Examples of these principles are the provisions which stress transparency within EU institutions in order to be 'closer to citizens',<sup>747</sup> simplification of procedures as necessary for good governance and freedom of information<sup>748</sup> were established to benefit all EU citizens, especially those who are in weaker positions, such as traditional communities.<sup>749</sup>

The legal protection of folklore could be framed by EC institutions by the application of these principles as well as a balance of IPRs and new means of protection from outside the intellectual property arena.

## 5.5. The EU Approach to TCEs

The necessity of fostering cultural diversity as laid out by the EU Constitutional Treaty is also at the basis of the EU development agenda, whose references to Indigenous peoples is relatively recent. The Agenda of the Development Cooperation Group of the Council held on 18 March 1997 mentioned for the very first time the issue 'Indigenous Peoples'. At its meeting on 5 June 1997, the Development Council invited the European Commission to present a policy paper on EU development policy on Indigenous peoples. On November 22, 2005 the Joint Statement on EU development policy adopted by the Council, the Parliament

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<sup>746</sup> For the value of these democratic principles it is worthy to acknowledge the statement of Jack Straw, Secretary of State for Foreign and Commonwealth Affairs '... we have a draft Constitutional Treaty which is a good start to deliver the kind of European Union we want: a Union clearly anchored in the democracies of the nation states; that is easier to understand, and more effective', *Draft Constitution for the European Union* Issued by Her, Majesty's Government Series: Command Papers, ISBN: 0-10-158722-8 Publisher: The Stationery Office, July 2003 p.4.

<sup>747</sup> Annexes to Presidency Conclusions European Council Meeting in Laeken 14 and 15 december 2001 Laeken Declaration On The Future Of The European Union, at I. *Europe at a crossroads* reported in *Draft Constitution for the European Union* Issued by Her, Majesty's Government Series: Command Papers, July ISBN: 0-10-158722-8 Publisher: The Stationery Office, 2003 p.6.

<sup>748</sup> See art 41 (2) (3) 16.12.2004 EN Official Journal of the European Union C 310/447 and C 311/447.

<sup>749</sup> Annexes to Presidency Conclusions European Council Meeting in Laeken 14 and 15 december 2001 Laeken Declaration On The Future Of The European Union, at I. *Europe at a crossroads* reported in *Draft Constitution for the European Union* Issued by Her, Majesty's Government Series: Command Papers, July ISBN: 0-10-158722-8 Publisher: The Stationery Office, 2003 pp.9-10.

and the Commission enforced the previous commitments: The EU will include in development programmes activities regarding the safeguard, protection and promotion of Indigenous issues. As Commissioner Benita Ferrero-Waldner expressed it in on the occasion of the International Day of the World's Indigenous People on August 9 2006, there exists a necessity to acknowledge and respect these specific traditions and knowledge.<sup>750</sup>

The Approval of the UN Declaration on Indigenous peoples has aroused major concerns regarding protection within the EU. 'The Declaration's message is equality for all – and we in the European Commission will not rest until Indigenous peoples have that equality, wherever they live in the world.'<sup>751</sup>

The development of the participation of the EU to the WIPO ICG has been strongly influenced by changes made at the international level in the recognition of of fundamental Indigenous peoples' rights. The EU participation at the first WIPO ICG sessions had not been pro-creative and was markedly passive. However, even before the approval of the UN Declaration on Indigenous Peoples this attitude changed. The EU is no longer interested in participating as mere spectator to the ICG but is providing an opinion on what the idea of development means and what protection should actually consist of. This position is well summarised by the following by the EU delegates at the 23rd session of the Working Group on Indigenous Populations in Geneva:

'We participate to the Working Group first and foremost to listen to the concerns and proposals that Indigenous representatives and members of the Working Group will present in order to be able to integrate them in the reflections and discussions shaping the positions of the EU. However, we felt that, because of the large representation of Indigenous peoples in the sessions of the Working Group, it would be useful to reiterate here the principles that the European Community has defended on this issue in other *fora*, where the presence of Indigenous representatives may be more limited or inexistent.'<sup>752</sup>

Even the EU attitude towards the application of copyright categories to Indigenous peoples has changed over time. The EU has shifted from a largely

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<sup>750</sup> IP/06/1090 Brussels, 8 August 2006.

<sup>751</sup> *Ibid.*

<sup>752</sup> Statement of the European Commission on behalf of the European Community at the 23rd session of the Working Group on Indigenous Populations Geneva, 20/07/05 under item 4(b) '*Indigenous Peoples and the International and Domestic Protection of Traditional Knowledge*'.

inactive role to calling for a constructive debate. The EU now 'supports further work towards the development of international *sui generis* models of protection'.<sup>753</sup>

While the EU remains in favour of the application of specific IPRs categories to Indigenous peoples' folkloric works, it does not maintain that IPRs should be the only means of protection. On the contrary, in exploring the possibility of a *sui generis* application, the Commission recalls the importance of customary laws which should be included in all development programmes regarding Indigenous peoples. This approach is also echoed in the following statement:

'In addition to supporting specific instruments in the field of intellectual property aimed at protecting traditional knowledge, the EU supports the recognition of customary laws of Indigenous peoples that protect traditional knowledge. Such laws should be respected by governments when taking decisions that could potentially impact on Indigenous communities and the traditional knowledge they hold.'<sup>754</sup>

In the context of the UN Convention on Biological Diversity, for instance, the EU is fully engaged in the development of the Work Programme on Article 8 j, a provision of the Convention that specifically addresses the role of traditional knowledge. The EU has also been active in the development and adoption of the so-called 'Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization'. Among other objectives, the guidelines aim at contributing to the development of mechanisms at the national level that respect and protect traditional knowledge, innovations and practices of Indigenous and local communities.

Under the Bonn Guidelines, when traditional knowledge associated with genetic resources is accessed, national authorities are expected to involve the holders of traditional knowledge and seek their prior informed consent before taking any decision. A requirement to disclose the origin of genetic resources and associated traditional knowledge when applying for a patent would probably help to enforce national requirements on Prior Informed Consent. This is one of the reasons why the EU supports the introduction of a disclosure requirement and has made submissions on its specific views on this issue to both WIPO and the WTO.

The EU has held that the participation and involvement of Indigenous representatives in *fora* is vital where protection of traditional knowledge is discussed. In this context it has supported the establishment of a voluntary fund in

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<sup>753</sup> *Ibid.*

<sup>754</sup> *Ibid.*

the WIPO to sponsor the participation of Indigenous representatives on Intergovernmental Committees on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. The European Initiative on Democracy and Human Rights, aimed at funding projects of civil society and international organizations, has also recently targeted funds to support initiatives designed to improve the participation and follow-up of UN processes relevant to Indigenous peoples and the issue we are discussing falls into this category.<sup>755</sup> This has been aptly summarised in the following statement, which demonstrates the interest of the EU in involving Indigenous peoples in decisions regarding them:

‘The Declaration’s message is equality for all – and we in the European Commission will not rest until Indigenous peoples have that equality, wherever they live in the world. We must meet the high expectations people have of the second International Decade of the World’s Indigenous People (2005 – 2015). We must commit ourselves to ensuring all Indigenous peoples everywhere see a positive difference to their lives. And we must help their representatives who worked so hard for the Declaration by fighting with them for a more just and inclusive society, for the benefit of Indigenous peoples and all of humanity.’<sup>756</sup>

As reported in the EU Constitutional Treaty, there is a need to foster cultural diversity both within and outside the EU. The contributions of Indigenous peoples in highlighting the importance of cultural diversity have been underlined by EU development policy. On 18 March 1997, the EU Agenda on Development Co-operation mentioned the issue of ‘Indigenous Peoples’ for the very first time.<sup>757</sup> The same year, the Council invited the Commission to present a policy document on EU development policy on Indigenous peoples.<sup>758</sup> It followed the Commission Working Document,<sup>759</sup> which underlined the main problems and issues related to Indigenous peoples policy with particular reference to their heritage.

General guidance in supporting Indigenous peoples’ rights is therefore established at the EU level.<sup>760</sup> It also laid down the instruments devoted to co-

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<sup>755</sup> See the EC website [http://ec.europa.eu/comm/external\\_relations/human\\_rights/ip/index.htm](http://ec.europa.eu/comm/external_relations/human_rights/ip/index.htm).

<sup>756</sup> See the message of Commissioner Benita Ferrero-Waldner on the occasion of the International Day of the World’s Indigenous People, 9 August 2006.

<sup>757</sup> This is established at a Council level.

<sup>758</sup> This was done at a meeting on 5 June 1997.

<sup>759</sup> This document titled Commission Working Document on support for Indigenous Peoples in development co-operation of the Community and the Member States. Available on 11 May 1998 at [http://europa.eu.int/comm/external\\_relations/human\\_rights/ip/work\\_doc98.pdf](http://europa.eu.int/comm/external_relations/human_rights/ip/work_doc98.pdf).

<sup>760</sup> Since 1999, the rights of Indigenous peoples have been included as a thematic priority under the European Initiative for Democracy and Human Rights (EIDHR), and in the EU funding programme to



operation and humanitarian aid. These could assist in working towards a clear policy on how to tackle the issue of protecting Indigenous peoples' expression of folklore outside a simple copyright dimension. This document echoes the basic ideas beyond the United Nations policy, specifically that Indigenous peoples must be protected because 'they represent unique cultures with distinct languages, knowledge and beliefs, and their contributions to world heritage...[in the form of]... art, music, technologies, medicines and crops are invaluable'.<sup>761</sup> Procedures and methodological tools are developed in order to implement a valuable policy framework.

Before addressing the EU change of political behaviours towards TCEs, it is essential to examine the intentions of the EU legislator in the co-operation policy regarding Indigenous peoples. This policy can be considered unique to the European Union.<sup>762</sup> Following the analysis of the EU Constitutional Treaty, it is clear that this policy's primary objective is 'the reduction and, in the long term, the eradication of poverty'.<sup>763</sup> The eradication of poverty in the globalised world can be assisted through development co-operation and the fostering of international agreements on this important theme.<sup>764</sup> It follows that the European Union deals with the issue of the protection of folklore of Indigenous peoples in two different directions, firstly exploring it within the existing copyright/IPRs dimension, secondly through other routes which are outside the intellectual property arena. The scope of the above-mentioned EU Commission Working Document is to 'address the relation between Indigenous peoples and the development process'.<sup>765</sup> It also aims to draw a 'general

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support NGOs and Co-operation with International Organisations. The rights of Indigenous peoples have also been identified as a thematic funding priority for the EIDHR for 2002-2004 in the recent Commission Communication on the EU's Role in Promoting Human Rights and Democratisation in Third Countries, available at [http://europa.eu.int/comm/external\\_relations/human\\_rights/doc/index.htm](http://europa.eu.int/comm/external_relations/human_rights/doc/index.htm).

<sup>761</sup> In the Introduction and Section II 'Identity and Identification' in which it is affirmed that 'Indigenous cultures constitute a heritage of diverse knowledge and ideas which is a potential resource for the entire planet.' Reported in Working Document of the Commission of May 1998 on support for Indigenous peoples in the development co-operation of the Community and the Member States. The necessity of following UN rules is also underlined in the Council Conclusions on Indigenous Peoples 18<sup>th</sup> November 2002, available at [http://europa.eu.int/comm/external\\_relations/human\\_rights/hr181102](http://europa.eu.int/comm/external_relations/human_rights/hr181102).

<sup>762</sup> Article III-317 at paragraph 1 speaks in terms of 'European laws or framework laws', while paragraph 2 leaves a certain autonomy to the national legislatures to negotiate matters in relation to this matter.

<sup>763</sup> Chapter IV Cooperation With Third Countries And Humanitarian Aid Section 1 Development Cooperation Article III-316 At paragraph 1.12.2004 EN Official Journal of the European Union C 310/143.

<sup>764</sup> Chapter VI International Agreements 16.12.2004 EN Official Journal of the European Union C 310/146.

<sup>765</sup> See the whole Introduction of the Commission Working Document, available at [http://europa.eu.int/comm/external\\_relations/human\\_rights/ip/work\\_doc98.pdf](http://europa.eu.int/comm/external_relations/human_rights/ip/work_doc98.pdf).

policy framework which should subsequently be implemented through the development of more specific activities and guidelines’.

In this document the Commission demonstrates that Indigenous peoples’ problems cannot be identified merely as the problem of one country, but rather more generally. The document states that Indigenous peoples live in extremely ‘diverse geographical, social and political settings’.<sup>766</sup> It asserts that Indigenous communities’ rights cross national boundaries and that they are more appropriately considered at a supranational level such as the EU. Furthermore, the globalisation of economies and resources creates increased pressures for rapid change in Indigenous societies. In order to manage these pressures and transformation processes in a sustainable way, Indigenous peoples cannot rely only on resources and knowledge found at the local level. Thus, harmonisation and recognition of Indigenous peoples’ rights over folklore should be enforced at the supranational level.<sup>767</sup>

Another relevant argument addressed by the Commission Working Document is the link between Indigenous peoples/developing countries and the north-south dichotomy.<sup>768</sup> The EU approach is to define Indigenous issues as belonging only to developing countries. The EU policy is mainly focused on mainstreaming development co-operation of those communities which are outside the EU boundaries. The only explicit exception can be found in the Sami peoples, to whom an annex of the EU Constitutional Treaty is dedicated.<sup>769</sup> The political motives underpinning this approach have already been suggested to be linked to fears of separatist movements within the EU.<sup>770</sup> Moreover, it is affirmed that Indigenous peoples do own ‘their own concepts of development’.<sup>771</sup> Therefore, their different

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<sup>766</sup> Working Document of the Commission of May 1998 on support for Indigenous peoples in the development co-operation of the Community and the Member States, available at [http://europa.eu.int/comm/external\\_relations/human\\_rights/ip/work\\_doc98.pdf](http://europa.eu.int/comm/external_relations/human_rights/ip/work_doc98.pdf) in the Introduction.

<sup>767</sup> Working Document of the Commission of May 1998 p.12.

<sup>768</sup> This does not mean that there are no Indigenous peoples in Europe, but only that the majority of them is found to be in developing countries. See Introduction of the Working Document of the Commission of May 1998, as well as the European Communities Commission Report, Brussels, 11.6.2002 COM(2002) 291 final ‘A review of progress of working with Indigenous peoples’, available at [http://europa.eu.int/comm/external\\_relations/human\\_rights/doc/com02\\_291.htm](http://europa.eu.int/comm/external_relations/human_rights/doc/com02_291.htm) p.9.

<sup>769</sup> Annex B point 32. Declaration on the Sami people 16.12.2004 EN Official Journal of the European Union C 310/465.

<sup>770</sup> J. Richardson ‘European Union Law Essay: The European Union In The World-- A Community of Values’ [November 2002] 26 Fordham Int’l L.J. p.22.

<sup>771</sup> Section II. See also Section V. Vulnerability in the development process where is affirmed that Indigenous peoples should be ‘allow[ed] ... the right to determine their own social, economic and cultural development’.

cultures and values should not only be respected, but also employed in achieving development for them and for the whole planet.<sup>772</sup>

### **5.5.1. Economic Sustainability, Intellectual Property and Indigenous Peoples' Empowerment**

The Commission Document 1998 discussed above strongly affirms the link between the application of unequal trade rules and the political marginalisation of Indigenous peoples.<sup>773</sup> It states that 'there are not already made models for implementing Indigenous peoples' development strategies.'<sup>774</sup> The employment of Indigenous peoples' cultures and their free and informed consent<sup>775</sup> in regulating the access to traditional works of art belonging to them, is at the basis of this policy. It is underlined that Indigenous peoples should be empowered and should participate in the issue regarding valuable access to development resources and benefits.<sup>776</sup> They should take part in the democratisation process in matters related to their cultures and heritage,<sup>777</sup> such as, for example, monitoring and evaluating development projects based on their traditional heritage. Essentially this is a matter of human rights, democratisation of societies<sup>778</sup> and application of fair justice principles.<sup>779</sup> Indigenous communities should advocate their rights through non-profit and non-governmental organisations<sup>780</sup> and other institutions related to Indigenous peoples' rights, such as the established European Alliance with Indigenous Peoples, EAIP, (1995), and Haakansson and Bussmann (1998).<sup>781</sup> In doing so, the benefits will be on both sides; 'the donor community' (*alias* the Western society) will also benefit

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<sup>772</sup> See UNDP *Human Development Report* 2004.

<sup>773</sup> See Section V. Vulnerability in the development process.

<sup>774</sup> Working Document of the Commission of May 1998 p.13.

<sup>775</sup> *Ibid.*

<sup>776</sup> E.g. participation in International negotiations and networking among Indigenous communities at 14-15-16. This emerged from studies carried out at the EU. See document p.11.

<sup>777</sup> Introduction. e.g. Capacity building and education pp. 6-7.

<sup>778</sup> Changing the attitude towards Indigenous peoples p.6.

<sup>779</sup> Art. 47 (2) C 310/450 EN Official Journal of the European Union 16.12.2004.

<sup>780</sup> TITLE V European Communities Brussels, 11.6.2002COM(2002) 291 final Report From The Commission To The Council Review of progress of working with Indigenous peoples. See also J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 Fordham Int'l L.J. p.33. Role of NGOs in participatory democracy.

<sup>781</sup> Working Document of the Commission of May 1998 at 11.

from implementing Indigenous peoples cultures and participation in the development process.<sup>782</sup>

In terms of commercial policy, what should be promoted is an 'ethical trade' based on environmental and sustainable social development.<sup>783</sup> The Council Resolution of 30 November 1998<sup>784</sup>, which followed the Commission Working Document 1998, speaks in terms of equal trade and enhances cultural diversity. The EU Constitutional Treaty calls for a common commercial policy based on 'uniform principles' also in relation to intellectual property issues and agreements.<sup>785</sup> In particular, decisions regarding intellectual property should be made by unanimous consent of the Council.<sup>786</sup> Furthermore, agreements related to intellectual property matters which can prejudice the Union's cultural and linguistic diversity, should be taken only unanimously by the Council.<sup>787</sup> These democratic principles have been taken deeply into account by the EU Commission while drafting the development co-operation policy. The Commission is aware that Indigenous peoples have 'their own diverse concepts of development',<sup>788</sup> which should be respected and protected. The Council Resolution re-echoes the Commission Working Document when affirming that 'Indigenous cultures constitute a heritage of diverse knowledge and ideas, which is a potential resource for the entire planet'.<sup>789</sup>

### **5.5.2. Land, Spiritual and Dynamic Value of Indigenous Peoples' Cultures**

In addition to identifying and boosting cultural diversity, several other important issues should be addressed in a development policy in favour of Indigenous peoples. Relevance should particularly be given to the bond with the land<sup>790</sup> and the spiritual value of the Indigenous peoples' cultures – a value which is

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<sup>782</sup> Section II 'Indigenous peoples should not be victimised or seen as backwards nor as passive receptors of development interventions'. See also UNDP *Human Development Report* 2004.

<sup>783</sup> See Const Article III-29216.12.2004 EN Official Journal of the European Union C 310/131.

<sup>784</sup> Council Resolution, 30 November 1998 titled The guidelines to support Indigenous peoples Indigenous peoples within the framework of the development cooperation of the Community and the Member States available at [http://europa.eu.int/comm/external\\_relations/human\\_rights/ip/res98.pdf](http://europa.eu.int/comm/external_relations/human_rights/ip/res98.pdf).

<sup>785</sup> Chapter III, Article III-315, 1.

<sup>786</sup> Chapter III, Article III-315, 4.

<sup>787</sup> Chapter III, Article III-315, 4 (a). C 310/142 EN Official Journal of the European Union 16.12.2004.

<sup>788</sup> Council Resolution, 30 November 1998. Introductory part.

<sup>789</sup> *Ibid.*

<sup>790</sup> Council Resolution, 30 November 1998 at IV. Key-role regarding environment and sustainable development.

not 'static'.<sup>791</sup> As underlined in the first chapter of this thesis and the chapter reviewing Australian practices, Indigenous art encompasses this characteristic of a living culture. While this culture evolves it also remains faithful to its founding principles and identity so that it can continue to survive and be replicated. In the Commission Working Document 1998, it is ascertained that Indigenous peoples prefer collective identity to a private concept of property and that their economy is not based on market values.<sup>792</sup>

It is not only on mere 'subsistence'<sup>793</sup> that Indigenous peoples' society is oriented, but more on values, customs and practise to be shared collectively for the benefit of the community and its members. With regard to this, it is not clear what is intended as the 'support of Indigenous peoples' economies in the long term as has been enshrined in the EC development strategy. Parameters and methodologies are not discussed in the Council Resolution 1998, whose purpose is more to attract attention on the existence of these new rights and in finding a solution to the problem. Perhaps due to this lack of clarity the same European Commission recognises that 'there is still a gap between the expressed intentions and the actual practices'<sup>794</sup>.

### 5.5.3. The Challenge of Creating a Comprehensive Policy

The need for a comprehensive policy to encompass Indigenous peoples' rights was endorsed through two main documents which followed the Commission Working Document of 1998 and the Council Resolution of the same year. The sharing of experiences among members of the EU and among countries world-wide is stressed in both these documents. A dialogue between supranational organisations, countries and Indigenous peoples and co-ordination between the Community and the Member States is also needed,<sup>795</sup> as well as an action plan to set overall objectives.<sup>796</sup> In none of the EU documents related to the development co-operation policy in support of Indigenous peoples' folklore are the *means* of protection directly discussed.

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<sup>791</sup> *Ibid.*

<sup>792</sup> *Ibid.*, where it is reported that 'Many Indigenous economies are oriented towards subsistence rather than the market economy'.

<sup>793</sup> *Ibid.*

<sup>794</sup> *Ibid.*, p.6. This is particular affirmed not in relation to expressions of folklore that as we said have not been mentioned but more in relation to the exploitation of natural resources and the application of the Rio Declaration 1992 by its signatories members.

<sup>795</sup> *Ibid.*, p.17.

<sup>796</sup> *Ibid.*, p.16.

The Resolution also requested the Commission to report back to the Council with a review of progress in working with Indigenous peoples. The report presented at the Council June 2002<sup>797</sup> underlined the necessity of a database<sup>798</sup> on Indigenous experiences to identify specific projects tailored to Indigenous peoples' exigencies and priorities. It stressed the need of a methodological approach to this subject.<sup>799</sup>

These outcomes emerged from the questionnaire, returned by eighty-six Delegations of the European Commission in developing countries in 2001, based on the recommendations of the Resolution. It underpinned the importance of Indigenous customary laws to regulate Indigenous peoples' properties and their heritage.<sup>800</sup> Furthermore, the European Commission highlighted the necessity for competent staff, dedicated to serve Indigenous peoples' development issues.<sup>801</sup> The Council Conclusions,<sup>802</sup> based on the Commission Report 2002, were to select a number of pilot countries with EC-funded development programmes to find more concrete ways of including Indigenous peoples as a part of civil society in all phases of the project cycle: partnership, co-operation and consultation.

Specific procedures could facilitate the implementation of programmes in partnership with Indigenous peoples. Efforts should be made to promote capacity building of organisations representing Indigenous peoples. It should also be ensured that reporting on the progress of the implementation of EC policy towards Indigenous peoples is included in the Annual Report on the Implementation of the Community's External Assistance and in the European Union Annual Report on Human Rights.

Following the report from the Commission, the Council adopted the 18<sup>th</sup> November conclusions 2002<sup>803</sup> on issues concerning Indigenous peoples. In these conclusions, the Council recalls its commitment to the 1998 Resolution and invites the Commission and the Member States to continue in its implementation. In particular, the conclusions recommend the selection of a number of pilot countries with EC-funded development programmes where efforts should be made to enforce

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<sup>797</sup> European Communities Commission Report, Brussels, 11.6.2002 COM(2002) 291 final 'A review of progress of working with Indigenous peoples', available at [http://europa.eu.int/comm/external\\_relations/human\\_rights/doc/com02\\_291.htm](http://europa.eu.int/comm/external_relations/human_rights/doc/com02_291.htm)

<sup>798</sup> *Ibid* in the Introduction and at page 3.

<sup>799</sup> *Ibid* p.5.

<sup>800</sup> *Ibid*, p.7.

<sup>801</sup> *Ibid* p.11.

<sup>802</sup> [http://europa.eu.int/comm/external\\_relations/human\\_rights/doc/gac.htm](http://europa.eu.int/comm/external_relations/human_rights/doc/gac.htm)

<sup>803</sup> [http://europa.eu.int/comm/external\\_relations/human\\_rights/hr181102](http://europa.eu.int/comm/external_relations/human_rights/hr181102)

Indigenous peoples participation and capacity building of organisations representing their works.

#### 5.5.4. Considerations on the European Constitutional Treaty

The European Constitutional Treaty has been examined for its high symbolic value and with the purpose of exploring whether a supranational entity could succeed in the harmonisation of those issues which are always regarded as a delicate political matter. In particular, the values and provisions set forth under the Draft Constitution could be conceived as 'best practise' which could possibly grant protection at a supranational level.<sup>804</sup>

The strict territoriality approach of copyright national laws can be mitigated by the introduction of new supra-national elements and values. While the rules of EU internal market are in support of the philosophy that copyright makes economic sense - where the EU legislator still promotes the copyright culture of property value for the benefit of a single author and the copyright industries - the exercise of that right meets new limits. Under the EU Constitutional Treaty, copyright is constitutionally limited when it does not meet the goals of the internal market and when it conflicts with *other important values*. The monopolistic nature of copyright is corrected through the principles of non-discrimination and moral rights. Copyright still remains a property right but with the necessary added touch of respect for human rights and cultural diversity, which come first on the scale of most important European values.

The negative response to the national referendum for the approval of the EU Draft Constitutional Treaty in France and The Netherlands does not leave much room for optimism. Jack Straw prophetically articulated the rude awakening of nationalistic campaigns.<sup>805</sup> Unfortunately, the process of European unification goes along this path.<sup>806</sup> The hope is that the EU Constitutional Treaty motto 'united in cultural diversity' will not be substituted by 'divided by cultural diversity'. It would be a tragic epilogue not only for protection of minorities and their cultures but generally for the mechanisms already in place to assure the growth towards European modernisation.

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<sup>804</sup> J. Shaw 'Europe Constitutional Future' P.L. 2005 p.132 ss.

<sup>805</sup> *Draft Constitution for the European Union* Issued Her, Majesty's Government Series: Command Papers Month: July Paper/Bill no.: CM 5872 ISBN: 0-10-158722-8 Publisher: The Stationery Office Date Published: 2003 p.5.

<sup>806</sup> W. Kingston 'Why Harmonisation is a Trojan Horse' [2004] E.I.P.R. p.447.

## 5.6. Africa - The Hopes of the African Continent to Protect Traditional Cultural Expressions

### 5.6.1. Shared Knowledge and Oral Traditions

Most Indigenous peoples' works of folklore are of an oral nature.<sup>807</sup> These works are based on a common system of shared knowledge among members of a community who are the depository of such knowledge. Traditional cultural expressions usually have a spiritual significance as well as an economic value. The elder members of the community contribute by communicating their cultural knowledge to the select younger members of the community in order to keep their cultural heritage and traditions alive but still within the community.<sup>808</sup>

As it has been already affirmed, a traditional society can be old or new, but all depends on the perspective used to look at the knowledge it produces<sup>809</sup>. Cultural and artistic expressions are passed from generation to generation and each artist adds something new to the preceding one - what is part of an old past, therefore, comes back to life. This is part of a regeneration process moved by artistic creation. Through his/her creation, the artist is making new what has passed; through a dynamic contribution which embraces elements and stories of traditional heritage which are then introduced into a new creation.<sup>810</sup> The positive connotation of traditions based on orality has never been recognised by the Western world, which has always seen the result of the Indigenous creation process as uncultured and non-creative. However, in African countries, many traditional works are based on oral works transmitted from one generation to another through the practice of storytelling.<sup>811</sup>

The Maasai, an African nomadic tribe in between several territories and countries, identifies its culture in oral tradition.<sup>812</sup> Nevertheless, the path towards

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<sup>807</sup> M. Niedzielska, 'Intellectual Property Aspects of Folklore Protection', Copyright, No. 339, at 340, [1980] stating that folklore is 'passed by word of mouth, from memory or visually, from generation to generation within a specific social group which is at once its user and carrier'.

<sup>808</sup> See G.N. Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring, 2004] 21 *Ariz. J. Int'l & Comp. Law* p.192 where the author sustains that 'Knowledge of most Indigenous people, the backbone of collective existence, remains caged in their owners' minds and risks demise with the holder's death'.

<sup>809</sup> G. Dutfield 'Protecting Traditional Knowledge and Folklore' ICTSD-UNCTAD Project on IPRs and Sustainable Development pp.24.-25.

<sup>810</sup> *Ibid.*

<sup>811</sup> See in general J.H. Kwabena Nketia 'Safeguarding Traditional Culture and Folklore in Africa' available at <http://www.folklife.si.edu/unesco/nketia.htm>

<sup>812</sup> See P. Sillitoe 'What, Know Natives? Local Knowledge in Development' [1998] 6 *Social Anthropology* pp.207-09.



recognition of the Masaaï culture, in the sense of empowering the community in selecting which works of folklore should be exploited and which should not, has always failed.<sup>813</sup> Moreover, this community, as many other African traditional communities, has never had the possibility to benefit from any exploitation of their cultural artistic expressions. This has caused great prejudice against the Masaaï community, and also against African countries such as Kenya and Tanzania, where Masaaï tribes are settled.

The reason for the disappearance of many African traditional works can be found in the expropriation of many Indigenous lands, as well as land contamination due to the urban expansions. Many traditional communities have abandoned pastoral farming and agriculture and have settled in urban areas.<sup>814</sup> This change of living customs and conditions is putting at risk the safeguard of folklore. The migration of entire cultures from rural to urban areas was mainly caused by misguided national governmental policy, which did not support traditional agriculture in remote areas of the country.

The result has been that relevant African resources - and in particular traditional agriculture - have been neglected and urban areas have created slums where traditional populations have moved to live in poverty in conditions which represent an affront to their basic rights as human beings'. The next paragraph will explain why the link between folklore and the land, which has already be addressed in the Australian experience, is also central in the African context.

### **5.6.2. Land Issue and Transmigration of Cultures: The Transnational Nature of Most African Folkloric Works**

As observed in the previous paragraph, another problem faced by traditional African communities is the difficulty in finding legal protection of folklore at a national territorial level, since many works of folklore surpass national boundaries. Many traditional African communities move from one region to another, from one country to another. Their style of life follows the one of many Indigenous peoples world-wide: they are not static but rather migrate from one territory to another and from one country to another.

Taking the Masaaï culture as an example, Tarayia describes how the Masaaï people built their villages along the Rift Valley in central and southern Kenya and

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<sup>813</sup>See G. Nasieku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring 2004] 21 *Ariz. J. Int'l & Comp. Law* pp.192-93.

<sup>814</sup> See J. Mugabe 'Intellectual Property Protection and Traditional Knowledge', at para c) iv), issued by African Centre for Technology Studies, Nairobi, Kenya.

northern Tanzania. Like many Indigenous African communities, their economic survival is based on pastoral farming.<sup>815</sup>

The bond with the land, in more generic terms, is very strong for many traditional communities.<sup>816</sup> This issue represents the heart in protecting their cultural heritage within national boundaries.<sup>817</sup> Folklore protection is intertwined with land protection. This is more evident because folklore disappears in those territories where Indigenous peoples have lost the communal knowledge of land.<sup>818</sup> The enforcement of private property by the national legislator introduced an unknown concept for traditional communities, which was not included in 'customary tenure'.<sup>819</sup> The sense of community, necessary to develop traditional cultural heritage and folklore, could no longer be nourished.<sup>820</sup> Moreover, the effect of colonialism on land unification forced many colonies to use a common language - the language of the area's imperial rulers. Thus, traditional communities have been deprived of the cultural diversity in their multiple languages.<sup>821</sup> The promotion of cultural unification without respect of cultural diversity tends to level off diversity of identities. Therefore, the main consequence is the death of traditional cultural expressions.

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<sup>815</sup> G. Nasioku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring 2004] 21 *Ariz. J. Int'l & Comp. Law* p.185, where the author sustains while talking about the Masaai '...pastoralism have been closely linked in east African historical and ethnographic literature'.

<sup>816</sup> See the paragraph 'The dreaming and the Land' in the Australian chapter.

<sup>817</sup> See in general chapter 8 'Land' in Law and sustainable development since Rio, Fao legislative studies publication, Rome 2002, ISSN 1014-6679 at 222 where it is affirmed that '...there is as yet little empirical evidence that individual titling results either in increased productivity or better access to credit. Titling might itself contribute to insecurity of tenure, by raising the spectre of land being lost to outsiders and creditor, and by disrupting locally recognised system without replacing them with other institutions that can or will effectively protect the newly designated rights'. See also para 3.2.2. Strengthening the Land Rights of Indigenous Peoples pp.227-229.

<sup>818</sup> See in general chapter 8 'Land' in Law And Sustainable Development Since Rio, Fao legislative studies publication, Rome 2002, ISSN 1014-6679.

<sup>819</sup> *Ibid.*

<sup>820</sup> G. Nasioku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring, 2004] 21 *Ariz. J. Int'l & Comp. Law* p.187.

<sup>821</sup> 'The Maasai identify themselves as all those who speak the Maa language and uphold the culture of pastoralism. However, a wide variety of dialects exist in the Maa language. Different branches of Maasai peoples are known by different names, though they are basically, all one people.' in G. Nasioku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring, 2004] 21 *Ariz. J. Int'l & Comp. Law* p.188.

### 5.6.3. Africa: The New Colonialism

The African Continent still suffers from the commercial and social effects of colonialism.<sup>822</sup> The negative outcomes of colonialism cannot be underestimated nor the fact that a new form of it is taking shape through the illegal appropriation of artistic, cultural and natural resources by many Western companies and governments.<sup>823</sup> Exploitation represents a new form of colonialism, which is instituted through a new system of rules.<sup>824</sup> African legal systems still contain traces of this colonial experience. New models and concepts, unknown and difficult to accommodate in the African context (for example, the idea of single authorship) were imposed by the colonisers on all African countries. These new legal systems have led to different rules of protection.<sup>825</sup> The main consequence was that, due to the colonial legal systems imposed, African countries slowly abandoned customary laws, which were a more appropriate means of protection for folklore.<sup>826</sup> Copyright laws were introduced in Africa to protect works of Western authors. Traditional African works or African authors<sup>827</sup> were not all covered by copyright protection and were exploited with impunity by the former colonisers.

Development policies of Western countries towards traditional African communities have been designed as aid towards an inferior civilisation. No real

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<sup>822</sup> Despite many African countries reached independence on 1950s and 1960s, the legal systems belonging to the colonial model were not changed. See Adebambo Adewopo: 'The Global Intellectual Property System And Sub-Saharan Africa: A Prognostic Reflection', 33 U. Tol. L. Rev. At 750 -1-3.

<sup>823</sup> G. Dutfield 'Protecting Traditional Knowledge and Folklore' ICTSD-UNCTAD Project on IPRs and Sustainable Development' p.26. The author argues that 'While the misappropriation of TK and folklore are serious matters demanding attention, the most urgent concern is probably their alarmingly rapid disappearance. Protecting Traditional Knowledge and Folklore'.

<sup>824</sup> G. Nasioku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring, 2004] 21 Ariz. J. Int'l & Comp. Law p.198.

<sup>825</sup> J.H. Kwabena Nketia 'Safeguarding Traditional Culture and Folklore in Africa' available at <http://www.folklife.si.edu/unesco/nketia.htm>.

<sup>826</sup> On customary laws applied to folklore see in general P. Kuruk 'African Customary Law and the Protection of Folklore' Vol. XXXVI, No. 2, UNESCO Copyright Bulletin (2002), cfr. N.J. Udombana, 'Articulating the Right to Democratic Governance in Africa' [Summer, 2003] 4 Mich. J. Int'l L. p.1216. The author sustains that 'postcolonial states were mere extensions of the old system, with new methods of divide-and-rule'.

<sup>827</sup> A. Adewopo 'The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection', 33 U. Tol. L. Rev. at 751 recalls the British Commonwealths that introduced the English Copyright Act of 1911. This has been defined as a new colonialism by G. Dutfield 'Protecting Traditional Knowledge and Folklore' ICTSD-UNCTAD Project on IPRs and Sustainable Development. The author states that 'For Africa, the perception seems to be that the continent as a whole is prey to the biopirates' p.24 'Protecting Traditional Knowledge and Folklore' ICTSD-UNCTAD Project on IPRs and Sustainable Development.

study was ever carried out on customary laws regulating works of folklore.<sup>828</sup> Thus, Africa was left to face imposed Western systems in various forms, which did not encompass the exigencies and rules of many ethnic groups. The colonisers applied several legislative means, separating even more a continent already divided prior to colonisation. To draw a comparison with the historical period of the Middle Ages in Europe, it can be said that Africa was divided into small feudal and legislative legal systems, which did not contribute to a sense of unity.

Even following independence, the influence of European traditions on the legal and political structures in most African countries was strongly present. Traditional or indigenous knowledge and practices were not formally recognised or valorised. Further still, they were not protected. The legal frameworks inherited by African countries were very clear when addressing copyright or a protection, recognition and reward given to the works of the author<sup>829</sup> - all African people are affected by the abandoning of their own rules<sup>830</sup> without any solution afforded for their works of art.<sup>831</sup> The memory of Indigenous people who contributed much to the African economy was almost nullified. In depriving them of their cultures and lands, Indigenous peoples have lost 'control of critical areas of the economy',<sup>832</sup> with great damage to the whole African community.

Difficulty in protecting African folklore cannot be found only in the creation of categories adaptable to works resulting from oral traditions.<sup>833</sup> Slavery, colonialism, abandonment of customary laws are some of the causes. Moreover, the shattering of the traditional connections to historical Indigenous lands, the difficult battle for democratisation, the high level of corruption of African leaders, as well as problems of education, back of infrastructures and new technological means, have contributed to the lack of protection for cultural rights of Indigenous peoples in Africa.<sup>834</sup> In the

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<sup>828</sup> See P. Kuruk 'Protecting Folklore under Modern Intellectual Property Regime: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States' [1999] 48 *American Univ. L. Rev.* pp.770-75.

<sup>829</sup> A. Adewopo 'The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection', 33 *U. Tol. L. Rev.* at 751 sustains that '... intellectual property developments in most parts of the African region within this imperialistic pattern'.

<sup>830</sup> See generally P. Kuruk 'African Customary Law and the Protection of Folklore' Vol. XXXVI, No. 2, *UNESCO Copyright Bulletin* (2002).

<sup>831</sup> As already addressed under the chapter on the United States approach notions as ownership, originality, fixation are concept extraneous to Indigenous communities.

<sup>832</sup> See G. Nasieku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring, 2004] 21 *Ariz. J. Int'l & Comp. Law* p.198.

<sup>833</sup> See S. C. Agbakwa 'Reclaiming Humanity: Economic, Social, and Cultural Rights as the Cornerstone of African Human Rights' [2002] 5 *Yale Hum. Rts. & Dev. L.J.* 177 p.193.

<sup>834</sup> *Ibid.*

following paragraphs, the approach of the African Union to the matter of folklore and its protection will be critically studied.

## 5.7. The African Union

The AU was created with the aim to respond to a sense of continental unity to overcome Africa's divisions and the difficulties of operating with different legal systems.<sup>835</sup> The AU is a supra-national organisation composed of member states Its predecessor, the OAU, was developed in the 1960s in the context of the Pan-African movement.<sup>836</sup> The AU supports the efforts of many African states to be independent from previous colonisers as well as their efforts to undertake the path towards democratic governance.<sup>837</sup>

The African Union Act, adopted on July 11 2000, established that the AU should act as a political, economic, and social organisation. This supranational organisation should '...accelerate the process of implementing the Treaty establishing the African Economic Community (AEC) in order to promote socio-economic development of Africa and to face more effectively the challenges posed by globalisation.'<sup>838</sup>

In the following paragraphs it will be argued that a practical approach to the question of folklore is necessary and that the African Union is adopting interesting mechanisms which deserve serious discussion. Foremost, the Intellectual Property Bangui Agreement set by AIPO (African Intellectual Property Organisation) and the African Cultural Convention in the AU context will be analysed.

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<sup>835</sup> Examples of the division in the legislation of sub-saharan Africa are provided by A. Adewopo, 'The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection' [2001] 33 U. Tol. L. Rev. p.750, where the author affirms that in Sub-Saharan Africa there are 'Geo-Political and Juridical Landscape', so called 'Imperial lines'. 'This includes the Francophone and the Anglophone systems of both Western Europe (France and United Kingdom) on the one hand and the Roman-Germanic civil system of continental Europe comprising Portugal, Spain, Belgium and Italy on the other hand.'

<sup>836</sup> The African Union (AU) was inaugurated in Durban, South Africa on July 9, 2002 replacing the Organisation of African Unity (OAU). See Constitutive Act of African Union, July 11, 2000.

<sup>837</sup> N.J. Udombana 'Articulating the Right to Democratic Governance in Africa'[2003] 4 Mich. J. Int'l L. pp.1213-14. 'Following the Addis Ababa Declaration of 1990, on 1999 the OAU carried its democracy crusade to Algiers Declaration which was incentivating many countries to promote independence for the benefit of progress and development' *Ibid* p.1257.

<sup>838</sup> N.J. Udombana 'Articulating the Right to Democratic Governance in Africa' [2003] 4 Mich. J. Int'l L. at note 311.

### 5.7.1. The Protection of Folklore and the African Continental Intellectual Property Initiatives

Before turning to the AIPO intellectual property initiative, and centrally the Intellectual Property Bangui Agreement, it is necessary to observe that in Africa there are two main continental intellectual property organisations: the Organisation Africaine de la Propriété Intellectuelle (OAPI), which covers sixteen French-speaking countries, and the African Regional Industrial Property Organisation (ARIPO) for the fifteen English-speaking countries.<sup>839</sup> These organisations are also the result of the diverse legal background left by colonisers.<sup>840</sup> Both organisations are limited in scope and do not over rule national governments in the general policy regarding intellectual property rights.<sup>841</sup>

However, for the purposes of this research it is interesting to notice that both organisations explicitly recognise the protection of folklore, which is considered as 'created by the national ethnic communities in member states which are passed from generation to generation.' Nevertheless, traditional communities are not considered as the owners of their works of folklore, because folklore is meant to be part of the national heritage. The access to folklore is not free, but its regulation is left to a competent state agency which administers it.<sup>842</sup>

Notwithstanding this approach, the fact that folklore is recognised as something to preserve and protect is already highly innovative. The step forward should have been that of modifying copyright categories as single authorship, originality and fixation to national copyright laws. No changes were made in this direction, despite some devices being introduced to correct this notion.

It is in this climate - created by the need for setting specific rules for folkloric protection and the difficulty of moving away from a national copyright approach - that the African Union tried to build a centralised administration like the African Intellectual Property Organisation. The aim was to provide the African continent

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<sup>839</sup> See respective web sites and M. Leetsi and T. Pengelly 'Capacity Building for management of Intellectual Property Right' pp.57-8, in *Creativity, Innovation and Intellectual Property Rights, UNDP Cooperation South* [2002] ISSN 0259-3882.

<sup>840</sup> A. Adewopo 'The Global Intellectual Property System and Sub-Saharan Africa: A Prognostic Reflection' [2001] 33 U. Tol. L. Rev. p.766.

<sup>841</sup> M. Leetsi and T. Pengelly 'Capacity Building for management of Intellectual Property Right' at 58, in *Creativity, Innovation and Intellectual Property Rights, Creativity, Innovation and Intellectual Property Rights, UNDP Cooperation South* [2002] ISSN 0259-3882.

<sup>842</sup> P.Kuruk 'Protecting Folklore under Modern Intellectual Property Regimes: A Reappraisal of the Tensions between Individual and Communal Rights in Africa and the United States' [1999] 48 *American University Law Review* pp.812-14.

with more uniform legislation for the protection of African cultural heritage and works of folklore.<sup>843</sup>

### **5.7.2. Towards Intellectual Property Harmonisation and Protection of Folklore - The Bangui Agreement.**

Under the patronage of the African Union, many African countries signed the revision of the Bangui Agreement,<sup>844</sup> relating to the creation of an African Intellectual Property Organisation. The purpose was to intertwine intellectual property rules with development issues in order to create a uniform application of intellectual property rules for the whole African continent.<sup>845</sup> The scope of this organisation is also to enforce and protect those African values and traditions that are expressed through literary and artistic property<sup>846</sup> and also through oral works.<sup>847</sup>

Folklore is defined as part of a state cultural heritage, as 'the totality of traditions and literary, artistic and religious, scientific, technological and other productions of the communities transmitted from generation to generation'.<sup>848</sup> This provision re-echoes Section 18 of the Tunis Model Laws (1976), which stated that 'all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or ethnic communities, passed from generation to generation and constituting one of the basic elements of the traditional cultural heritage.' However it differs in that Indigenous peoples are not mentioned in the Bangui Agreements.

Folklore protects both tangible and intangible works (from beliefs to monuments)<sup>849</sup> and, in this respect, the Bangui Agreement provides different legal

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<sup>843</sup> A. Adewopo in 'The Global Intellectual Property System And Sub-Saharan Africa: A Prognostic Reflection' [2001] 33 U. Tol. L. Rev. p.752 recalls how developing countries as Africa started to understand the importance of unity in addressing the issue of intellectual property especially after the Stockholm Protocol of 1967,,which aimed at giving them greater access to copyright materials.

<sup>844</sup> The Bangui Agreement of 2 March 1977 was revised 24 February 1999. Text available at the web-site of the African Union <http://www.africa-union.org/home/Welcome.htm>. 15 Countries have currently adhered to the Agreement. See <http://oapi.wipo.net/ratification.html>.

<sup>845</sup> Preamble at 14-15 of the (Bangui Agreement, Creation of an African Intellectual Property Organization as revised on February 24, 1999, Bangui Agreement of March 2, 1977, Text available at the web-site of the AIPO and lett (d)Title I art. 1 at 17. See M. Blakeney, 'The Growth of IP Capacity in Developing Countries', p.3 paper available on CD, Fordham IP Conference, 2003.

<sup>846</sup> Title I Article 1 lett b) at 17.

<sup>847</sup> Annex VII of the Bangui Agreement, as amended on 1999, contains provisions enacting cultural heritage and folklore is uphold in this section under Article 67.

<sup>848</sup> Article 68 para 1.

<sup>849</sup> Article 67.

means than the Tunis Model Laws.<sup>850</sup> Therefore, no distinction is made over tangible and intangible works of folklore.

#### **5.7.2.1. Protection of Folklore in the Words of the Charter - A New Concept of Authorship**

Important rules are set in Annex II of the Charter related to literary and artistic property and under Annex VII which is devoted to the protection of Cultural Heritage. In particular Article one of Annex II sets basic rules of copyright protection. It is worth noticing that copyright rules are kept separate from rules dedicated to related rights (performances, phonogram productions, broadcasting).<sup>851</sup> The same thing happens with those concerning the protection and promotion of cultural heritage.<sup>852</sup> This distinction is made with the intent of underpinning priority actions and disciplines to be applied to both classical works of an author and traditional African works of art.<sup>853</sup>

The subject matter of protection, the traditionally literary and artistic work of the mind,<sup>854</sup> can also be conceived as incorporeal property. Albeit the Charter is infused with common law heritage, this tends to successfully mediate between the common law approach and the continental approach to author's rights. For this reason, economic rights<sup>855</sup> are recognised without infringing on the moral rights of the author.<sup>856</sup>

Many exceptions to the application of economic rights are listed in the Charter. The Charter, in fact, seems to care more about the author's moral rights than about the economic rights of authorship.<sup>857</sup> Although the terminology is not appropriate - because folklore cannot be addressed as a mere 'property' - its protection could benefit from the concept of authorship extended to cover immaterial property. In

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<sup>850</sup> See A. Lucas-Schoetter, 'Folklore' in *The protection of Traditional Knowledge and Folklore*, Silke Von Lewinski ed. (Kluwer Law International 2004) p.238.

<sup>851</sup> Annex VII Article 1 General, respectively lett a) and b).

<sup>852</sup> *Ibid* lett. c).

<sup>853</sup> While Section I disciplines copyright and related rights, Annex VII is all dedicated to the protection of works of cultural heritage. See See A. Lucas-Schoetter, 'Folklore', in *The protection of Traditional Knowledge and Folklore*, Silke Von Lewinski ed. (Kluwer Law International 2004) p.237.

<sup>854</sup> Chapter II Subject Matter of Protection Article 4 (1) Subject Matter of Protection: General p.12.

<sup>855</sup> *Ibid*, Article 9 p.123.

<sup>856</sup> *Ibid*, Article 8 p.122.

<sup>857</sup> See the whole Chapter IV Limitations on Economic Rights pp.123-24-25.



fact, traditional cultural expressions are expressly recognised in the subject matter of copyright, as mentioned above.<sup>858</sup>

The necessity of promoting folklore through specific provisions characterised the African union approach to the matter. In Africa there are many works which cannot be characterised by originality and ownership in the sense of copyright. They also cannot be covered by. Moreover, many works do not belong to a single author but are the result of a collective effort (mainly community based works).<sup>859</sup> For this reason the Bangui Agreement also distinguishes between collective works,<sup>860</sup> works of joint authorship,<sup>861</sup> and composite works. Within the area of joint authorship<sup>862</sup> each autonomous work must be attributed to a single author, while a collective work is produced by a legal person.<sup>863</sup> This can be applied to Indigenous peoples as collective entities and may provide an answer to the problems created by strict copyright application of single authorship.<sup>864</sup> In particular Article 30 set forth the elements to recognise that a work can be attributed to a legal or natural person who is recognised as the owner of the work if he/she commissioned the work from an artist under his/her responsibility. The only problem results from the necessity of publication. This seems to be in contradiction with the provision which limits fixation and which recognises only creation as general criteria for copyright protection.<sup>865</sup>

Another interesting category is that created by *composite work*.<sup>866</sup> This category can help to reach protection of new works based on pre-existing works, which many works of folklore are.<sup>867</sup> This article should be read jointly with article 6

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<sup>858</sup> Article 5 (1) (xii).

<sup>859</sup> J.H. Kwabena Nketia, 'Safeguarding Traditional Culture and Folklore in Africa' available at <http://www.folklife.si.edu/unesco/nketia.htm>.

<sup>860</sup> Article 30 Ownership of Rights in Collective Works p.128.

<sup>861</sup> Annex VII Article 2 lett (iv) p.120 And Article 23 p.127 and Article 29 p.128.

<sup>862</sup> Joint authorship and collective works have already been examined under the U.S. chapter.

<sup>863</sup> Annex VII Article 2 lett v) p.120.

<sup>864</sup> To the communal creation process of African folklore A. Adewopo, 'The Global Intellectual Property System And Sub-Saharan Africa: A Prognostic Reflection' [2001] 33 U. Tol. L. Rev. p.756 'The essence of intellectual property is to create property rights in the subject matter of protection - a notion diametrically opposed to the traditional African concept underlying those types of creativity'.

<sup>865</sup> The Tunisi Model Laws, signed by some of same countries African Signatory Sates of the Bangui Agreement, was not requiring fixation for folkloric works and consequently no duration: folkloric works were protected without limit of time. See Section 18 Tunisi Model Laws and Paethorpe at 41.

<sup>866</sup> Annex VII Article 2 lett vi) p.120.

<sup>867</sup> See article 6 (1) (ii) p.122.

(1) (ii), which extends the subject matter of protection to expressions of folklore.<sup>868</sup> Strict copyright rules are abandoned to favour traditional works. Fixation is no longer a prerequisite for protection.<sup>869</sup> The creative work is protected by the simple fact of its creation.<sup>870</sup> In spite of that, the duration requirement is still 70 years after the author's death, whereas moral rights become unlimited in time.<sup>871</sup> In relation to economic rights of authorship, a 'national collective rights administration'<sup>872</sup> will act as a watchdog to safeguard and enforce those rights. This 'collective agency' will act at a national level, following rules and provisions set nationally.<sup>873</sup>

#### **5.7.2.2. Paying Public Domain and Liability Regimes: What About the Right of Traditional Communities?**

The introduction of a collective state agency enables the treatment of folklore as a public issue. It is considered as originating from Indigenous communities. This system was implemented following the Tunis Model Law Provisions, which established that the economic and moral rights of folkloric works are to be administered by a competent state authority. Nevertheless, the Tunis Model Law refers to Indigenous peoples and the necessity of involving them in the participation process.

The fact that many works of folklore are in the public domain raises the question whether the state authority should have more power in regulating Indigenous peoples' rights, as well as in building mechanisms which exclude traditional communities from the participation process. The AIPO Charter has adopted what can be defined as a liability regime.<sup>874</sup> In a liability regime, prior authorisation from the author is not required, and the user can get immediate access to the work, according to the principle 'use now pay later'.<sup>875</sup> If it is true that a

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<sup>868</sup> *Ibid.*

<sup>869</sup> *Ibid.*

<sup>870</sup> Annex VII Art. 4 (2) at 121.

<sup>871</sup> The Tunis Model law auspices that the protection granted to folkloric works is unlimited.

<sup>872</sup> Chapter V Term of Protection Article 22 p.127.

<sup>873</sup> Part Four, Collective Administration Article 60 p.138.

<sup>874</sup> A liability regime is part of the positive protection. 'Positive protection refers to the acquisition by the TK holders themselves of an IPR such as a patent or an alternative right provided in a *sui generis* system. Defensive protection refers to provisions adopted in the law or by the regulatory authorities to prevent IPR claims to knowledge, a cultural expression or a product being granted to unauthorised persons or organisations.' G. Dutfield 'Protecting Traditional Knowledge and Folklore' June 2003, Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1 Published by International Centre for Trade and Sustainable Development (ICTSD) p.28. The author sustains at pages 8, 29 that rules of liability should work jointly with property regimes.

<sup>875</sup> *Ibid.*, p.7.

liability regime does not respond to the copyright proprietary logic and that it can be considered in this respect a sort of *sui generis* norm, it is also true that if proper mechanisms do not intervene, traditional communities do not benefit.<sup>876</sup>

The introduction in the Charter of a collective agency which has the duty to gather fees for works of folklore being used, does not diminish the fears of Indigenous communities having their rights over their works go unrecognised. Notwithstanding the pro-positive character of this system, which requires prior authorisation, it is still disputable whether the state should interfere between the community and the users. From a theoretical point of view, prior authorisation should be first asked of the Indigenous communities. However, on the practical side, there is an understandable difficulty that each user will face in demanding the right to access from each individual holder, especially because it is also difficult to establish who has the power within the community to allow use of folkloric works. Furthermore, three exceptions to the system of prior authorisation are laid down under Article 74. In the following cases there is no need to ask permission from the competent authority for the works that are employed as follows:

- use for teaching;
- use as illustration of the original work of an author on condition that the scope of such use remains compatible with honest practice;
- borrowings for the creation of an original work from one or more authors;

The negative impact of these exceptions on traditional communities' folklore is mitigated by the provisions set under Article 73, 74.<sup>877</sup> These establish that both reproductions and performances<sup>878</sup> are prohibited unless duly authorised by the competent authority.

The payment of a 'relevant royalty',<sup>879</sup> imposed by the state authority to the users of folkloric works, does not guarantee that the community to whom folklore belongs will benefit of some of these royalties. It is most likely that the state will retain the whole share of the profits, through the collective agency in charge of

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<sup>876</sup> *Ibid.* A *sui generis* system based on such a principle has certain advantages in countries where much of the TK is already in wide circulation but may still be subject to the claims of the original holders.

<sup>877</sup> A. Lucas-Schoetter 'Folklore' in *The protection of Traditional Knowledge and Folklore*, Silke Von Lewinski ed. (Kluwer Law International 2004) p.237. The author defines these provisions as the most important of the Charter.

<sup>878</sup> The Charter provides identical protection for both tangible and intangible works. See A. Lucas-Schoetter, 'Folklore', in *The protection of Traditional Knowledge and Folklore*, Silke Von Lewinski ed. (Kluwer Law International 2004) at note 380.

<sup>879</sup> Article 59 p.137.

collecting these revenues. There is no acknowledgment of traditional communities' right to claim some of this economic return. In spite of that, the provisions of the Tunis Model Laws refer to the possibility of employing the royalties for the benefit of the creators and performers of works of folklore. Therefore, the traditional community will be rewarded and motivated to keep its traditions alive, rather than promoting a generic culture of folklore.<sup>880</sup>

However, there is a rational explanation for state intervention: works of folklore in Africa, as already said, belong to different ethnic communities, even within one country. It would be difficult for a national authority to identify all the works of folklore originating within a country. Nevertheless, the state should carry out intensive work and research to identify and collect such data. Moreover, it should foster community development through intellectual property revenues. Despite the goal of devolving royalties derived by the commercialisation of expressions of folklore to 'welfare and cultural purposes',<sup>881</sup> the control over this is still not well regulated. Thus, it leaves room for discretionary implementation.

Folklore is part of the cultural heritage of a nation but it also belongs to traditional communities. The role of the national authority should be that of regulating at a national level the dimension of folklore and establishing specific criteria to reward traditional communities for those folkloric works which are commercialised. The right of the state should not be opposed to that of traditional communities. On the contrary, co-operative behaviour should be enacted to enforce laws which could be beneficial for both the country and the traditional communities.

As outlined above,<sup>882</sup> collective agencies set up by the state or a private authority might be beneficial '....to reduce transaction and enforcement costs'; however 'considerations of economic efficiency should not be the only criteria for designing an effective and appropriate sui generis system'. The role of the state and

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<sup>880</sup> A system in which the State rewards the community is PERU'. The Defence of Competition and Intellectual Property (INDECOPI) enacted a system to protect the collective knowledge of Indigenous peoples of that country. G. Dutfield 'Protecting Traditional Knowledge and Folklore' June 2003, Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1 Published by International Centre for Trade and Sustainable Development (ICTSD) p.46.

<sup>881</sup> Article 59 (2) (3) p.137. See also G. Dutfield Protecting Traditional Knowledge and Folklore June 2003, Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1 Published by International Centre for Trade and Sustainable Development (ICTSD) p.7.

<sup>882</sup> 'TK holders and communities will be its users and beneficiaries. They will not be interested in a system that does not accommodate their world views and customs but rather imposes other norms with which they feel uncomfortable and wish to have no part of' G. Dutfield 'Protecting Traditional Knowledge and Folklore' June 2003, Intellectual Property Rights and Sustainable Development UNCTAD Issue Paper No. 1 Published by International Centre for Trade and Sustainable Development (ICTSD) p.8.

that of competent intellectual property authorities should be neutral 'guarantor' between traditional communities and the users of folklore. Overall, the AIPO Charter establishes a positive protection rather than a defensive one. It is a courageous instrument, which tends to enforce effective and positive rules of protection rather than to preserve and promote folklore.<sup>883</sup>

### 5.7.3. A Cultural Charter for Africa

The Organisation of the African Unity has encouraged the adoption of an African Cultural Charter (together with the adoption of the Bangui Agreement),<sup>884</sup> which aims to protect and foster African cultural heritage and, above all, works of African folklore.<sup>885</sup>

The political framework beneath the Charter is meant to strengthen the capability of the African Union to influence member state' policy as regards African artistic and cultural works, in order to create more harmonious and uniform legislation.<sup>886</sup> In relation to works of folklore, the Charter elevates works of a collective nature, which are based on orality,<sup>887</sup> to creative works.<sup>888</sup> African states should not discriminate against works of communal creation. On the contrary, they should boost effective measures and policies to favour collective methods of creation as well as individual authorship.<sup>889</sup> The Cultural Charter constitutes an important achievement: it is the first time that Africa opens up to a common sense of

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<sup>883</sup> A. Lucas-Schoetter, 'Folklore' in *The protection of Traditional Knowledge and Folklore*, S. Von Lewinski ed. (Kluwer Law International 2004) p.238.

<sup>884</sup> The draft convention was adopted on 5 July, 1976 in Port Louis, Mauritius and came into force on 19 September, 1990. In alphabetical order the countries which signed and almost all ratified the Convention are Algeria, Angola, Benin, Niger, Burkina Faso, Burundi, Cameroon, Congo, Djibouti, Egypt, Ethiopia, Ghana, Guinea, Guinea-Bissau, Kenya, Libya, Madagascar, Malawi, Mali, Mauritania, Mauritius, Morocco, Niger, Nigeria and Rwanda. Text available at <http://www.africa-union.org/home/Welcome.htm>

<sup>885</sup> In the preamble is stated the intent of the African Unity to create a basic set of rules and principles to protect African cultural works.

<sup>886</sup> The Organisation of African Unity 'The Cultural Charter for Africa' Charter of Africa at page 4 is affirmed that '...common determination to strengthen understanding among our peoples and cooperation among our States in order to meet the aspirations of our peoples to see brotherhood and solidarity reinforced and integrated within a greater cultural unity which transcends ethnic and national divergences.'

<sup>887</sup> PART III National Cultural Development 1. Priorities disciplines respectively at lett (b) and d) oral and artist cultures.

<sup>888</sup> See Article 7. The African States recognise that the driving force of Africa is based more on development of the collective personality than on individual advancement and profit, and that culture cannot be considered as the privilege of an elite p.8.

<sup>889</sup> Article 23. Part VII. The Role of Governments in Cultural Development Chapter VI – Assistance to Artistic Creation.

respect, protection and promotion of African cultural rights crossing the borders of national countries' strategies.<sup>890</sup> Thus, the protection for cultural heritage and folklore is envisaged with the intent of reaching a sense of unity, which has long been undermined by Western colonialism and its 'cultural domination'.<sup>891</sup>

Overall, despite different historical, ethnic and religious backgrounds, many African countries have committed themselves to finding a common and political solution against the threat of the illegal global exploitation and misappropriation of common cultural heritage.<sup>892</sup> African states are finally aware that only through the preservation and comprehension of the value of cultural diversity will it be possible to turn the page on wars and poverty.

### **5.7.3.1. Preserving Identities in Cultural Diversity: The Motto of the African Union**

The African continent is, then, shaped by many diverse ethnic and tribal backgrounds. Regions and sub-regions emerged within single nation states. This separatism results from natural and anthropological reasons related to cultural diversity, as well as from the unfavourable outcomes of colonialism.

The hope of the legislator of the African Cultural Charter is that a sense of unity can be reached through the elevation of cultural diversity. The Charter is inspired by the feeling that cultural diversity is not bad per se and, as has been demonstrated with the European Union, it can turn out to be a great source for modern democracy and sustainable development.<sup>893</sup> The way to overcome the cultural distress created by the post-colonialist era is definitely to spread the importance of cultural diversity as a basic value for peace and democracy.<sup>894</sup> Among other sectors, traditional cultural expressions must be fully promoted and protected

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<sup>890</sup> The full text of the Charter is available at [http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Cultural\\_Charter\\_for\\_Africa.pdf](#) In the preamble is possible to read that '... all cultures emanate from the people, and that any African cultural policy should of necessity enable the people to expand for increased responsibility in the development of its cultural heritage' p.2.

<sup>891</sup> The Organisation of African Unity 'The Cultural Charter for Africa' available at [http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Cultural\\_Charter\\_for\\_Africa.pdf](http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Cultural_Charter_for_Africa.pdf) at page 3. And lett a) and lett d) PART I Aims, Objectives And Principles Article 1 p.4.

<sup>892</sup> See also lett. h) of the Charter.

<sup>893</sup> See Article 3, 4 and 5 at p.5. In particular Art. 4 states that 'The African States recognise that African cultural diversity is the expression of the same identity; a factor of unity and an effective weapon for genuine liberty, effective responsibility and full sovereignty of the people'. On the issue of democracy in Africa see in general J. Kpundeh 'Democratization in Africa: African Voices', African Views [1992]12.

<sup>894</sup> *Ibid.* See art 2 in particular lett a) and e) at 5. See World Bank *Global Economic Prospects and the Developing Countries 2002: Making Trade Work for the World's Poor* 2001 Washington DC. Available at <http://www.worldbank.org/prospects/gep2002/full.htm>.

in formal state structures in order to reflect the importance of traditional communities and artistic heritage.<sup>895</sup> This will allow African countries to establish for themselves a new position of strength in the globalised world.

In addition, information and modern technology<sup>896</sup> are highlighted among the main obstacles to the achievement of a common cultural protection for African folklore. On the whole, the Charter implies that it could be easier to develop a cultural framework for Africa through modern means of communication.<sup>897</sup> These could help to limit illegal exploitation of folklore, while promoting national library systems and databases.<sup>898</sup>

In spite of existing differences, the important appraisal of a sole identity demonstrates that in Africa, like in Europe, common values can bring people together towards agreed solutions.<sup>899</sup> Strong political implications exist behind this approach: the Charter endorses the creation of 'common values' also to be found in traditional cultural and artistic production, a grassroots requirement for human dignity.<sup>900</sup> Thus, it might be possible to create a sense of political unity within the several ethnic, culturally and linguistically diverse African groups, at a national and supranational level.<sup>901</sup>

As stressed in the objectives of the Charter, this sense of African unity will contribute, furthermore, to create a better and more responsible relationship with the international community in the field of cultural co-operation.<sup>902</sup> The Charter does not reject progress and foreign trade for African cultural works. On the contrary, it aims to achieve it through an intelligent balance of multiple factors, primarily, through a good relationship among African states. Without this 'internal' and 'regional' co-operation, the external enemy of illegal exploitation of African artistic and cultural works of folklore cannot be defeated. Development and positive globalisation for the African economy and African countries should be achieved through a sensitive

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<sup>895</sup> *Ibid.*

<sup>896</sup> *Ibid* art. 2 lett. d).

<sup>897</sup> See in particular Art. 21 PART VI Use of Mass Media p.11.

<sup>898</sup> See the whole Art. 22 p.11.

<sup>899</sup> *Ibid.* '... the affirmation of cultural identity denotes a concern common to all peoples of Africa' p.3.

<sup>900</sup> *Ibid*, Part I Aims, Objectives And Principles Article 1 at lett.d).

<sup>901</sup> *Ibid.* '...that African cultural diversity, the expression of a single identity, is a factor making for equilibrium and development in the service of national integration.' At 3. See also PART I Aims, Objectives and Principles Article 1 at 4 lett. e).

<sup>902</sup> *Ibid.*, see lett. f).

policy. Common objectives and awareness of problems related to cultural exploitation of Indigenous peoples' works represent the key to making progress. Moreover, it helps to explain how legal protection for traditional cultural expressions should be conceived.<sup>903</sup> Democracy and respect are necessary to achieve the objectives laid down in the Charter<sup>904</sup> since they are indispensable elements for cultural creation.<sup>905</sup>

### **5.7.3.2. How to Protect Works of Folklore within the African Context? - Possible Solutions and the Copyright Dimension**

As critically analysed above, the AU promotes some solutions which could place African works of folklore within the framework of the African cultural heritage. That policy must be supported by other important mechanisms which should interact and be linked with each other. Primarily, it will be extremely difficult to set durable and effective legal means of protection without the existence of a culture and enhancing education,<sup>906</sup> which should promote the relevant meaning of folkloric works and enhance respect for traditional communities. For the above reasons, the Cultural Charter takes into account the necessity of training to raise awareness about<sup>907</sup> TCEs - especially among young people.<sup>908</sup>

The Charter promotes actions intended to enforce capacity building and to raise awareness of the importance of works of folklore. These initiatives should be especially addressed to those people who are responsible for ensuring that traditional cultural African works are protected.<sup>909</sup> The use and respect of the multiple African languages has become part of the working plan.<sup>910</sup> Cultural diversity expressed in oral and unwritten traditional works of folklore will survive also thanks to a multilingual environment.

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<sup>903</sup> As affirmed under art. 6 lett b) 'cultural development' should be integrated in 'economic and social development' policy.

<sup>904</sup> Respectively lett c) and b) of Art. 2 p.5.

<sup>905</sup> Art 2 *Ibid.* lett b).

<sup>906</sup> Articles 15 and 16. African governments will have to pay special attention to the growing importance of life-long education in modern societies. See also on the issue of peoples education to the correct use and meaning of intellectual property rights, Copyright bulletin UNESCO Publication Vol. XXXV, No. 1, 2001 at para 19 'Promotion of teaching of copyright and neighbouring rights at the university'.

<sup>907</sup> Article 12 p.9.

<sup>908</sup> Chapter III – The Need for Active Participation by Youth in National Cultural Life p. 9 art. 9-10-11.

<sup>909</sup> See Art. 6 and 8 p.8 of the Charter.

<sup>910</sup> Part V The Use Of African Languages p.10.



Copyright legislation is also considered by the Charter as another possible way to achieve protection of works of folklore.<sup>911</sup> However, the words of the Charter are still weak when indicating the path that copyright laws should follow in achieving that protection. Copyrightable works are all works that 'give spiritual and mental pleasure'.<sup>912</sup> The Charter does not give any details, nor does it explore the copyright dimension of folkloric works. It asserts that a protection exists, but does not state elucidate how to enforce it. This is a major limit of the Charter, which aims are more on cultural grounds: a general contribution to raise awareness on the importance of traditional cultural works among African citizens.

Copyright is seen as the instrument to achieve protection for works of folklore. In particular, it is endorsed as a collective management of rights. The Charter seems to underpin the birth of collective societies, which must balance private ownership and the public right of access to the works of an author. The moral rights of the author, which are not significantly addressed by the individual rights relationship, are also a matter of concern.<sup>913</sup> In this Charter, copyright is not seen as an obstacle to the protection of communal works, and the dichotomy between the commercial and spiritual values of folkloric works is left without a solution.

#### **5.7.4. Other Solutions between Defensive and Positive Protection: Development Co-Operation, Education, New Technological Means of Communication, Customary Laws and the Fight against Corruption**

Other possible solutions not explicitly recalled by the Cultural Charter are nonetheless necessary to create a balanced protection for folklore. As observed previously, protection of folklore could be achieved through a policy<sup>914</sup> that takes into account intellectual property means as well as co-operative development policy. Regarding the latter, the African Union established an African technical co-operation programme.<sup>915</sup> In spite of not being a development initiative especially designed for Indigenous peoples, such as the one enforced by the EU, it shares the same views

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<sup>911</sup> Chapter VII article 24 p.12.

<sup>912</sup> Chapter VII article 25 p.12.

<sup>913</sup> Chapter VII Article 28 p.13.

<sup>914</sup> K.E. Maskus and J.H. Reichman 'The Globalisation of Private Knowledge Goods and the Privatisation of Global Public Goods' [June 2004] JIEL p.279 where it is affirmed that 'Open trade and investment regimes work best to encourage development and structural transformation where markets for information and technology transfer are competitive in ways that permit innovation, learning, and diffusion to flourish. Put differently, for poor countries to take advantage of globalisation opportunities, they need to absorb, implement, and even develop new technologies.'

<sup>915</sup> This has been adopted in Kampala on 18th August 1997.

regarding economic sustainability and main objectives, such as eradication of poverty.

First, when discussing folklore as material and immaterial property or in terms of the duty of the state to regulate the rights between traditional communities and the users, one should also remember that in Africa it is essential to envisage a policy which teaches people to respect, protect and promote folklore as part of the African cultural heritage.<sup>916</sup> Second, traditional African communities should be encouraged to take the lead in the protection of their rights and cultures with a sense of common consciousness<sup>917</sup> as regards their capacity for producing cultural works which have an impact on the entire world economy and not only on the economic growth of their traditional communities and countries.<sup>918</sup> Following this, Indigenous communities need to organise themselves in networks that can enable the exchange of ideas and experiences, building their own capacities through education and benefits offered at a national, supranational or international level.<sup>919</sup>

The importance attached to collecting data and information on traditional cultural expressions in order to prevent the loss of folkloric knowledge should not, then, be underestimated. A rapid growth in the information and technological means of communication should be pursued to achieve that goal. Mechanisms should be adjusted in favour of traditional communities, and the right of access and information should be sought only through authorisation of the rights holders or of those acting on their behalf.

Furthermore, more consideration should be given to those communities which have traditional cultural expressions of a sacred, secret or symbolic nature, and cannot therefore be translated into fixed forms. State and supranational institutions, as well as non-profit organisations, should not be mere spectators but should collaborate with Indigenous communities and provide them with support and

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<sup>916</sup> T. Pengelly *Technical Assistance for the Formulation and Implementation of Intellectual Property Policy in Developing Countries and Transition Economies- Intellectual Property Rights & Sustainable Development- Issue Paper No. 11, International Centre for Trade and Sustainable Development (ICTSD) November 2004 paragraph 5.7 pp.35- 6.*

<sup>917</sup> G. Nasieku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring 2004] 21 *Ariz. J. Int'l & Comp. Law* p.219.

<sup>918</sup> *Ibid*, p.220. 'The Maasai people contribute immensely to the Kenyan economy in a range of industries including arts and crafts, tourism, advertising, and film'.

<sup>919</sup> P. Kuruk 'African customary law and the protection of folklore', Vol. XXXVI, No. 2, UNESCO Copyright Bulletin 2002 p.18.

advocacy to enable them to express their views on how to regulate their traditional works nationally, continentally and internationally.<sup>920</sup>

Another way to foster protection for works of folklore is through the implementation of customary laws. Customary laws represent social norms of a dynamic and not static nature; they are made to regulate group relationships within the community.<sup>921</sup> They correspond to Indigenous customs and sets of rules which diverge between different ethnic and tribal backgrounds.<sup>922</sup> Therefore, '[they] cannot be wished away like a bad omen'.<sup>923</sup>

As many works of folklore, customary laws are mainly unwritten rules<sup>924</sup> and their sanctions are mainly based on the relationship between single members of the community and the community itself.<sup>925</sup> Customary courts in fact apply sanctions that have a meaning only for the members of the community<sup>926</sup> and this can cause some problems for their enforcement on outside members. Despite these limitations, customary laws should be used in protecting folklore.<sup>927</sup> Therefore, customary laws should be known and identified, and there should be public awareness on their legal means.<sup>928</sup> This would also help to have a better knowledge of traditional works and of the community from where they originated.

The application of customary law could be done either by statutory courts or by customary law tribunals.<sup>929</sup> What it is important is the correct interpretation of the laws which can be achieved only through a good knowledge of their systems.

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<sup>920</sup> *Ibid*, p.220. 'Government and non-governmental organizations should encourage and support policies that enhance the viability of pastoralist, as it is a major factor in the economy of the Maasai community. This has been adopted in Kampala on 18th August 1997 national and district administration, so as to strengthen the Maasai culture and way of life for the community'.

<sup>921</sup> P. Kuruk 'African Customary Law and the Protection of Folklore', Vol. XXXVI, No. 2, UNESCO Copyright Bulletin 2002 p.37.

<sup>922</sup> *Ibid*, p.6.

<sup>923</sup> G. Nasieku Tarayia 'The Legal Perspectives of the Maasai Culture, Customs, and Traditions' [Spring 2004] 21 *Ariz. J. Int'l & Comp. Law* p.204.

<sup>924</sup> *Ibid*.

<sup>925</sup> UNDP *Human Development Report* 2004, 'Cultural Liberty in Today's Diverse World', at paragraph 'Policy on customary law and legal pluralism' p.57.

<sup>926</sup> *Ibid*, p.25 and pp.37-8. This kinship right can allow the community to impose sanctions that have moral or social nature.

<sup>927</sup> *Ibid*, p.25.

<sup>928</sup> S.L. Pinel and M.J. Evans 'Tribal Sovereignty and the Control of Knowledge', in T. Greaves (ed.), *Intellectual Property Rights For Indigenous Peoples: A Sourcebook* (Oklahoma City: Society for Applied Anthropology 1994).

<sup>929</sup> P. Kuruk 'African Customary Law and the Protection of Folklore', Vol. XXXVI, No. 2, UNESCO Copyright Bulletin 2002 at 18.

Nowadays, customary laws have grown in importance because it has been finally understood that some issues like folklore could be regulated almost exclusively through them if they are not in so much contrast with the rules set at a statutory national level.<sup>930</sup>

This recognition of Indigenous communities' laws should be enforced within a national policy together with laws established to respect their cultural distinctiveness and to protect the results of their cultural and artistic process.<sup>931</sup> This policy should be accompanied by the fight that must be undertaken in many African countries against corruption among state officials and governmental authorities. The African continent has specifically highlighted this battle through a Convention<sup>932</sup> which promotes principles of transparency and fair justice and proclaims the abandonment of corruption. In fact, corruption, in particular of leaders, is endemic in Africa. This also creates obstacles to the protection of traditional cultural expressions.<sup>933</sup>

Finally, a development co-operation policy<sup>934</sup> should not export models valid for other countries and situations but rather should promote a civilisation based on shared values, cultural diversity and solid democratic institutions.<sup>935</sup> Moreover, co-operation should take into account the human rights of the beneficiaries<sup>936</sup> and centrally the Indigenous communities. The state and supranational authorities should have only a mediation role.<sup>937</sup>

## 5.8. Conclusion

It is difficult to predict which path the protection of works of folklore will take in the future. Global information, diminishing resources, international trade, and

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<sup>930</sup> *Ibid*, p.10.

<sup>931</sup> *Ibid* pp.194-95.

<sup>932</sup> African Union Convention On Preventing And Combating Corruption Adopted by the 2nd Ordinary Session of the Assembly of the Union Maputo, 11 July 2003, available at [http://www.africaunion.org/Official\\_documents/Treaties\\_%20Conventions\\_%20Protocols/Convention%20on%20Combating%20Corruption.pdf](http://www.africaunion.org/Official_documents/Treaties_%20Conventions_%20Protocols/Convention%20on%20Combating%20Corruption.pdf).

<sup>933</sup> S.C. Agbakwa 'Reclaiming Humanity: Economic, Social, And Cultural Rights As The Cornerstone Of African Human Rights' [2002] 5 Yale Hum. Rts. & Dev. L.J. p.196.

<sup>934</sup> The New Partnership for Africa's Development (NEPAD) was created on October 23, 2001.

<sup>935</sup> UK Commission of Intellectual Property Rights, at 25. Nsongurua J. Udombana, 'Articulating the Right to Democratic Governance in Africa' [Summer 2003] 4 Mich. J. Int'l L. p.1230.

<sup>936</sup> C.M. Tucker 'Regional Human Rights in Europe and Africa: A Comparison' [1983] 10 Syracuse J. Int'l L. & Com. p.162.

<sup>937</sup> Nsongurua J. Udombana 'Articulating the Right to Democratic Governance in Africa' [Summer 2003] 4 Mich. J. Int'l L. p.1241.

expropriations of lands are harming Indigenous populations considerably, with great prejudice against their traditional cultural expressions. State laws and their territoriality copyright provisions have failed in approaching a matter which goes beyond national boundaries. Therefore, it is desirable that multilateral agreements could promote major consensus and generally applicable solutions.<sup>938</sup> The nature of folklore itself is characterised by works that transmigrate from one country to another and that often occupy more than one territory.<sup>939</sup>

In this chapter, it has been asked whether a supra-national dimension could overcome the problems faced by the national legislator in developing a protection for traditional cultural expressions. The European Union and The African Union have been chosen for their supranational dimension, but also because they guarantee some sort of safeguard for works of folklore - either directly or indirectly. The European Union and the African Union approach the topic differently, but some objectives and results are similar.

The EU Constitutional Treaty and the EU Development Policy are trying to accommodate new principles and values in a society which tries to balance the aspiration of integration with the need to preserve the current *status quo*. Copyright and IPRs in general are being influenced by the additional EU value of cultural diversity. The active behaviour of the European Commission within the WIPO ICG sessions on folklore is proof that the EU understands that a balance of rights is necessary in the world.

On the other hand, the African Union is more explicitly embracing the path of a *sui generis* instrument of protection both in the AIPO Charter and in the African Cultural Convention. The African Union leaves its nations to act as a contracting agency between the users of folkloric works and the community. However, the community's prior consent to the use of their folkloric works is not requested. In the majority of the cases, the community is neglected and not recognised as the holder of folkloric works. As a consequence, no economic reward has been passed to the community.<sup>940</sup>

The traditional communities occupy an uncertain role in the African continental policy framework and there is no mention of their entitlement to participate to agreements concerning their rights. In this chapter, concerns are raised in relation to the power of the continental authority in regulating matters regarding

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<sup>938</sup> EU Const Article III-292. 16.12.2004 EN Official Journal of the European Union C 310/131.

<sup>939</sup> This is, in particular, the case of the African continent.

<sup>940</sup> G. Dutfield 'Protecting Traditional Knowledge and Folklore' *op.cit.supra* pp.46-47 and note 104.

traditional communities without involving them directly. In spite of this, the Bangui Agreement provides some positive protection.<sup>941</sup> This means that the AU, through AIPO, seeks new means of protection. It is more active in its role of protecting folklore in its continental dimension, rather than concentrating on instruments such as 'identification' and 'preservation'. The European Union tries to make up for this lack of explicit protection through very democratic rules established in the Constitutional Charter. In particular, the principle of cultural diversity, which is also the basic value of the African Union,<sup>942</sup> is established as the EU's motto.

Nowadays, supranational entities - centrally, the EU and the AU - are taking up roles previously reserved for national countries as well as expanding their political influence on cultural matters. The system to preserve and guarantee folklore is based on fair justice, sharing sovereignty and governance,<sup>943</sup> implementation of human rights, as well as the right to sustainable development.<sup>944</sup> Under the supranational approach, IPRs could be softly transformed into instruments necessary to develop harmonisation and cultural diversity.<sup>945</sup> The point still remains as to whether these supranational entities have the strength to bypass international agreements such as TRIPs, and how effective their legal instruments can be.<sup>946</sup>

What is certain is that developing countries as well as Indigenous peoples should be empowered to decide the kind of protection they want for their works and to draw their own systems of intellectual property.<sup>947</sup> Nevertheless, the core problem is also to clarify the relationship between intellectual property and trade. As regards the Africa continent, the words of an eminent economist<sup>948</sup> can conclude '...there is

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941 See A. Lucas-Schoetter 'Folklore' in *The protection of Traditional Knowledge and Folklore*, Silke Von Lewinski ed. (Kluwer Law International 2004) p.237,

942 Cultural diversity is mainly promoted to avoid a 'clash of civilizations' in J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 *Fordham Int'l L.J.* p.35.

943 J. Richardson 'European Union Law Essay: The European Union In The World-- A Community Of Values' [November 2002] 26 *Fordham Int'l L.J.* p.26.

944 UNDP *Human Development Report* 2004 under the Section: 'Cultural Liberty in today's diverse world'.

945 A. Adewopo 'The Global Intellectual Property System And Sub-Saharan Africa: A Prognostic Reflection' [2001] 33 *U. Tol. L. Rev.* at 756.

946 Will Copyright Rules Allow Developing Countries To Close The Knowledge Gap? Integrating Intellectual Property Rights and Development Policy Commission on Intellectual Property Rights London September 2002 at para 160.

947 Chapter 8 Integrating Intellectual Property Rights and Development Policy Intellectual Property Commission London, 2002.

948 J. Sachs 'The Global Innovation Divide', in A. Jaffe, J. Lerner, and S. Stern, eds. *Innovation Policy and the Economy* Volume 3 (MIT Press, Cambridge MA.) available at <http://www.nber.org/books/innovation3/>.

an opportunity to re-think the intellectual property rights regime of the world trading system vis-à-vis the world's poorest countries.'

The economic analysis of copyright and folklore demonstrates the fact that international copyright agreements should take into account the needs of Indigenous communities and their special cultures.<sup>949</sup> Instruments such as the internet and new technologies should serve this purpose.<sup>950</sup> More respect and value should also be given to the Indigenous way of regulating their people's rights through customary laws. Indigenous solutions and penalties should be studied and then integrated into national legal measures already in place for the same violations.<sup>951</sup> The protection of traditional cultural expressions needs a flexible right able to accommodate a community's local needs.<sup>952</sup>

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<sup>949</sup> At chapter 104. Integrating Intellectual Property Rights and Development Policy Intellectual Property Commission London, available on web-site <http://www.iprcommission.org>, February 2003 (3rd edition).

<sup>950</sup> D. Gould and W. Gruben 'The Role of Intellectual Property Rights in Economic Growth', [1996] 48 *Journal of Development Economics* pp.323-350.

<sup>951</sup> Integrating Intellectual Property Rights and Development Policy Commission on Intellectual Property Rights, at chapter 74 and 84, available on web-site: <http://www.iprcommission.org>, February 2003 (3rd edition).

<sup>952</sup> *Ibid*, at chapter 80.

**Part III**



### **Introduction to Part III**

The difficulty in applying copyright categories to works of folklore has been analysed fully in chapter 3 and 4.

The U.S. copyright regime has been taken as a model of study, since this specific regime internationally dominates and leads the world-wide copyright setting. It has been proven that a 'constitutionalised' right intended to promote only further innovation is unconceivable to protect works which do not fit the standards of creation, hence that they do not meet the requirements of originality and fixation. Other intellectual property means have also been proven to lack that specificity or adaptability to suit the protection of folklore, e.g. the trademark can provide assistance only for those works which are tangible and not for immaterial works, such as oral and spiritual folkloric works. The Australian courts decisions have questioned the applicability of copyright to works of folklore. Although the supranational model might grant better protection at a regional level it is still based on principles which need to find practical application but that in theory create a balance between the natural and the economic copyright doctrine.

Part III will analyse the international dimension of folklore. Thus, the focus will be on what means to use to grant protection for folklore world-wide. The real essence of copyright is questioned also in the light of what the previous chapters have underlined. Can copyright still play a role at the international level? Is it the internationally dominant copyright doctrine capable of embracing the protection of those special rights as folkloric works? The assessment of the currently prevailing political status with the U.S. leading the establishment of international copyright trends, which accordingly are shaped to the U.S. doctrine, shows the limits of this copyright model. However, as an academic challenge this thesis tries to question whether copyright could still play a role in a different political setting. The outcomes are that major changes and revisions are necessary in the copyright theoretical approach. Realistically speaking, it seems hard to imagine that this might occur. Nevertheless, in principle this could happen, as copyright has proven to be a right that has changed over history. There is no doubt that copyright is challenged by the introduction of new rights to be protected as the rights of Indigenous peoples to their works of folklore.

The work over a possible international convention on adequate mechanisms to protect folklore will also be examined in the light of the efforts undertaken by two major UN agencies, UNESCO and WIPO. An international response to the

protection of folklore is desirable, but the process that leads to an international convention is long and results are not guaranteed without further ratification by the states, which will be difficult to attain. This is why it becomes relevant to advocate for a change in the leading international structure. IPRs and copyright in particular should be set in an appropriate environment, being rights that should foster cultures and not exclusively economic development. Therefore, it becomes necessary to re-introduce copyright in the right setting involving agencies as WIPO and UNESCO which should collaborate to find and agree on common solutions, ensuring Indigenous peoples' participation. Copyright should be detached from the strict trade dimension and return to the origin of its foundations. While promoting a new trend in the copyright doctrine, it is also important to explore a *sui generis* dimension which could be suitable to protect the special nature of folkloric works. The new *sui generis* right could not be simple, but rather a complex and articulated right which should encompass several elements among which customary laws and Indigenous peoples' empowerment in decision making have vital importance.

## Chapter 6

### The International Debate: Towards an International Convention for the Protection of Folklore?

#### 6.1. Introduction

The debate over a possible application of intellectual property rights and in particular of copyright instruments on works of folklore has been critically analysed on the national level.<sup>953</sup> It has been ascertained, in an examination of the United States, that national copyright and intellectual property laws are in general unsuitable to protect folklore world-wide. The analysis is enriched by offering a new legal and political framework. The new framework provides an analysis of the international dimension given to folklore and how folklore is perceived and protected, and whether protection does exist at an international level. Folklore has 'new economic and cultural potential' due to the spread of technology in society which has eased commercial use of folkloric works.<sup>954</sup> It will again be questioned whether existing internationally recognised intellectual property means and in particular copyright, can still play a role in the protection of folklore, or whether new *sui generis* dimensions should be explored.

In discussing the U.S. Copyright Statute the 'holes' in the Western approach to folklore have been highlighted with particular reference to national copyright laws - with the United States and Australia as models. The ideology beyond folklore, which asserts that copyrightable work must be the result of the effort of a single author,<sup>955</sup> represents the core of the problem. In fact, although protection for joint work exists, it is still organised and distributed on a single-based approach, like, for example, co-authorship rules in joint works.<sup>956</sup> As already affirmed, for a work to be protected by

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<sup>953</sup> See chapters 3 and 4.

<sup>954</sup> See WIPO Publ. 'Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore' available at <http://www.wipo.int/about-ip/en/studies/index.html>.

<sup>955</sup> S. Scafidi 'Intellectual Property and Cultural Products' [October 2001] 81 B. U. L. Rev p.795. The author states that the value on copyright and IP in general is put in the 'rationale mind' to create economic value so to assure the 'Progress of Science and Useful Arts' as recalled by the U.S. Constitution examined previously. (U.S. Const. Session I, 8, cl. 8).

<sup>956</sup> See P. Jazi 'On the Author Effect: Contemporary Copyright and Collective Creativity', [1992] 10 Cardozo Arts & Ent. L. Rev. p.293 See also P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) pp.634-39 describing the two criteria in use in the U.S. courts: Nimmer's *de minimis* standard and P. Goldstein copyrightability test. The first test protects the final product of the joint work, while the

copyright laws it must fit the prerequisites of originality, fixation and must have 'economic value' to benefit market efficiency.<sup>957</sup>

The analysis of the U.S. copyright model concluded that copyright as it is known and established today is inadequate to protect folklore. In fact it is defined as something 'derivative', therefore not original and belonging to the 'common culture' of a nation. The derivative consequence of this entails that TCEs might fall under public domain without recognising any type of rights (either of immaterial or material nature) of Indigenous communities. Moreover, the Indigenous peoples' communities will suffer from this scenario as they are deprived of their knowledge that it is considered of *res nullius* and therefore placed it into public domain.<sup>958</sup>

The above-mentioned characteristics of copyright like originality, fixation, threaten Indigenous peoples' values and customary law principles. The notion of Western copyright is almost never applicable to Indigenous peoples' folklore as they do not recognise their culture as property<sup>959</sup> and, above all, as private property.<sup>960</sup> In this regard, another matter for concern in applying copyright to folklore is its individualistic nature as opposed to the group sharing rights of Indigenous peoples' communities.

Furthermore, TCEs - predominantly those intangible expressions - have a secret spiritual meaning, which their communities very often do not wish to

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latter, more extreme, considers copyrightable the joint work which is the collection of each single copyrightable work. As it has been addressed by A.R. Riley in 'Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities' [2000] 18 Cardozo Arts & Ent. L.J. p.203 'In the Western world, if groups are addressed at all, it is only as a conglomerate of individuals, each with a distinct, particularised identity'.

957 See P. Drahos with J. Braithwaite *Information Feudalism* (Earthscan Publ. 2002) in particular, for the purposes of our quotation, the whole introduction.

958 Often culture of a group community and the one of a nation could be confused and superimposed. For this reason it stays unclear the diverse applicability of the terminology 'cultural property' and 'cultural heritage'. Anyhow, the first should always be a subcategory of the second. See L.A. Roussin 'Cultural Heritage and Identity' [Summer 2003] 11 Cardozo J. Int'l & Comp. L. p.710.

959 'Indigenous peoples do not view their heritage as property at all...but in terms of community and individual responsibility', in Thomas J. Krumenacher 'Protection of Indigenous Peoples and Their Traditional Knowledge: Could A Registry System Reduce The Misappropriation of Traditional Knowledge?' [Winter 2004] 8 Marq. Intell. Prop. L. Rev.p.151.

960 E. F. Fisher and A. Dickens 'Symposium: The New American Hegemony?: Development and Hegemony: Cultural Property and Cultural Propriety in the Maya Region' [Spring, 2004] 19 Conn. J. Int'l L. p.317 where the authors criticised the opinion expressed by Hernando De Soto *The mystery of capital: why capitalism triumphs at the west and fails everywhere else* (Basic Books New York 2000) where 'private property rights are the last great frontier of capitalistic expansion in developing world'.

disclose.<sup>961</sup> The dichotomy between tangible and intangible works always constitutes an obstacle to the application of copyright.<sup>962</sup>

The same issue of the possible applicability of copyright and intellectual property categories to folklore and traditional knowledge<sup>963</sup> indicate that something is happening in the copyright arena which could lead to a change in the way copyright has been drafted and understood since the seventeenth century.<sup>964</sup>

The use of trademark law with the introduction of a special trademark named 'Indigenous artefacts' was introduced within the IACA Act by the U.S. legislator. However, this can provide valid assistance only for those works which are tangible and not for immaterial works, such as oral and spiritual folkloric works. Moreover, the generic use of the phraseology 'Indigenous artefacts' does not provide any clear protection to the Native American to which these folkloric works belong. Thus, the same concept of novelty necessary for works to be trademarkable shares similarities with copyright, which is also unable to protect the symbolic and sacred nature of their artistic culture. In addition, folklore is constantly evolving due to cultural progress that accompanies the community life<sup>965</sup> of Indigenous peoples, and this kind of knowledge cannot be identified in a static trademark.

The efforts carried out by the Australian courts in supporting possible solutions through the application of common law categories like the recovery of damage and the level of sufferance in which the author of the folkloric work experienced from the infringement of his/her right, also add another layer to the framework of useful national instruments available for the protection of folklore. The analysis of the

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961 W. E. Effross 'Owning Enlightenment: Property Spirituality in the 'New Age' Marketplace', 51 [2003] *Buff. L. Rev.* pp.559, 646.

962 For a sound definition of tangible and intangible works see chapter 2, where it is also underlined the oral and intangible nature of most folkloric works.

963 For an economic perspective of the role of intellectual property in relation to TK and folklore see T. Cottier 'The Protection of Genetic Resources and Traditional Knowledge, towards More Specific Rights and Obligations in World Trade Law' [1998] *JIEL* p.53.

964 Note the comment of P. Drahos with J. Braithwaite *Information Feudalism* (Earthscan London 2002). 'Intellectual property rights began life as tools of censorship and monopoly privileges...In some respect not much has changed' at 29. *Contra* R. Deazley *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* Oxford: Hart, 2004, where the author underlines how historically, in the UK, copyright was conceived and developed (Statute of Anne) to meet the exigencies of the public readers and to spread education. For the U.S.A. approach see W. Halpern, C.A. Nard, K. L. Port *Fundamental of the United States Intellectual Property: Copyright, Patent and Trademark*, Kluwer Law International (1999) at chapter 1 § 1. and P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the Law of Intellectual Property*, Foundation Press, (1999) at 6.

965 S. Scafidi 'Intellectual Property and Cultural Products' [October 2001] 81 *B. U. L. Rev.* p.794. Herein, the author of this anthropological article is questioning 'which version of a recipe or folktale [should be considered] the real one'.

Australian legislation and the implementation of moral rights laws, as a stand-alone means of protection, demonstrate how the protection of folklore could be shifted outside *strictu sensu* intellectual property traditional means. In that respect, as noted under the section relating to the Australian legislation on moral rights, moral rights should not be shaped following the copyright model.

The supranational/continental approach examined in the previous chapter adds another level to the analysis. Primarily it helps to understand how strict copyright laws and their territoriality approach can be bypassed. The same nature of folklore, which goes beyond the national geographical dimension, requires the research to move to a higher level of protection. The European Union and the African Union as supranational entities guarantee some sort of protection for works of folklore.

First they reshape the common law model of copyright by adding soft elements such as values of non-discrimination and moral rights. Europe and Africa share the same objective in their constitutional drafts: the necessity of promoting cultural diversity as the main and most important value. However, the ways to respect this value are perceived differently by the EU and the African legislator. While the AU promotes a *sui generis* model, authorising nations to act as contracting agencies for the supranational entity and the community, the European legislator has not yet elaborated a precise response to the problem. The protection of folklore can only be accomplished through implicit elements and provisions of the Charter. Overall, the supranational model shows that there is a solution to the application of strict copyright rules and that even copyright laws can be 'expanded' to accommodate new exigencies. To borrow an expression used by Long, it is possible to affirm that 'no immutable line in the sand actually exists'.<sup>966</sup> Copyright, according to Long, is already a flexible enough instrument since exceptions like 'fair use' can be introduced.<sup>967</sup>

As already mentioned under the previous chapters, on March 15, 2006 United Nations Member States approved the establishment of a new Human Rights Council (hereinafter HRC)<sup>968</sup> to replace the Geneva-based Commission on Human Rights, whose mandate was compromised by the allegations of excessive politicization.<sup>969</sup> During this first meeting, on 29<sup>th</sup> June 2006 the HRC, among other practical

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<sup>966</sup> D.E. Long 'Traditional Knowledge and the Fight for the Public Domain' [2006] 5 J. Marshall Rev Intell. Prop.L. p.321.

<sup>967</sup> *Ibid.*

<sup>968</sup> See the website of the HRC [www.ohchr.org/english/bodies/hrcouncil](http://www.ohchr.org/english/bodies/hrcouncil). See also Human Rights' website at: [www.ishr.ch](http://www.ishr.ch)

<sup>969</sup> The Commission was dismissed on March 2006 while the new Council held its first meeting of the newly established HR Council was held in Geneva 19 - 30 June, 2006.

procedures, it was discussed and finally adopted the Declaration on the Rights of Indigenous Peoples.<sup>970</sup> The Declaration is another soft law. It is non-binding for governments but it is a fundamental step in the advocacy of Indigenous peoples rights. It also essential to highlight that a key aspect of the Declaration is to promote harmonious relations and mutual respect between Indigenous peoples and States. Rights like self-determination, self-governance and participation in the political, economical, cultural and social life of the state are particularly stressed.<sup>971</sup> Outside articles which recognise the right to education (see Article 14) or specific provisions such as human rights (see Article 17), there are specific provisions which make reference to the importance of involving Indigenous peoples and informing them on issues regarding their own development and matters in their interest since they refer to their tradition, culture and customs (Articles 29, 32). Article 31 bears particular significance because it establishes Indigenous peoples' rights 'to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions'. This article should be read in conjunction with Article 35 which established the link between the single Indigenous individual and the community to which he/her belong. Establishing that Indigenous peoples can foresee their own IPRs as well as 'to determine the responsibilities of individuals to their community' (Article 35) the Declaration has two purposes: recognising IPRs customary laws as well as the community-communal nature of Indigenous rights.

### **6.1.1. Shifting the Debate: From National to Supranational and Global Protection**

After consideration of the legal mechanisms available for the protection of folklore at a national level, this chapter moves on from the premise that a more structured and well co-ordinated approach in contrast to the lack of legal protection for folklore, is needed. Remedies should also be established for the lack of empowerment of Indigenous peoples over their folkloric works.<sup>972</sup>

This new protection could be afforded internationally, shifting the *querelle* from a national approach to an international one, through due consideration and the sound balance of several components. There is a necessity to balance: rights of Indigenous communities within the nation in which they live and develop their

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<sup>970</sup> The Declaration has now been forwarded to the UN General Assembly plenary for approval optimistically before the end of 2006.

<sup>971</sup> Respectively art 3, 4 and 5. This is also re-echoed in several articles (e.g.. Article 20 paragraph 1).

<sup>972</sup> For an insight discussion on matters related to Indigenous peoples' rights in general and empowerment visit the website of the UN Permanent Forum on Indigenous Issues (UNPFII) at <http://www.un.org/esa/socdev/unpfii>.

culture; rights of most developed countries and of developing countries; rights of nature and of the market; human and economic rights. This new dimension, if shaped well, could avoid the application of a set of multiple rules either at a national or bilateral<sup>973</sup> level, which would conflict with the globalised world in which all humankind lives.<sup>974</sup>

The participants of this new trend are mainly represented by international organisations - and especially the UN - Indigenous peoples' groups and NGOs advocating Indigenous cultural rights. The awareness of the need for a clear interpretation and protection on the subject of folklore started at the end of the 70s, when the debate over the misappropriation of traditional knowledge, or natural resources, started to become relevant to intellectual property and human right issues.<sup>975</sup>

Since then, the debate has grown enormously - and especially politically<sup>976</sup> - because attention is now directed towards the protection of medical, cultural knowledge and natural resources. These are new resources to be exploited from developing countries and communities, since almost all similar resources have been exploited in the Western industrialised society.<sup>977</sup>

The chapter assesses and estimates how much work still has to be carried out in developing a complete and sustainable strategy to save and protect folklore from the risks represented by unequal globalisation.<sup>978</sup>

The United Nations in particular plays a relevant role through the work of the Office of the High Commissioner for Human Rights; the recently appointed United Nations Permanent Forum on Indigenous Issues (UNFPII) within the Division of Social Policy and Development of the United Nations Secretariat; and the

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973 P. Drahos with J. Braithwaite *Information Feudalism* (Earthscan London 2002) at chapter 6, where the authors affirm that international intellectual property protection is better than bilateral agreements, which enforce an exclusionary and protectionist approach.

974 *Ibid.*

975 For this reason it was easily applicable (e.g. many developing countries especially in North Africa adopted it and converted it into national copyright legislation) the Tunisi Model Law (1976), a soft law drafted by the UN agency in response to the claims coming from developing countries.

976 See 'Traditional Cultural Expressions and Intellectual Property: An Overview', WIPO Public. available at <http://www.wipo.int/tk/en/cultural/background/index.html>.

977 E. Longacre 'Advancing Science while Protecting Developing Countries from Exploitation of Their Resources and Knowledge' [2003] 13 Fordham Intell. Prop. Media & Ent. L. J. p.963.

978 See United Nations Secretary-General Kofi Annan's speech in the Millennium Summit titled 'We The Peoples: The Role Of The United Nations In The 21st Century' where he states that 'The benefit of globalisazion are obvious...[but] these benefits are so unequally distributed, and because the global market is not underpinned by rules based on shared social objectives', reported in the United Nations Public, *Basic Facts About the United Nations*, ISBN: 92-1-1000850-6, E.00.I.21, [2000] p.128.



specialised UN agencies, WIPO (World Intellectual Property Organisation) and UNESCO (Nations Educational, Scientific and Cultural Organisation). In addition, the United Nations has promoted for a decade the protection of Indigenous peoples. This underlined many questions related to the protection and preservation of their life, culture and environment.<sup>979</sup>

This chapter will ascertain if an international answer could be reached in the copyright context. In order to investigate this theme, the work of WIPO<sup>980</sup>, whose model is to address, promote, regulate and harmonise intellectual property worldwide, will be examined and discussed.<sup>981</sup> In particular, the analysis will focus on the evidence gathered since 1999 during the WIPO Sessions of the International Governmental Committee for the Protection of Traditional Knowledge and Folklore-the (IGC) Sessions<sup>982</sup>, in which many stakeholders (NGOs, traditional peoples' groups and representatives from the developed world) have been participated. These sessions allow themes to be discussed and bring about solutions on which everyone can agree.

The attempts undertaken at the United Nations level, in particular the WIPO, to create a model which could work both for the creators and for the users of folklore, will be examined in order to establish if there is an available route towards the implementation of an international treaty on traditional cultural expressions. The chapter will not limit the analysis to the WIPO ICG sessions but will also focus on

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979 The first international decade of the world's Indigenous people was 1995 – 2004. For the importance of achieving the goals established during the first decade a second decade has been (<http://www.un.org/rights/Indigenous/backgrounds1.htm>) and recently promoted by the United Nations General Assembly –see resolution A/RES/59/174 on 22 December 2004. This new decade started on 1 January 2005. News available at [http://www.un.org/esa/socdev/unpfii/news/news\\_2.htm](http://www.un.org/esa/socdev/unpfii/news/news_2.htm).

980 In this regard of role of WIPO and its duties, responsibilities and overall work to folklore see The Role of WIPO <http://www.wipo.int/about-ip/en/studies/index.html> Intellectual Property and Genetic Resources, Traditional Knowledge, and Folklore (last visited 20th October 2004).

981 Established in 1967 by Convention the World Intellectual Property Organisation (WIPO), which is one of the sixteen specialised agencies of the United Nations (arts 57 and 63 of the UN Charter), it became a UN agency in 1974. Article 2 (vii) of the 1967 Convention provides a broad, enumerated list of all matters that might conceivably fall within the concept of intellectual property. However, the 1967 convention does not provide a definition of intellectual property. The list includes rights related to 1) literary, artistic, and scientific works; 2) performances of performing artists, phonograms, and broadcasts; 3) inventions in the field of human endeavour; 4) scientific discoveries; 5) industrial designs; 6) trademarks, service marks, and commercial names and designations; 7) protection against unfair competition; and 8) all other rights resulting from intellectual activity in the industrial, scientific and literary fields. This long definition does not cover rights in trade secrets and know-how. As observed by M. Batiste and J. Y. Henderson in *Protecting Indigenous Knowledge and Heritage: A Global Challenge* (Purich Publishing Ltd, Saskatoon 2000) p.175, this list does not help in building a unifying scheme of protection and it does not fill the gaps of the lack of protection of 'human creativity'.

982 See WIPO web site at <http://www.wipo.int/about-ip/en/studies/index.html>.

the past solutions taken at an international level through the use of soft laws, initiatives like the WIPO and UNESCO joint efforts.<sup>983</sup> The purpose of this chapter is to demonstrate that only through a balanced, democratic collaboration and interaction of different stakeholders can a sustainable solution be achieved to protect folklore. Also in this chapter, the importance of collaboration between agencies, which helps to harmonise intellectual property and trade will be a relevant topic of discussion. The World Trade Organization (WTO) is actually playing another role in co-ordinating intellectual property standards implementing the TRIPs Agreement.<sup>984</sup> The TRIPs Agreement, introduced in 1994, became, unfortunately, a weapon in the hands of rich and industrialised countries as will be discussed briefly in the next paragraph.<sup>985</sup>

Overall, the international dimension of folklore will take the analysis carried out under part II a step further: from a national and continental approach to the analysis of a possible model applicable world-wide that might be able to overcome national and continental boundaries as well as diversities.<sup>986</sup> This new approach is dictated by the necessity of having a global view to the issue of folklore, which goes beyond national and continental boundaries.<sup>987</sup>

## 6.2. International Copyright, Trade and Regime Shifting

### 6.2.1. Technological Changes, Cultural Heritage and the Enforcement of Copyright: Which International Dimension?

#### 6.2.1.1. Copyright and Trade

The necessity of international laws of protection for folklore is mainly dictated by globalisation, where supranational rules could be drafted to regulate matters that

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983 J. Moustakas 'Group Rights in Cultural Property: Justifying Strict Inalienability' [September 1989] 74 Cornell L. Rev. pp.1183-185 and pp.1179-182.

984 The acronym TRIPs stands for 'Trade Related Aspects of Intellectual Property. For a brief Historical Background of TRIPs, see L. Bently and B. Sherman, *Intellectual Property Law* (Oxford University Press 2004) pp.7 –9 and 40 under paragraph 6.3. See also P. Goldstein in *Copyright's Highway* (Stanford University Press 2003) pp.160-61 and 10.

985 M. Blakeney 'The Growth of IP Capacity in Developing Countries', at 2 paper available through Fordham IP Conference, 2003, where the author defines regarding TRIPs that the distinction between developed, developing and least developing countries is 'another area of crudity'. See also W.T. Fryer III 'Global intellectual property Development: A Recommendation to Increase WIPO and WTO Cooperation' 9 U. Balt. Intell. Prop. J. p.175.

986 L.R. Helfer 'Regime Shifting: The TRIPs Agreement and the New Dynamics of International Intellectual Property Lawmaking' [Winter 2004] 29 Yale J. Int'l L. p.1.

987 P. Drahos with J. Braithwaite *Information Feudalism* (Earthscan London 2002) chapter 7 and in particular p.114.

go beyond national frontiers. After Cottier, it could be affirmed that while national law is meant to 'allocate private property rights to individuals...or leading matters in public domain...global law it is traditionally a matter of allocating sovereign rights among different states'.<sup>988</sup> Applying this statement to folklore, it can be said that international laws seem more suitable than national laws to solve the difficulty of allocating different group rights within the country and among several states.

While the importance of domestic issues such as folklore are becoming relevant world-wide, the national legislator is losing power in tailoring rules which fit the exigencies of the same domestic intellectual property legislation.<sup>989</sup> This is the reason why copyright has increasingly attracted attention in the international arena;<sup>990</sup> this does have consequences for the protection of folklore.

It should be stressed that over the years many copyright laws and treaties have been created without altering the basic nature of the right. Moreover, the standards imposed by international intellectual property treaties are usually minimum standards which leave enough freedom to the national legislator to determine how and when some treaty norms must be implemented and translated into national law. Therefore, many differences in application at a national level still remain.<sup>991</sup> How can these differences be overcome in a globalised technological world? The issue is relevant. Through the use of Internet,<sup>992</sup> as well as other sophisticated modern technological means, folklore could become even more easily available and exploited if international standards are not put in place and enforced world-wide.

However, how would it be possible to integrate Indigenous peoples' exigencies with the new technological and modern Western world? Which set of rules are in

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988 T. Cottier 'The Protection of Genetic Resources and Traditional Knowledge, towards More Specific Rights and Obligations in World Trade Law' [1998] JIEL p.49.

989 Especially with the introduction of TRIPs and the increasing role of WTO, the national legislator is limiting his/her action in intervening in matters concerning intellectual property in general. See P.K. Yu 'The Harmonization Game: What Basketball Can Teach about Intellectual Property and International Trade' [January 2003] 26 Fordham Int'l L.J. p.251.

990 'Today's international copyright more closely resembles a giant squid, whose many national law tentacles emanate from but depend on a large common body of international norms.' Jane Ginsburg reported by P.K. Yu 'The Harmonization Game: What Basketball Can Teach about Intellectual Property and International Trade' [January 2003] 26 Fordham Int'l L.J. p.251 and note 152.

991 But national legislation is still indispensable for the protection of folklore as well as for enforcing eventual international treaties on this matter.

992 For the implications of internet on ideas and property See L. Lessig *The Future of Ideas* (Vintage 2002) at chapter 3 'Commons of the Wires' at 26 and followings and the whole chapter 7 'Creativity in Real Space'. See also in general R.P. Merges, P.S. Menell and M.A. Lemley *Intellectual Property in the New Technological Age* (2nd ed. Aspen Law & Business Gaithersburg, New York 2000).

place internationally to protect folklore world-wide and are there copyright treaties that can somehow assist?

In the area of international copyright application TRIPs, established in 1994 as part of the GATT (General Agreement of Tariff and Trade), set specific standards for the application of copyright and intellectual property in general.<sup>993</sup> WTO (the World Trade Organisation) disciplines TRIPs with the purpose of improving trade among States.<sup>994</sup>

The Agreement does not mention the protection of Indigenous peoples' traditional knowledge,<sup>995</sup> neither is protection granted more specifically to folklore. On the contrary, enacting TRIPs has complicated the solution because protectionist rules of enforcement and strict ones for infringement procedures have been established.

The fall of the Soviet Union and the increasing influence of the United States<sup>996</sup> and American multinational lobbies have accelerated the establishment of TRIPs. As noted,<sup>997</sup> the two main actors working at the international level in the area of governing the application of intellectual property rules are WIPO and WTO. Nevertheless, the introduction of TRIPs has meant a shifting in the position of WIPO<sup>998</sup> and in the relationship between these two organisations and for our purposes, to the protection of folklore. WTO, has used the TRIPs Agreement to change the role of WIPO in drafting regulations which could be adopted globally and to shift even more intellectual property into the trade dimension and especially onto the WTO agenda.<sup>999</sup>

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993 M. Blakeney *Trade Related Aspects of Intellectual Property Rights: A Concise Guide to the TRIPs Agreement* (Sweet & Maxwell London 1996).

994 E.B. Bluemel 'Substance Without Process: Analyzing TRIPs Participatory Guarantees in Light of Protected Indigenous Rights' [September 2004] 86 J. Pat. & Trademark Off. Soc'y pp. 683-84. See also Christopher Arup 'TRIPs: Across the Global Field of Intellectual Property' [2004] 26 (1) E.I.P.R. p.7.

995 L.R. Helfer 'Regime Shifting: The TRIPs Agreement and the New Dynamics of international intellectual property lawmaking' [Winter 2004] 29 Yale J. Int'l L. pp.29-30.

996 See L.Bently and B.Sherman *Intellectual Property Law*, Oxford 2004 at 6. See also P. Goldstein in *Copyright's Highway* (Stanford University Press 2003) describing from pp.151-161 the relationship between the United States and the Berne Convention.

997 W.T. Fryer III 'Global Intellectual Property Development: A Recommendation to Increase WIPO and WTO Cooperation' [2001] 9 U. Balt. Intell. Prop. J. pp.175-76.

998 D. Vaver 'Internationalizing Copyright Law: Implementing the WIPO Treaties' P 01/99 OIPRC Electronic Journal of Intellectual Property Rights <http://www.oiprc.ox.ac.uk/EJWP0199.html>

999 L. R. Helfer 'Regime Shifting: The TRIPs Agreement and the New Dynamics of international intellectual property lawmaking' [Winter 2004] 29 Yale J. Int'l L. p.1. See in general M. Blakeney *Trade Related Aspects of Intellectual Property Rights : A Concise Guide to the TRIPs Agreement* (Sweet and Maxwell London 1996).

### 6.2.1.2. Enforcing Co-operation between WIPO and WTO

All these considerations explored above have a political explanation. At the end of the 1970s to beginning of the 1980s, WIPO became a very democratic forum in which several countries bearing very different economic positions could debate and where the voices of the poorest countries and of the Indigenous communities could be heard. At that time, usually international intellectual property Treaties and Conventions were regulated by WIPO, the United Nations Agency specialising in intellectual property. This was, and still is, a guarantee of the impartiality of the decisions taken by the WIPO Assembly, in which developing countries are fully represented.<sup>1000</sup>

However, the intellectual property regime was abruptly shifted from WIPO to WTO with the establishment of TRIPs Agreement. In his article 'Global Intellectual Property Development: A Recommendation to Increase WIPO and WTO Cooperation' William T. Fryer,<sup>1001</sup> questions the relationship between WTO and WIPO and their actual roles. This is not only a philosophical debate on which organisation should take the lead, but is an important political issue. It considers the role and the importance of the United Nations, which although back in the spotlight today, during the 1980s and 1990s played a secondary role in drafting world policy. This was a consequence of the hegemonic role played by the United States,<sup>1002</sup> as well as many other developed countries, which dictated rules according to principles of 'most progressive' and economically powerful.

The trend of TRIPs marks strongly this political attitude. The balance in that case is in favour of the economic logic of the 'progressives'.<sup>1003</sup> Moreover, past history and the actual merging of Indigenous peoples teach about how the important

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<sup>1000</sup> W.T. Fryer III 'Global Intellectual Property Development: A Recommendation to Increase WIPO and WTO Cooperation' [2001] 9 U. Balt. Intell. Prop. J. p.176. 'Third world group can control the outcome of a treaty negotiation'.

<sup>1001</sup> *Ibid.*

<sup>1002</sup> The reason for enforcing TRIPs by the U.S. policy is motivated by the fact that 'intellectual property is one of this nation's greatest advantages' P.N. Fowler and A. T. Zalik 'Symposium: Globalization's Impact on International Trade and Intellectual Property Ia: A U.S. Government Perspective concerning the Agreement on the Trade Related Aspects of Intellectual Property: Past, Present and Near Future' [Spring 2003] 17 St. John's J. L. Comm. p.402.

<sup>1003</sup> *Ibid* p.179. The author strongly affirms that 'The effect of TRIPs has been to give to WTO a major role in intellectual property Law development'. Moreover as Nuno Pires de Carvalho puts in 'the world's poorest countries were given until 2006 to comply in full with the requirements of the treaty' 'Requiring Disclosure Of The Origin Of Genetic Resources And Prior Enforcement Consent In Patent Application Without Interfering The TRIPs Agreement: The Problem And The Solution' [2000] 2 Wash. U. J.L. & Pol'y pp.371, 391-92. See also R.J. Coombe *The Cultural Life of Intellectual Properties* (Duke Univ. Press 1998) p.54, talking about the 'concept of 'progress' that that constitutionally enables the grant of intellectual property protections in the Unite States.

knowledge and information of Indigenous peoples is shared. It also appraises how a new set of rules should be shaped to delineate who is the owner of these values.<sup>1004</sup>

However, this trend is not only showing changes in the awareness of developing countries and Indigenous peoples communities in contributing to the intellectual property debate, but also for the constant, slow improvement of the role of United Nations. WIPO and WTO should conceive a joint policy with the scope of solving and curing problems caused by the lack of protection for folklore. This is not an impossible solution<sup>1005</sup> and in order to do so, 'global co-operation' must be achieved.<sup>1006</sup>

Notwithstanding the fact that the goals of these organisations<sup>1007</sup> are different, co-operation between WTO and WIPO could bring positive results. First, this co-operation could be achieved by the sharing between the two agencies of news and information<sup>1008</sup> and in learning how the different counterparts implement their own intellectual property and copyright standards. A better system of communication and passing on information could help to maintain a dialogue between the developing world, represented by WIPO, and developed world represented by WTO.<sup>1009</sup> To achieve this, some procedures should be settled both at the WIPO and WTO level. It is unreasonable to state that they already exist or that a co-operative attitude is present in TRIPs.<sup>1010</sup>

The balance of interests and the adoption of a co-operative attitude and policy could bring consensus in developing new ideas, forums and debate over the issue of intellectual property and folklore. It would definitely be a stimulating challenge to

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1004 For the relationship between intellectual property and information see J. Lipton 'Information Property: Rights and Responsibilities' [January 2004] 56 Fla. L. Rev. the all article and in particular p.167 and followings.

1005 See W.T. Fryer III 'Global intellectual property Development: A Recommendation to Increase WIPO and WTO Cooperation' [2001] 9 U. Balt. Intell. Prop. J. pp.177-78-79.

1006 P.K. Yu 'The Harmonization Game: What Basketball Can Teach about Intellectual Property and International Trade' [January, 2003] 26 Fordham Int'l L.J. p.250.

1007 WTO's scope through TRIPs aims to eliminate trade barriers, WIPO's role is the harmonisation and the democratic application of intellectual property rules.

1008 W.T. Fryer III 'Global Intellectual Property Development: A Recommendation to Increase WIPO and WTO Cooperation'[2001] 9 U. Balt. Intell. Prop. J. pp.177-178-179.Cooperation between administrative staff is also quite rightly promoted by the author.

1009 See R.J. Coombe *The Cultural Life of Intellectual Properties* (Duke Univ. Press 1998) at chapters 6 and 7.

1010 *Ibid* p.255.

share programs and ideas in a constructive way. A common plan of action should not only be part of this paradigm but the way to forward in the near future.<sup>1011</sup>

The role of WIPO will be afterwards examined, while in the following paragraphs preference will be given to the analysis of the roles TRIPs and WTO play in relation to folklore.

### **6.2.1.3. Strict Copyright Rules in a Globalised World Are Not a Response to the Protection of Folklore**

The shaping of international intellectual property opinions and standards of protection is at present a monopoly of developed countries.<sup>1012</sup> However, these countries apply different rules and have different values not only in the way they perceive the issue of folklore, but also in the way they share intellectual property and copyright.<sup>1013</sup>

To comprehend the issue of folklore, the importance that TRIPs Agreement and WTO had in the past ten years cannot be disregarded, as well as the influence it could have in the future. In fact, seeking to connect cultural heritage to trade in a proper and positive manner should not be neglected by the international agenda.

On the contrary, the solution to this problem might explain why initially enthusiastic members from developing countries, who signed TRIPs Agreement with the hope of improving and safeguarding their positions, are at present willing to change their decision.<sup>1014</sup> The determination to revise or redraft TRIPs by many developing countries and Indigenous communities is mainly due to the fact that copyright debate is attracted into trade dimension. This agreement focuses more on the importance that copyright plays in the economic growth of many countries, especially those that already have flourishing economies.<sup>1015</sup>

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1011 *Ibid.* He proposes in his conclusion a possible 'intellectual property Idea Forum' to raise co-operation between the two organisations, however he does not discuss on which matters the two organisations should confront and relate to each other.

1012 D.E. Long, Book Reviews: 'G.G. Letterman: *Basics of International Intellectual Property Law*' [July 2002] 96 A.J.I.L. p.758.

1013 For what is concerning the fair use exemptions the EU, in the Directive on Harmonisation of Certain Aspect of Copyright and Related Rights in the Information Society, establishes numerous fair use exemptions, which for the protection of folklore means that everyone is free to use it without the author's permission. On the contrary, the United States in the Digital Millennium Copyright Act provides no such fair use exemptions. *Ibid* at 759.

1014 *Ibid.* The author states rephrasing UNDP Report (February 2003) that 'relevance of TRIPs is highly questionable for large parts of the developing world'...from this the need from the developing countries to 'begin dialogues to replace TRIPs ...with alternate intellectual property paradigms and in the meantime trying to 'modify the way the Agreement is interpreted and implemented', at 3.

1015 The U.S., the European Communities and Japan are the countries for which the treaty was enacted and that are strongly pursuing its application. L.R. Helfer, 'Regime Shifting: The TRIPs

For the reasons set out in the introduction to this thesis, enforcing even a more strict application of these copyright rules creates more concern.<sup>1016</sup> In particular, much criticism arises from the so called 'compliance procedure' and the related penalties which countries incur if they do not comply with the rules laid down in TRIPs.<sup>1017</sup> Members who do not comply, in fact, are fined by WTO, which is in charge of monitoring the application of TRIPs.<sup>1018</sup>

Overall, TRIPs and WTO policy are criticised for putting so much focus on the sanctions that poor countries must pay if they want to use intellectual property protected works.<sup>1019</sup> The practical application of TRIPs has created a paradox: those countries or communities which produce folkloric works must pay for their own slightly re-elaborated works. Thus, developed countries demand payment of expensive royalties for those materials and works which have been taken by misappropriating the cultural and natural resources of the same poor countries.<sup>1020</sup> This is the origin of the paradox.

#### 6.2.1.4. Trade v. Folklore

This latter argument finds an immediate application to Indigenous folklore. This can be aptly illustrated in the following example.

Let's imagine traditional African songs played by a remote Kenyan community. This community is using songs and music in rituals. The words and sounds reproduced in the songs represent their concept of life, love, religion and death. They are generally inspired by their everyday life. The songs have never been

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Agreement and the New Dynamics of International Intellectual Property Lawmaking' [Winter 2004 ] 29 Yale J. Int'l L. p.2 See also L. Bently and B. Sherman *Intellectual Property Law* (Oxford 2004) p.6.

<sup>1016</sup> M. Hamilton points out that the TRIPs Agreement is 'remaking international copyright law in the image of Western copyright law', reported in P.K. Yu 'The Harmonization Game: What Basketball Can Teach about Intellectual Property and International Trade' [January, 2003] 26 Fordham Int'l L.J. 218 p.253 and note 166.

<sup>1017</sup> For criticism see the insightful opinions expressed by P. Drahos with J. Braithwaite *Information Feudalism* (Earthscan London 2002).

<sup>1018</sup> L.R. Helfer 'Regime Shifting: The TRIPs Agreement and the New Dynamics of international Intellectual Property Lawmaking,' [Winter 2004] 29 Yale J. Int'l L. 'TRIPs has teeth...it is linked to the WTO's comparatively hard-edge dispute settlement system in which treaty bargains are enforced through mandatory adjudication backed up by the threat of retaliatory sanctions' p.2.

<sup>1019</sup> S. Gosh 'Traditional Knowledge, Patens, And The New Mercantilism (Part II)', [November 2003] 85 J. Pat. & Trademark Off. Soc' y p.885.

<sup>1020</sup> A major role in the exploitation of Indigenous peoples folklore is played by major multinational companies. See D.N. Fagan 'Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples against Multinational Corporations' [May 2001] 76 N.Y.U. L. Rev. p.626.



written down because young members of the community learn them through their families' teaching and from the community's eldest members.

Let's suppose that their music and songs, of which they have a huge *repertoire*, are considered some of the best examples of Kenyan and African cultural knowledge. Let's also imagine that the community has the power and right to perform its music and songs, and in a few public exhibitions they have the possibility of telling people about themselves and their amazing cultural background. Then, imagine that some officers from a big multinational record company go on safari<sup>1021</sup> and by chance their tourist guide belongs to the above-mentioned community.

Moreover, the story brings in the fact that the tourist guide, by his friendly nature, discloses his membership in the community in question and proudly invites the group to attend a live performance of his community. There the officers are enchanted by such beautiful melodies and, secretly, decide to record them. Their first thought is how to put them into the market and to make them a successful.

It is easy to guess the end of this story.<sup>1022</sup> After returning to their country, the multinational record company can easily obtain copyright on those folkloric works which were never 'written' before - due to their intangible oral nature. In copying or stealing another's creation, the multinational company will not infringe any law but the law of the community. The company will probably improve its profits by selling the Kenyan songs but the community will not tangibly gain anything from it. On the contrary, it will only lose and not just economically speaking. Copyright of the folkloric work will also prevent others to using that work. The so-called 'exclusionary effect', will keep the community from benefiting from its own work<sup>1023</sup> and from being considered the author of it.<sup>1024</sup> Thus, follows that, duly considering what these songs and music represent for the community (e.g. religious and sacred meaning), the community will lose even more than potential commercial revenue: it will lose its dignity. This example demonstrates that copyright rules in the manner in which they are drafted at present are not set forth for the benefit of the communities and their folklore. Making these rules even stricter could considerably

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1021 This is meant to be ironic because usually these predatory expeditions are planned in advance after in depth research and organisation.

1022 Despite being totally invented, it is not very dissimilar to many real stories of folklore exploitation.

1023 D.J. Gervais 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' [Spring 2002] 12 Fordham Intell. Prop. Media & Ent. L.J. p.961.

1024 This has moral rights implication. The implications of moral rights on folklore ( e.g. in particular the author's rights of attribution and integrity) have already be examined under the chapter related to the Australian experience.

harm Indigenous peoples' communities which are struggling to survive and to preserve their cultural heritage in a globalised technological world.

The third world and the Indigenous communities with TRIPs do not seem to have much to do and to say. They run the risk that the implementation of this agreement, which imposes strict copyright rules, will make rich countries even richer and impoverish the positions of the ones that are already economically weak. Therefore, TRIPs, if special corrective mechanisms are not introduced, could contribute to the increase of the economic gap between global North - South divide.<sup>1025</sup> TRIPs are drafted in the clear language of Western society with no consideration at all for Indigenous peoples' rights. Trade that empowers some countries of special protection but impoverishes others is not good and fair trade.<sup>1026</sup> Being reluctant to protect folklore, TRIPs neglects the importance of community ownership, where the aims are an improvement of trade and an increase in innovation. Furthermore, a new trade practise must be pursued in order to make room for those rights (e.g. folklore of Indigenous peoples) which do not have any protection at the moment.

### **6.2.2. Developing a New Trade Practice: Which Values Should Be Protected?**

Gervais<sup>1027</sup> singles out two main reasons for developing a new trade practice for folkloric works. The first reason is dictated by the desire of many developed countries to be enriched by discovering existing forms of folklore. The other reason is the popularity of traditional cultural expressions at an international level. In fact, the many efforts to provide protection to Indigenous communities and their folklore (made by developing countries' governments, international organisations and NGOs) have raised awareness in the public eye.<sup>1028</sup>

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<sup>1025</sup> UNDP Public. *Cooperation South, Creativity, Innovation And Intellectual Property Rights* [2002], in particular the article by R.J.S. Ross and A. Chan, From North-South to South-South. See also E. K. Bender, 'North and South: The WTO, TRIPs and The Source of Biopiracy' [Fall 2003] 11 *Tulsa J. Comp. & Int'l L.* pp.290-91-92-93.

<sup>1026</sup> There is a need to rewrite intellectual property rules and TRIPs in a way that could give some advantages to Indigenous peoples, See J.H. Reichman 'Securing Compliance with the TRIPs after U.S. v. India' [1998] *J.Int'l Econ. Law* pp.585-587.

<sup>1027</sup> D.J. Gervais 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' Spring, [2002] 12 *Fordham Intell. Prop. Media & Ent. L.J.* p. 956.

<sup>1028</sup> The famous United Nations 'Rio Declaration' on the Environment and Development, signed in June 1992, has a single non-binding reference to Indigenous peoples' property and intellectual property rights in Principle 22: Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

In a globalised world many new means of information put cultural expressions and identities of the Indigenous community at risk.<sup>1029</sup> At the same time, world cultural heritage is left unprotected<sup>1030</sup> and for this reason national and international rules must be intertwined.<sup>1031</sup> 'Rules of appropriation' and 'rules of diffusion' especially should be balanced to be both democratic and efficient.<sup>1032</sup>

This latter consideration emerges from almost all the documents and reports drafted by WIPO where issues like intellectual property, traditional knowledge and folklore, are at the top of the debate. Moreover, the issue of respect for cultural diversity emerges at UNESCO where DG Koïchiro Matsumura underlines: <sup>1033</sup>

'The debate between those countries which would like to defend cultural goods and services which, as vectors of identity, values and meaning, must not be treated as mere commodities or consumer goods, and those which would hope to promote cultural rights has thus been surpassed, with the two approaches brought together by the Declaration, which has highlighted the causal link uniting two complementary attitudes. One cannot exist without the other'.

However, despite efforts made by WIPO and advocacy organisations, the protection granted to folklore of Indigenous peoples is still inadequate.<sup>1034</sup> This lack of protection might have also been caused by the absence of consideration at an international level on the issue of folklore, which has always been thought of as less important and 'precious' than traditional knowledge.<sup>1035</sup> However, recently the trend is changed and folklore has an enhanced importance, especially on an academic level.

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Reported in Lauren E. Godshall 'Making Space for Indigenous Intellectual Property Rights Under Current International Environmental Law'[2003] 15 Geo. Int'l Env'tl. L. Rev. p.523.

1029 See R.J. Coombe *The cultural life of intellectual Properties* (Duke Univ. Press 1998) pp.29-33. On the impact of the new technological means of communication on information see C.T. Marsden (ed) *Regulating the Global Information Society* (Routledge London 2000).

1030 L.A. Roussin 'Cultural Heritage and Identity' [2003] 11 Cardozo J. Int'l & Comp. L. p.707-710.

1031 *Ibid.*

1032 P. Drahos with J. Braithwaite *Information Feudalism* (Earthscan London 2002) chapter 7 and 13.

1033 Reported in the Introduction of the *UNESCO Universal Declaration of Cultural Diversity* was adopted by the 31st Session of UNESCO General Conference held in Paris on 2nd November 2001. (Text available at <http://www.unesco.org>).

1034 E.B. Bluemel 'Substance without Process: Analyzing TRIPs Participatory Guarantees in Light of Protected Indigenous Rights' [September 2004] 86 J. Pat. & Trademark Off. Soc'y p.674. The author is referring to the lack of protection of Indigenous peoples rights in general and he refers also to the missing empowerment of Indigenous peoples in the international forum (e.g. TRIPs) regarding their rights.

1035 The differences between these two have been deeply examined under chapter 1.

At present, the new challenges of copyright and intellectual property must be addressed in the direction of encompassing traditional mechanisms of protection with the new exigencies represented by the protection for folkloric works. However, this is not an easy task. As it was already noted,<sup>1036</sup> it is very difficult to grant protection to the many different forms of folkloric works. Further, some of these works are already too old and have been in the public domain for many years. In these cases, how can we provide protection which could overcome the limits of copyright?<sup>1037</sup> As suggested, a 'nuanced protection' could be applied depending on the type of traditional knowledge at issue and the importance of that traditional knowledge to the relevant holder.<sup>1038</sup> The recovery of many works of folklore already in the public domain depends upon it. The difficulty lies with the reconciliation of very different values and requests rather than with the most appropriate devices to be used.

#### **6.2.2.1. Copyright and Folklore: Single Rights *Versus* Communal Rights**

WIPO working group on folklore underpins the difficulty in discussing the appropriation of a culture by an external force outside the life of the traditional communities as well as the problem raised by disciplining a new definition of 'authorship'. In addition, confusion is also created by community artists who can be recognised as the 'only, sole author', with prejudice for the community.<sup>1039</sup> Although most Indigenous artists share the benefit of their artistic production with the community, this is not always the rule. Thus, the extension of the benefit to Indigenous communities largely depends upon the behaviours of Indigenous artists, who are under no legal obligations.

Overall, the structure of copyright in this specific case is not flexible to uphold the protection of communal rights so a new mechanism must be sought.<sup>1040</sup> Thus, the WIPO Committee, building on the experience of member states, proposes several routes to follow in order to protect traditional cultural expressions. These will also be examined in the following paragraphs.

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<sup>1036</sup> See the chapters on the national approach to the issue of folklore.

<sup>1037</sup> See the U.S. Copyright Act 1976, 17 U.S.C. § 302 (1994) as amended by the Soni Bono Term Extension Act 1998. The Berne Convention for the Protection of Literary and Artistic Works (1886) provides in Article 7 (1) and (2) a term of protection of 50 years. See generally Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) pp.582-83.

<sup>1038</sup> D.E. Long 'Traditional Knowledge and the Fight for the Public Domain', [2006] 5 J. Marshall Rev Intell. Prop.L. p.321.

<sup>1039</sup> WIPO/GRTKF/IC/6/3.

<sup>1040</sup> WIPO/GRTKF/IC/6/3 p.26.

### 6.2.2.2. Protection of Common Values<sup>1041</sup> and Cultural Commodification

As stated in the previous chapter and underlined again in the introduction to this chapter, it is not easy to translate the concept of communal ownership into copyright language. Copyright is a Western creation, which aids and supports the creative efforts of a single author. On the other hand, the concept of communal rights is particularly present in customary and tribal laws. Customary laws intertwine concepts of communal and single rights, that is, the right of the artist to represent his/her creation the community to whom he/she belongs. Indigenous communities have their own kind of 'intellectual property' rules unknown to outsiders.

The question is which values and ethics should prevail: those of developing countries and Indigenous communities or those of the more developed Western world. It is possible to compare diverse rules and to find common values. However, is it possible to rescue some goodness in the protection granted by a balanced application of copyright for the purposes of protecting Indigenous peoples' rights?

Davis insightfully sustains that common principles could be established in international trade to avoid 'cultural colonialism and ethical relativism'.<sup>1042</sup> These principles might be found in factors like the suffering caused to the victims by a wrongful application of trade.<sup>1043</sup> In particular, he supports the opinion that common values should be found in the rejection of any form of violence, either physical or moral violence as humiliation.<sup>1044</sup> These values are of a discretionary nature because they are based on 'moral judgement', but between protection of trade economies and safeguarding of human rights the latter should always prevail<sup>1045</sup> and 'errors should work in favour [of the victims of intellectual property and trade]'.<sup>1046</sup>

As pointed out by Fisher and Dickens, themselves recalling the words of Strathern,<sup>1047</sup> culture and identity should be encompassed into the notion of cultural

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1041 This terminology is employed without any moral judgement or implication. The use of the phraseology 'common values' or 'common principles' will be alternated in the chapter.

1042 M. Davis 'Just (Don't) Do It: Ethics and International Trade'. [1997] 21 Melb.U. L. Rev. p. 606.

1043 *Ibid*, p.620. This same criteria were adopted by the Australian court in *Bulun Bulun & Milpururru v R & Textiles Pty Ltd* [1998] 41 IPR 513.

1044 M. Davis 'Just (Don't) Do It: Ethics and International Trade'. [1997] 21 Melb.U. L. Rev. p.620.

1045 C. Thomas 'Poverty Reduction, Trade, and Rights' [2003] 18 Am. U. Int'l L. Rev. 1399 where the author presents the beneficial effects of incorporating human rights in international trade applied to Indigenous community as necessary 'to develop a language within international trade law for discussing justice. at 1416 See also the Avishai Margalit' book, *The Decent Society* [1996].

1046 M. Davis 'Just (Don't) Do It: Ethics and International Trade'. [1997] 21 Melb.U. L. Rev. p.620.

1047 E.F. Fischer and A. Dickens 'Symposium: The New American Hegemony?: Development and Hegemony: Cultural Property and Cultural Propriety in the Maya Region' [Spring 2004] 19 Conn. J. Int'l L. p.319 and note 14.

property. Copyright laws should therefore take into consideration this notion and should use it in a way which could favour 'marginalized native peoples'.<sup>1048</sup> Always in the opinion of the above authors, cultural property rights<sup>1049</sup> could be the key for interpreting intellectual property in a way which could benefit the protection of folklore.<sup>1050</sup>

In a pluralistic and democratic society, moving away from fundamentalism and enshrining the freedom of expression for different cultures, consent 'cultural diversity [to] be preserved as an adaptive process and as a capacity for expression, creation, innovation'.<sup>1051</sup> However, how it is possible to translate cultural knowledge into intellectual property remains undefined.<sup>1052</sup> Is it possible to reconcile different values without reinterpreting the same notion of copyright and without modifying its subject matter?<sup>1053</sup> A solution again proposed by Davis, is that 'reference [should be given] to a norm which is not specifically to our own culture or identity [which does not belong] to any culture'.<sup>1054</sup>

As stressed by Davis, we are far behind in the implementation of international standards<sup>1055</sup> and this is due to the fact that Indigenous peoples have almost no voice in proposing them.<sup>1056</sup> This is because the same values of Indigenous peoples are very diverse and distinguished depending on which group they belong to. Even more differences may arise from the fact that, despite a general sharing of collective knowledge, some Indigenous groups give more autonomy to the single artist. In addition, some communities aim to commercialise their own products and therefore set up the basis for the commodification<sup>1057</sup> of their culture. Other traditional

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<sup>1048</sup> *Ibid*, p.319.

<sup>1049</sup> Folklore is belonging to this category.

<sup>1050</sup> *Ibid*.

<sup>1051</sup> Koïchiro Matssura DG of UNESCO, Reported in the Introduction of the *UNESCO Universal Declaration of Cultural Diversity* was adopted by the 31st Session of UNESCO General Conference held in Paris on 2nd November 2001. (Text available at <http://www.unesco.org>).

<sup>1052</sup> N.N. Weinstock 'Copyright and a Democratic Civil Society'[1996] 106 Yale L J 283.

<sup>1053</sup> See W.R. Cornish and M. Llewlyn *Intellectual Property* (fifth ed. Sweet & Maxwell 2003) p.388.

<sup>1054</sup> M. Davis 'Just (Don't) Do It: Ethics and International Trade' [1997] 21 Melb.U. L. Rev. p.606.

<sup>1055</sup> *Ibid*, p.607.

<sup>1056</sup> *Ibid*, p.607. For criticism on international principles notice the assertion of the author who states that: 'those principles that has been suggested are either so abstract and formal as to be devoid of real effect in the sometimes violent and squalid world of international trade or they are so full of content that they are in effect moral imperialism in the guise of transcultural neutrality'.

<sup>1057</sup> This terminology is used to mean that copyright, but more extensively, intellectual property, are used to transform intangible property as the songs of the Kenyan community in our example in products of commercial value. See on this issue R.K. Paterson and D.S. Kajala 'Looking behind

communities may care more about the secrecy of their works. Thus it is very difficult to agree upon cultural commodification,<sup>1058</sup> despite many Indigenous communities' use of this same cultural commodification to raise political awareness.<sup>1059</sup>

This shows that if standards to protect folklore are not established many Indigenous peoples will start adopting Western concepts of property on cultural matters, challenging their existence, the preservation of their of cultural background and their dignity. If the notion of communal knowledge, so essential for the life and the relationship of the community, does not need to be completely replaced by an individualistic approach then it is necessary to start looking at alternative means of protection outside copyright.

The same traditional mechanisms might help to regulate folklore already within the public domain. Traditional laws should be also examined while keeping in mind the importance of building common principles applicable to a technological and global society. The implementation of less strict rules, semi-legislative means and mechanisms could help in the interim period of the creation of a more established treaty on the protection of folklore and should be pursued not as an alternative but as a parallel system.

### **6.3. 'Soft Laws' and 'Customary Laws' as Parallel Systems to Conventions**

It should not be overlooked that while international treaties and conventions on the protection of folklore may be the right goal to pursue, they require long procedures and a high degree of consensus among states.<sup>1060</sup> Changes in the

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Intellectual Property in Resolving Protection for the Intangible Cultural Heritage of Indigenous Peoples' [2002] 11 Cardozo J. Int'l & Comp.L. p.633.

<sup>1058</sup> On the issue of cultural commodification see in general N. Elkin-Koren and N. Netanel (eds) *The Commodification of Information: Political, Social, and Cultural Ramifications* (Kluwer 2000). See also J. Moustakas 'Group rights in cultural property: justifying strict inalienability' [September 1989] 74 Cornell L. Rev. p.1185. On the contrary, it is justifiable that individual property help enact group rights, however, whether personal property can help grouphood all depends on the relationship between the group and the single author. It is unfair to subordinate the identity and property of the group to that of the individual.

<sup>1059</sup> E.F. Fischer and A. Dickens 'Symposium: The New American Hegemony?: Development and Hegemony: Cultural Property and Cultural Propriety in the Maya Region Spring' [2004] 19 Conn. J. Int'l L. pp.323-324 recalling the case of the ANU in Japan which are commercially using some of their symbols to be recognised as an ethnic minority by the Japanese government, however the author sustains at 325 that commodifying cultures might be 'morally dangerous'.

<sup>1060</sup> Usually also the majority in adopting a Convention changes passing from a 'hard law' to a 'soft law' See UNESCO in the definition of Recommendations available at [http://portal.unesco.org/en/ev.phpurl\\_id=12026&url\\_do=do\\_topic&url\\_section=-471.html](http://portal.unesco.org/en/ev.phpurl_id=12026&url_do=do_topic&url_section=-471.html).

international environment can take two different pathways but both with the purpose of harmonisation.<sup>1061</sup> As already addressed in the paragraph above, so-called 'universal values' do not exist. But values and principles which may be compared and intertwined do exist to help build a legal framework for the protection of folklore. Moreover, mediating on values is even more difficult if this task is left to the national legislator, which will not be prepared to rule and harmonise global behaviours.

A balanced regime able to protect folklore could be shaped only if these diverse values - the values of the developed Western society and the ones of the Indigenous communities - are both known and reciprocally respected.<sup>1062</sup> Thus they could become part of the so called international customary practice, since countries can identify and agree upon some repeated uses.<sup>1063</sup>

To set a proper international framework the distinction should be made between 'hard' laws from 'soft' laws. To the first category belong treaties, international agreements and conventions, while to the latter all the other legal mechanisms such as guidelines, model laws, recommendations and declarations.<sup>1064</sup> A further distinction should be made between customary law, soft laws *strictu sensu* and treaty law.<sup>1065</sup> Despite being very dissimilar in their legal nature all these

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Recommendations are adopted by a simple majority, while a two-thirds majority is required for the adoption of conventions.

<sup>1061</sup> 'Harmonization occurs through formal instruments and informal devices. International treaties are the most obvious formal instruments', G.B. Dinwoodie 'Some Remarks on the Limits of Harmonization' [2006] 5 J.Marshall Rev. Intell. Prop. L. p.599.

<sup>1062</sup> N. Roht-Arriaz 'Reparations Decisions and Dilemmas' [Winter 2004] 27 Hastings Int'l & Comp. L. Rev.]. The author sustains at p.175 that soft laws 'when implemented over an undetermined amount of time, may ripen into custom'.

<sup>1063</sup> L.E. Godshall 'Making Space for Indigenous Intellectual Property Rights Under Current International Environmental Law' [2003] 15 Geo. Int'l Envtl. L. Rev. p.521.

<sup>1064</sup> These legal instruments have been often used by the United Nations, see Note how e.g. UNESCO Constitution under Article IV, paragraph 4 distinguishes between hard and soft law instruments, 'the General Conference shall, in adopting proposals for submission to the Member States, distinguish between recommendations and international conventions submitted for their approval ...'. In certain cases, the instruments adopted under the Organization's auspices will be adopted not by the General Conference but by International Conferences of States convened by it. These instruments will take the form of international conventions (treaties, agreements, etc.), recommendations to Member States or, though the Constitution makes no reference thereto, declarations and charters. See also D. Weissbrodt and M. Kruger 'Current Development: Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights' [October 2003] 97 A.J.I.L. p.914.

<sup>1065</sup> *Ibid*, p.914. The author asserts that it is easier to distinguish only between hard and soft laws since '...the interplay between treaty law, non-treaty law, and customary international law is quite complex...' In a way customary law not being hard law could easily fit in the soft law category. However, I prefer to refer to customary law as 'repeated common principles'.



mechanisms are related to each other and can influence each others is developing process.

For the purpose of this discussion we will refer to customary law with the intention of enhancing customary law principles. In addition, we will refer to soft laws as including all non-binding norms like soft laws, either written or unwritten. Customary law and soft laws are linked and interrelated and they can be an alternative route to hard laws.

Soft laws look at customary laws and their underlined principles. They enact common principles and make the public aware of the need to enforce and make legally binding those principles. Soft laws are a means that should support treaty law. Moreover, they could actually open the door to treaty law.

Sometimes these principles will intervene in the case of a non-existing treaty, but also in the case were a treaty must be interpreted democratically or during the *interim* period while waiting for a treaty to be enacted and fully implemented. It cannot be forgotten that international treaties and conventions require long-lasting procedures, i.e. before the signatory members agree to sign it and make it a binding law. They are not meant to overrule treaties but rather to step in where there exists a lack of a binding law, in order to avoid that abuses.<sup>1066</sup> While hard laws are '...intended to create legally binding obligations ..... whereas soft law starts in the form of recommendations...'<sup>1067</sup> soft laws could make it easier to achieve international consensus among countries and they could finally reveal the best possible way to protect folkloric works.

### **6.3.1. The Delicate Procedures toward a Binding Agreement**

The achievement of a legally binding instrument must take into consideration several factors which require explanation and clarification. It can be affirmed that the instrument of international obligations of a State is not a simple task. To be binding on a particular state, a norm must either have the force of customary international law, be an element of a treaty, or another legal instrument that has been formally accepted by that State as creating binding obligations upon itself.<sup>1068</sup> Negotiations of a treaty are often long procedures and vulnerable to political

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<sup>1066</sup> For the effect of soft laws on human rights see Naomi Roht-Arriaza 'Reparations Decisions and Dilemmas' [Winter 2004] 27 *Hastings Int'l & Comp. L. Rev.* pp.162-63.

<sup>1067</sup> *Ibid.*

<sup>1068</sup> In this regard e.g. declarations the United Nations agree upon the fact that '... in so far as the expectation is gradually justified by State practice, a declaration may by custom become recognized as Laying down Rules Binding upon States'. (Report of the Commission on Human Rights, United Nations document E/3616/Rev. 1, paragraph 105, eighteenth session, Economic and Social Council, 19 March -14 April 1962, United Nations, New York).

pressure.<sup>1069</sup> A state should therefore express its consent to allow the enforcement of the treaty, which could overrule matters governed by national or customary law. It is therefore fundamental to create a consensus as well as political sensibility towards the issue of an international treaty for folklore. It is one thing to agree a treaty; making it enforceable is another matter.

Some intellectual property treaties can be enforced, but they only apply as binding law in a relatively small number of countries - essentially limiting the scope of the treaty itself. Nevertheless, there are treaties now largely enforced by many countries which were only enforced after a long period of time and a process of norm implementation. A key example of this is the Berne Convention of 1886 which some countries took up to one hundred years to recognise and enforce.

It cannot then be forgotten that some countries decide to enforce only parts of an agreement/convention. And, rather than leaving them as part of an international agreement, they prefer to include them in the norms of their private international law.<sup>1070</sup> To avoid that a convention is ratified but not enforced and signed by the majority of world's countries, a political consensus must be reached. Several elements should, therefore, be taken into account when harmonising diverse values and legislation. Some of these important features which could help but also impede the process of the implementation of an international convention on folklore will be examined in the following paragraphs.

### 6.3.2. Customary Law

While values and laws usually diverge, international law also encompasses customs which consist of a consolidated praxis and which can act as a catalyst where the law is deficient. Customs are manifestations emanating from social life and customary law is the process of accommodating customs into daily life, as norms representing a living-judicial-law-making.<sup>1071</sup> Customs are recognised as the 'vox populi' the *Volksgeist*, an expression of people's development life style<sup>1072</sup> and will.<sup>1073</sup> Of course not all customs are positive, in the sense that not all deserve protection. As Sheleff observes, recalling Mboya, it is important to distinguish

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<sup>1069</sup> See the description provided by UNESCO on how a Convention is implemented, available at [http://portal.unesco.org/en/ev.php-URL\\_ID=21681&URL\\_DO.TUPI&URL\\_SECTION=-471.html](http://portal.unesco.org/en/ev.php-URL_ID=21681&URL_DO.TUPI&URL_SECTION=-471.html).

<sup>1070</sup> WIPO/GRTKF/IC/6/6 p.16.

<sup>1071</sup> L. Sheleff *The Future Of Traditions* (Frank Class 2000). This definition comes from unifying the two terminologies used by the author (pp.13-14) when he respectively refers to 'living law' and to 'judicial law making'.

<sup>1072</sup> *Ibid*, p.4.

<sup>1073</sup> *Ibid*, p.377.

between 'positive' and 'negative' customs.<sup>1074</sup> The way of valuing and accommodating customs is important since they can help to create legal pluralism.<sup>1075</sup> The advantages of fostering customary law through legal pluralism are not only for benefiting the tribal communities, but also to 'offer possible solutions to intricate political problems, as well as explanation of existing legal structures'.<sup>1076</sup> Therefore, customary laws should not be perceived as inferior - on the contrary they should be part of the legal system, of the *corpus iuris*<sup>1077</sup> as they can best interpret the communities' social relationships. In fact, they are built to respond, as 'extralegal non-governmental forces'<sup>1078</sup> to the exigencies of the people who generate them. The difficulty is to accommodate them in the correct framework and to combine them effectively with existing codified rules. In modern times the expansion of legal pluralism implies that sovereignty can be shared to a certain extent,<sup>1079</sup> although this bears the risk of creating conflicting norms (such as state laws vs. customary laws).<sup>1080</sup> Yet there is another possibly more important parallel danger: verifying that one customary law does not prevail on another. This problem relates more to 'infra-state grouping within the state':<sup>1081</sup> Is it the customary law of a settler majority which should prevail or the one of a minority - the Kenyan dominant Kikuyu or the Maasai? It is also a matter of accommodating tribal rights within a minority group or whether tribes are entitled to some rights at all.<sup>1082</sup> Another issue is the case of customary practises which are against state laws or which threaten to harm national identity.<sup>1083</sup>

Customary rules are becoming a constant issue in the protection of Indigenous peoples' folklore - and this should not come as a surprise. As noted in the chapter regarding the Australian legislator's approach to folklore, it was assessed how the land<sup>1084</sup> issue and the consolidated practise of Aboriginal communities could

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<sup>1074</sup> *Ibid*, p.20.

<sup>1075</sup> *Ibid*, pp.84, 379.

<sup>1076</sup> *Ibid*, p.432.

<sup>1077</sup> *Ibid*, p.380.

<sup>1078</sup> *Ibid*, p.3.

<sup>1079</sup> *Ibid*, pp.2-28.

<sup>1080</sup> *Ibid*, p.6.

<sup>1081</sup> *Ibid*, pp.6, 22.

<sup>1082</sup> *Ibid*, pp.10-11.

<sup>1083</sup> *Ibid*, 23.

<sup>1084</sup> FAO Legal Office Publ. [2002] 'Law and Sustainable Development since Rio', at chapter 8 under paragraph 3.2.2. titled 'Strengthening the Rights of Indigenous Peoples'. See also the paragraph a) The Dreaming and the Land: Basic Elements of Aboriginal Life in the chapter 'The Influence of

influence courts' decisions.<sup>1085</sup> In conclusion it was devised that the importance of customary law cannot be underestimated especially when addressing Indigenous peoples' rights to folklore protection and its regulation at an international level.

In this respect, Indigenous peoples' customary law includes a specific set of rules which discipline the life and relationships of members of the community. Indigenous peoples also have their own sort of intellectual properties, which are not based on the individualistic and monopolistic nature of the right but rather on community sharing.

The importance of customary law increases when addressing the protection of folklore in the international arena. It must be recalled that for an item to become customary law, a practise must be repeated over time without interruption.<sup>1086</sup> The 'customary law' of Indigenous peoples should be considered while drafting legislation on the protection of their folklore. Moreover, their positions need to be mediated through dialogue and co-operation among different countries with diverse backgrounds and interests.

The adoption of customary law has great potentials although it bears some difficulties. As observed by Sheleff: 'It is much easier to attempt reception of a legal system, when its central factor is a code; far more difficult when it is based on custom.'<sup>1087</sup> Thus, customary laws do not represent a threat for the current legal system, on the contrary they provide 'an integral aspect...an essential component of a meaningful law that is willingly accepted by the citizenry, because it is deeply embedded in their consciousness as living part of their culture.'<sup>1088</sup> For example, it may be able to regulate internal national exigencies which might not be covered by a treaty. In fact, treaties and customary laws can coexist simultaneously sharing legal authority in the international system.<sup>1089</sup> These basic principles do not substitute for values, which still remain diverse, but they can become legal principles adopted beyond the boundaries of a country and therefore are valid and applicable to more

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Courts in Addressing The Necessity of a New Intellectual Property Regime for the Protection of Folklore. The Australian Experience'.

1085 *Ibid.* See also J. Lipton 'Information Property: Rights and Responsibilities', [January 2004] 56 Fla. L. Rev. pp.174-75-76-77.

1086 See L.E. Godshall 'Making Space for Indigenous Intellectual Property Rights under Current International Environmental Law' [2003] 15 Geo. Int'l Envtl. L. Rev. p.521.

1087 L. Sheleff *The Future Of Traditions* (Frank Class 2000) p.79. The author at p. 85 sustains also that customary law are an importance source particularly for common law system.

1088 *Ibid*,87.

1089 *Ibid.* This happens when they are identical to treaty law.

than a single state.<sup>1090</sup> The impact that the adoption of these principle could have on Indigenous peoples' folklore is implicit.

### 6.3.3. Soft Laws: The 'Non-Binding' Instruments

Another possible international instrument could take the form of non-binding laws, which are usually in the form of recommendations or policy statements. These do not the legal force of international treaties but they can still influence domestic legislation. Moreover, they can be considered not just half way between international treaties and domestic laws, but as a step towards the enforcement of international measures.

This concept will be made clearer by reviewing the phrase of P Malanczuk<sup>1091</sup> '[t]he emergence of 'soft law'... has to do with the fact that states in agreement frequently do not (yet) wish to bind themselves legally, but nevertheless wish to adopt and test certain rules and principles before they become law.' These recommendations are useful instruments for national and continental policymakers, legislators as well as for WIPO, since these stakeholders all seem to encourage the use of soft laws, declarations and guidelines. Thus like customary laws, soft laws or quasi legislation,<sup>1092</sup> can constitute another important source of international law for the protection of folklore.<sup>1093</sup>

Soft laws can have a normative or political nature. These 'natures' are not necessarily represented in written form.<sup>1094</sup> The language used by these laws is very different from the language of treaty law. This is not the only element which differs between convention and treaty. In this regard, soft laws make use of a diplomatic language because their scope is to lay down by legally non-binding resolutions,<sup>1095</sup> declarations, regulations, international codes of conducts, guidelines, recommendations.<sup>1096</sup>

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<sup>1090</sup> *Ibid.*

<sup>1091</sup> P. Malanczuk *Akehurst's Modern Introduction to International Law* (7<sup>th</sup> edition Routledge, 1997) p.54. Quoted in the 6<sup>th</sup> ICG Report.

<sup>1092</sup> L. Sossin and C.W. Smith 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' [April 2003] 40 n. 4. *Alberta L. Rev* p.869. In relation to IPRs see also L. Bently and S.M. Maniatis *Intellectual Property and Ethics* (Sweet and Maxwell London 1998).

<sup>1093</sup> Though it could be questioned why folklore is so vital for the Indigenous communities, should not be disciplined in a more formal, binding way.

<sup>1094</sup> *Ibid* p.871.

<sup>1095</sup> As the non-binding resolutions of the United Nations Security Council. See N. Roht-Arriaza 'Reparations Decisions and Dilemmas' [Winter 2004] 27 *Hastings Int'l & Comp. L. Rev.* p.175.

<sup>1096</sup> For some differences among these instruments visit e.g. unesco web site at [http://portal.unesco.org/en/ev.php-url\\_id=12026&url\\_do=do\\_topic&url\\_section=-471.html](http://portal.unesco.org/en/ev.php-url_id=12026&url_do=do_topic&url_section=-471.html). See also

The adoption of soft laws has often been used in relation to folklore. Examples of that are the WIPO and UNESCO 'Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions were adopted in 1982' (the Model Provisions) and the UNESCO 'Recommendations on the Safeguard of Traditional Culture and Folklore 1989'.<sup>1097</sup> Another example of soft law is the 'Tunis Model Law on Copyright 1976' (Tunis Model Law), jointly drafted by UNESCO and WIPO. Soft laws may also be the many declarations of Indigenous peoples' communities.<sup>1098</sup> These declarations, though not binding, at least have the merit of raising the Indigenous rights issue at an international level.<sup>1099</sup>

Soft laws convey all those common principles expressed through customary law.<sup>1100</sup> They interpret and enact them, thus filling the gaps of standard laws. Soft law may have the power to 'bridge law and policy',<sup>1101</sup> but they must 'be subject to political justification and judicial scrutiny'.<sup>1102</sup> 'Lastly, soft law itself should be ...subject to both internal review for consistency and coherence, and judicial review for legal sufficiency'.<sup>1103</sup> These laws are important because they could become well established practices that if implemented by several countries could be considered as relevant international customary laws and, furthermore, taken into consideration in case of an international convention on folklore.

Soft laws are not legally binding but they still have an impact in their very process of implicit application. The non-binding nature characteristic of soft law could also have positive repercussions. Soft laws are the principle administrative

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D. Weissbrodt and M. Kruger 'Current Development: Norms On The Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights' [October 2003] 97 A.J.I.L. p.901.

<sup>1097</sup> Both will be addressed later on in this chapter.

<sup>1098</sup> See e.g. the Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples, see L.E. Godshall 'Making Space for Indigenous Intellectual Property Rights Under Current International Environmental Law'[2003] 15 Geo. Int'l Env'tl. L. Rev. pp.524-25.

<sup>1099</sup> E.B. Bluemel 'Substance without Process: Analysing TRIPs Participatory Guarantees in Light of Protected Indigenous Rights' [September 2004] 86 J. Pat. & Trademark Off. Soc'y p.673.

<sup>1100</sup> L. Sossin and C.W. Smith 'Hard Choices and Soft Law: Ethical Codes, Policy Guidelines and the Role of the Courts in Regulating Government' [April 2003] 40 n. 4. Alberta L. Rev p.875 where the authors sustain that '...non-legislative ethical tools which structure the growth of soft law principles play a prominent political role in shaping (and reshaping) administrative culture'.

<sup>1101</sup> *Ibid*, p.892.

<sup>1102</sup> *Ibid*.

<sup>1103</sup> *Ibid*, p.870.

mechanisms used to elaborate the legal standards and political values underlying bureaucratic decision-making.<sup>1104</sup>

## **6.4. Historical Background of the International Protection of Folkloric Expressions and Its Development in Intellectual Property Law.**

### **6.4.1. The Work Undertaken by UNESCO and WIPO and its Development**

One of the first attempts to define a set of rules applicable to folklore was the 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions', which were adopted in 1982 under the auspices of WIPO and UNESCO ('the Model Provisions'). The Model Provisions were born in response to concerns of developing countries, where the expressions of folklore, which represent an important part of the living cultural heritage of nations, were illegally exploited and where expressions of folklore were subjected to various prejudicial actions. Attempts had already been made at a continental level to find a consensus amongst national states.<sup>1105</sup>

In fact, the worry of the Expert Committee in charge of drafting the 'Model Provisions' was that the dissemination of folklore might lead to the improper exploitation of the cultural heritage of a nation. Another concern was the improper use of these cultural expressions and how they might prejudice and undermine the same cultural and economic interests of the nation. According to the promoters of the Model Provisions, expressions of folklore constituting manifestations of intellectual creativity must seek a protection as 'intellectual productions'.<sup>1106</sup>

The Model Provisions distinguish themselves by encouraging the promotion of a protection for folklore at a national level.<sup>1107</sup> Some participants at the meeting of the Committee of Governmental Experts (which adopted the Model Provisions)

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<sup>1104</sup> *Ibid*, p.871.

<sup>1105</sup> One of these regional attempts can be considered the Tunis Model Law which provides specific protection for works of national folklore. In 1976, the Tunis Model Law on Copyright for Developing Countries was adopted by the Committee of Governmental Experts convened by the Tunisian Government in Tunis from February 23-March 2, 1976, with the assistance of WIPO and UNESCO. The folkloric works within its provisions do not need to be fixed in material form in order to receive protection, and their protection is without limitation in time.

<sup>1106</sup> See the Preamble of the WIPO-UNESCO 'Model Provisions' 1982.

<sup>1107</sup> While the Model Provisions stress the accent over the necessity of strong and precise national laws, sub-regional, regional and international protection of creations of folklore are also taken into consideration.

stressed the importance of international protection and that it would be indispensable for extending the protection of expressions of folklore of a country beyond its national borders. WIPO and UNESCO upheld these requests with the call of a meeting of the Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property, which was held in Paris in December 1984. The Group of Experts took into consideration the need for specific international regulation on the international protection of expressions of folklore by intellectual property. The Group also looked at the possibility, either politically or technically, of drafting the text of a convention. The discussions at the meeting of the Group of Experts reflected a general recognition of the need for international protection of expressions of folklore, particular, with regard to the rapidly increased and uncontrolled use of such expressions by means of modern technology, beyond the limits imposed even by some states' regulations.<sup>1108</sup>

However, the great majority of the participants considered it premature to establish an international treaty since there was not sufficient experience available. In this regard, the protection of expressions of folklore at the national level, particular, affected the implementation of the Model Provisions. The two main problems identified by the Group of Experts were:

- a) the lack of appropriate sources for the identification of the expressions of folklore to be protected and
- b) the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region.

The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the Report of the Group of Experts. One of the main intents of the Model Provisions in the eyes of its drafters was to guarantee the applicability of its provisions to as many countries as possible, countries where some rules of protection for folklore were already in force and countries where no legislation was in force. Moreover, the Model Provisions express a desire for a model law, based on the use of means of copyright and neighbouring rights, where such forms of protection would be applicable.

However, this draft was never turned into an international treaty, because some member states found that the debate had moved on, and thus the draft did not

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<sup>1108</sup> See M. Blakeney *Legal Aspects of the Transfer of Technology to Developing Countries* (Esc Oxford 1989) and WIPO/GRTKF/IC/5/3Annex p.25.



address their more recent needs. As will be explained, nevertheless, a valid attempt can still be considered to reach an international protection for folklore. As the draft was indeed too rigid and protected only a limited number of works of folklore, it has thus survived as a Model Law with model provisions which national legislators could borrow and implement at national level.<sup>1109</sup>

Several countries have enacted legislation based at least in part on the Model Provisions, generally as part of their copyright law. First, however, the main elements of the Model Provisions will be summarised in the following paragraphs.<sup>1110</sup> At that stage, if an international protection was to be sought this could have been done only by considering a few aspects of the protection of folklore and therefore, an international treaty was not the most suitable legal species.

#### **6.4.1.1. Expressions of Folklore to Be Protected**

The Model Provisions do not offer any definition of folklore. However, Section 2 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.<sup>1111</sup> The Model Provisions use the words 'expressions' and 'productions' rather than 'works' to underline the fact that the provisions are *sui generis*, rather than part of copyright. It is another matter that expressions of folklore may, and often do, have the same artistic forms as 'works'.<sup>1112</sup> In fact, the word 'works' is seen as very much connected to the idea of copyright, and to the concept of commercial value, which is employed when it comes to copyright works.

Although the Model Provisions can be attributed to the first organic tentative on exclusive rights in expressions of folklore,<sup>1113</sup> only 'artistic' heritage is covered by the Model Provisions. This means that, among other things, traditional beliefs, scientific views (e.g. traditional cosmogony) or merely practical traditions as such,

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<sup>1109</sup> See S. Abada, 'La Recommendation UNESCO de 1989 et les Perspectives de la Protection Internationale du Folklore', in UNESCO-WIPO Forum Phuket, 1997, p.230.

<sup>1110</sup> See WIPO/GRTKF/IC/1/13 (Report of first session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore), paras. 156-175. See also generally M. Ficsor 'Attempt to Provide International Protection for Folklore by Intellectual Property Rights' in UNESCO-WIPO Forum Phuket, 1997 and also WIPO/GRTKF/IC/5/3Annex p.25.

<sup>1111</sup> Section 2 of the WIPO-UNESCO 'Model Provisions' 1982.

<sup>1112</sup> M. Ficsor, 'Attempt to Provide International Protection for Folklore by Intellectual Property Rights' in UNESCO-WIPO Forum Phuket, 1997 p.218.

<sup>1113</sup> WIPO/RT KF/IC/4/3 p.31.

separated from possible traditional artistic forms of their expression, do not fall within the scope of the proposed definition of 'expressions of folklore.' On the other hand, 'artistic' heritage is understood in the widest sense of the term, and covers any traditional heritage appealing to our aesthetic sense. Verbal, musical, and tangible expressions as well as expressions by action may all consist of characteristic elements of the traditional artistic heritage and qualify as protected expressions of folklore.

The Model Provisions also offer an illustrative enumeration of the most typical kinds of expressions of folklore. They are subdivided into four groups according to the forms of the expressions, namely expressions by words (verbal), expressions by musical sounds (musical), expressions by action (of the human body) and expressions incorporated in a material object (tangible expressions).<sup>1114</sup> The first three kinds of expressions need not be reduced to material form, that is to say, the words need not be written down, the music need not exist in musical notation and the dance need not exist in choreographic notation. On the other hand, tangible expressions by definition are incorporated in a permanent material, such as stone, wood, textile, gold, etc. The Model Provisions (which identify four forms) also give examples of each of the four forms of expressions. They are, in the first case, 'folk tales, folk poetry and riddles'; in the second case, 'folk songs and instrumental music'; in the third case, 'folk dances, plays and artistic forms of rituals'; and in the fourth case, 'drawings, paintings, carvings, sculptures, pottery, terra-cotta, mosaic, woodwork, metalwork, jewellery, basket weaving, needlework, textiles, carpets, costumes; musical instruments; architectural forms.'<sup>1115</sup>

#### **6.4.1.2. Acts Against which Expressions of Folklore Should Be Protected**

There are two main categories of acts against which, under the Model Provisions expressions of folklore are protected: 'illicit exploitation' and 'other prejudicial actions'.<sup>1116</sup>

'Illicit exploitation' of an expression of folklore is understood in the Model Provisions<sup>1117</sup> as any utilisation made both with gainful intent and outside the traditional and customary context of folklore, without authorisation by a competent authority or the community concerned. This means that a utilisation – even with gainful intent - within the traditional or customary context should not be subject to

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<sup>1114</sup> This enumerative list is under Section 2 of the WIPO-UNESCO 'Model Provisions' 1982.

<sup>1115</sup> *Ibid.* The Model Provisions distinguish between tangible and intangible expressions of folklore.

<sup>1116</sup> *Ibid.*, Section 1.

<sup>1117</sup> *Ibid.*, Section 3.

authorisation. On the other hand, an utilisation, even by members of the community where the expression has been developed and maintained, requires authorisation if it is made outside such a context and with gainful intent.<sup>1118</sup>

Use in the traditional context means that it remains in its proper artistic framework, based on the continuous use by the community concerned. For example, such is the case when a ritual dance is performed as part of a rite. Customary use instead refers to the use of expressions of folklore in line with the practices of the community's everyday life, such as the selling of expressions of folklore by local craftsmen.<sup>1119</sup>

Section 1 of the Model Provisions specifies the acts of utilisation which requires authorisation where the aforementioned circumstances described exist. It distinguishes between cases where copies of expressions are involved, and where cases of copies of expressions are not necessarily involved. In the first category of cases, the acts requiring authorisation are publication, reproduction and distribution; in the second category of cases, the acts requiring authorisation are public recitation, public performance, and transmission by wireless means or by wire and 'any other form of communication to the public.'<sup>1120</sup>

Section 4 of the Model Provisions determines four special cases regarding the acts restricted under Section 3. In these cases, there is no need to obtain authorisation, even if the use of an expression of folklore is made against payment and outside its traditional or customary context.<sup>1121</sup> The first of these cases is use for educational purposes. The second case is use 'by way of illustration' in an original work, provided that such use is compatible with fair practice. The third case is where an expression of folklore is 'borrowed' for creating an original work by an author. This important exception serves the purpose of allowing free development of individual creativity inspired by folklore. The Model Provisions aim not to hinder in any way the creation of original works based on expressions of folklore. The fourth case in which no authorisation is required is that of 'incidental utilisation.' In order

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1118 See the comments of H. Olsson in 'Economic Exploitation of expressions of folklore: the European Experience' UNESCO-WIPO Forum Phuket, 1997 p.177 where he affirms that there are two kinds of exploitation: 'One such kind is the unauthorized exploitation...which takes place, sometimes on a world-wide scale, through new means of communication and without the consent from those communities or countries from where they emerge. The other kind of exploitation is the one which results in mutilations or distortions or other acts which are prejudicial to the cultural, religious or social interests of the communities which are the source'.

1119 M. Ficsor, 'Attempt to provide international protection for folklore by intellectual property rights' in UNESCO-WIPO Forum Phuket, 1997 p.219.

1120 WIPO-UNESCO 'Model Provisions' 1982, Section 1.

1121 *Ibid*, Section 4.

to elucidate the meaning of 'incidental utilisation,' paragraph 2 mentions (not exhaustively) the most typical cases considered as 'incidental utilisation': utilisation in connection with reporting on current events and utilisation where the expression of folklore is an object permanently located in a public place.<sup>1122</sup>

'Other prejudicial actions' detrimental to interests related to the use of expressions of folklore are identified by the Model Provisions, as four cases of offences subject to penal sanctions<sup>1123</sup>:

-Firstly, the Model Provisions provide for the protection of the 'appellation of origin' of expressions of folklore. Section 5 requires<sup>1124</sup> that, in all printed publications, and in connection with any communication to the public, of any identifiable expression of folklore, its source be indicated in an appropriate manner by mentioning the community and/or geographic place from where the expression utilised has been derived. Reference to 'the community and/or geographic place' takes into account that the same folkloric expressions may be found in more than one territory. Under Section 6, non-compliance with the requirement of acknowledgement of the source is a punishable offence.

-Secondly, any unauthorised utilisation of an expression of folklore, where authorisation is required, constitutes an offence.<sup>1125</sup> It is understood that such an offence may also be committed by using expressions of folklore beyond the limits, or contrary to the conditions of an authorisation obtained.

-Thirdly, misleading the public by creating the impression that what is involved is an expression of folklore derived from a given community when, in fact, such is not the case, is also punishable. This is essentially a form of 'passing off.'

-Fourthly, it is an offence<sup>1126</sup> if, in the case of public uses, expressions of folklore are distorted in any direct or indirect manner 'prejudicial to the cultural interests of the community concerned.' The term 'distorting' covers any act of distortion or mutilation or other derogatory action in relation to the expression of folklore.

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<sup>1122</sup> *Ibid*, Section 4, paragraph 2.

<sup>1123</sup> *Ibid*, Section 6.

<sup>1124</sup> *Ibid*, Section 5.

<sup>1125</sup> The issue of sanctions will be discussed further on in this chapter.

<sup>1126</sup> WIPO-UNESCO 'Model Provisions' 1982, Section 5.

### 6.4.1.3. Authorisation of Utilisations of Expressions of Folklore

When the Model Provisions determine the entity entitled to authorise the utilisation of expressions of folklore, they alternatively refer to 'competent authority' and 'community concerned,' avoiding the term 'owner.' They do not deal with the question of the ownership of expressions of folklore since this may be regulated in different ways from one country to another.

The tasks of the competent authority at the national level (provided such an authority has been designated), are to grant authorisations for certain kinds of utilisations of expressions of folklore.<sup>1127</sup> Furthermore, the competent authority is to receive applications for authorisation of such utilisations, to decide on such applications and, where authorisation is granted, to fix and collect a fee, if required by law.<sup>1128</sup> The Model Laws have not been transformed into national implementations yet. However, countries such as Tunisia have already put in place similar provisions at the national level.<sup>1129</sup>

The Model Provisions offer the possibility of establishing in law the duty of the supervisory authority to set tariffs payable for authorisations of utilisations or to approve such tariffs. However it is without indication in the Model Provisions as to who will, in such a case, propose the tariffs; although it was understood by the experts adopting the Model Provisions that the competent authority would propose the tariffs<sup>1130</sup>, and that the supervisory authority's decision may be appealed to a court.<sup>1131</sup>

Where the community as such is entitled to permit or prevent utilisations of its expressions of folklore subject to authorisation, the community could act in its capacity as owner of the expressions concerned and would be free to decide how to proceed. There would be no supervisory authority to control how the community exercises its relevant rights. However, the Committee of Governmental Experts, which adopted the Provisions, was of the opinion that if the community was not in charge of the regulation process, it could be carried out by a designated representative body. Therefore, this representative body could be entitled, by legislation, to give the necessary authorisation. Such a body would qualify as a competent authority, subject to the relevant procedural rules laid down in the Model Provisions.

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<sup>1127</sup> *Ibid*, Section 3.

<sup>1128</sup> *Ibid*, Section 10, paragraphs 1 and 2.

<sup>1129</sup> *Ibid*, Introduction.

<sup>1130</sup> *Ibid*, Section 10.

<sup>1131</sup> *Ibid*, Section 11, paragraph 1.

The Model Provisions allow, but do not make mandatory, the collection of fees for authorisations.<sup>1132</sup> Presumably, where a fee is fixed, the authorisation will be effective only when the fee is paid. Authorisations may be granted without a fee. Even in such cases, the system of authorisation may be justified since it may prevent utilisation that would distort expressions of folklore. The Model Provisions also determine the purpose for which the collected fees must be used. They offer a choice between promoting either safeguarding national folklore or promoting national culture. Where there is no competent authority and the community concerned authorises the use of its expressions of folklore and collects fees, it seems obvious that the purpose of the use of the collected fees should also be decided upon by the community.

#### 6.4.1.4. Sanctions<sup>1133</sup>

The Model Provisions state that sanctions should be provided for by each type of offence determined by the Provisions in accordance with the criminal law of each country concerned.<sup>1134</sup> This is in line with intellectual property where any serious and deliberate offence is liable to criminal sanctions as provided for in article 61 of the TRIPs Agreement 1994. This is an important aspect of this set of provisions, as any immaterial intellectual property right primarily depends on its enforceability. The whole list of acts for which authorisation is required only becomes meaningful when it is backed up by the possibility of tough (criminal) sanctions for any infringement.<sup>1135</sup> Although the Model Provision can be considered as the first attempt to shape legislative means of protection for folkloric works, they left uncovered many important policy issues.

The main problem is that the Model Provisions do not sanction the 'borrowing of' an expression of folklore, except in cases which meet the criteria noted above in sub-paragraph 6.4.1.2. When this is necessary to create an original work<sup>1136</sup> no right of adaptation is provided for. What it is left unprotected is so-called 'defensive protection', which is the right of Indigenous peoples to prevent adaptation and use of

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<sup>1132</sup> *Ibid*, Section 10, paragraph 2.

<sup>1133</sup> See above when the topic of offences has been discussed.

<sup>1134</sup> E.g. Section 7 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions' for seizure and other similar measures and Ficsor, 'Attempt to Provide International Protection for Folklore by Intellectual Property Rights' in UNESCO-WIPO Forum Phuket, 1997 p.222.

<sup>1135</sup> For a definition of infringement of copyright and its different categories See in general W.R. Cornish and M. Llewlyn *Intellectual Property* (fifth ed. Sweet & Maxwell 2003) chap. 7.

<sup>1136</sup> Section 5 of the Model Provision excludes the acknowledgement of the source of folklore, when the expression has to be borrowed of for the creation of an original work. See WIPO/RT KF/IC/4/3 p.31.

their expressions, the right to prevent the use of derogatory, 'offensive and fallacious use' of their expressions, the right to be acknowledged and attribute works as belonging to them.<sup>1137</sup>

The scope of the Model provisions was partially achieved. WIPO and UNESCO had wished to develop a set of rules which could be incorporated into national legislation to protect folklore. This was not achieved as effective protection was not met at a national level. This is the reason why UNESCO decided to implement the 'Recommendation on the Safeguarding of Traditional Culture and Folklore' as an attempt to enforce the message of the Model Provisions. In addition, due to the lack of specific measures at national level the Model Provisions did not help to internationalise the protection of folklore. The goal of a globalised policy on folklore was therefore affected.

This was the reason why many countries asked for WIPO and UNESCO continental consultations in the World Forum held in Phuket, Thailand on 1997. It was thought that in order to better assess the impact of the model provisions within national law and to monitor the development of the protection of folklore, the analysis should be carried out at a continental level. Behind this lacklustre result, the unwillingness of many developed countries<sup>1138</sup> played an effective role in creating a system underpinned by more specific and sensitive rules. Moreover, the lack of any infringement measures where folkloric works are used to create a new original expression<sup>1139</sup> still underlines the Western monopolistic concept that protection through copyright should only apply to 'improvement of science and useful arts'.<sup>1140</sup>

Furthermore, they do not take into account the impact of globalisation and the new technological means which could aggravate the protection of folklore whether or not duly oriented and disciplined. In this regard, during the first ICG Session<sup>1141</sup> the applicability of the Model Provisions 1982 was discussed. In particular the need to update the Model Provisions in a way that they could grant protection for folklore

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1137 WIPO/RT KF/IC/4/3 p.31.

1138 But the main obstacle was created by the strong opposition of United Kingdom and U.S. in creating a set of more specific rules.

1139 WIPO-UNESCO 'Model Provisions' 1982, Section 5.

1140 See U.S. Cons. Article 1 §8(8). See S.W. Halpern, C.A. Nard and K.L. Port *Fundamental of the United States Intellectual Property: Copyright, Patent and Trademark* (Kluwer Law International 1999) at chapter 1 § 1. Cfr. P. Goldstein *Copyright, Patent, Trademark and Related State Doctrines cases and Materials on the law of Intellectual Property* (Foundation Press 1999) p.6.

1141 WIPO ICG First Session April 30 - May 3, 2001

also in cases of development of new forms of commercial exploitation was assessed.<sup>1142</sup>

The Model Provisions were not a total failure. They did help to create concerns among developing countries and Indigenous communities about the role played by developed economies in their folkloric cultures. These soft laws were just a first step, which did not help towards harmonisation of laws since, it was still too early. It did move UN agencies, NGOs, Indigenous peoples communities and all the other actors towards the search for a new set of rules and values which could be applicable to folklore.

A new effort undertaken at the international level is 'The Recommendations on the Safeguard of Traditional Culture and Folklore 1989', enacted by UNESCO. This will be examined in the follow paragraph in the light of the present increasing interest in cultural heritage of Indigenous peoples and small minority groups.<sup>1143</sup> However, before addressing the results of these continental consultations a substantial analysis of the Recommendation is crucial.

#### **6.4.2. The Recommendations on the Safeguard of Traditional Culture and Folklore, 1989**

A group of intergovernmental experts working for UNESCO tried to achieve in 1989 the results included in the Model Provisions through a new document titled 'Recommendation on the Safeguard of Traditional Culture and Folklore' with the same aim of harmonising national instruments to protect folklore. The work of UNESCO in protecting the world cultural heritage gives special attention to the protection of folklore of Indigenous peoples. This is one of the main goals of the organisation. UNESCO's role falls between WIPO and WTO in cultural matters concerning the legal protection of folklore. UNESCO, and its recent steps towards approving a 'Preliminary Draft Convention on the Protection of the Diversity of

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<sup>1142</sup> WIPO/GRT F/IC/ 1/3/ paras. 92-101.

<sup>1143</sup> See the Universal Declaration on Cultural Diversity, adopted at the 31<sup>st</sup> UNESCO General Conference on 2<sup>nd</sup> November 2001( in particular art 3 'cultural diversity as factor of development, art 7 'cultural heritage as a wellspring of creativity' and art 9 'cultural policies as catalysis of creativity'. (Text of the Declaration available at [www.unesco.org](http://www.unesco.org)) See the *Preliminary Draft Of A Convention On The Protection Of The Diversity Of Cultural Contents And Artistic Expressions*, Paris, July 2004 (doc. CLT-2004/CONF.201/CLD.2CLT/CPD/2004/CONF-201/2) also available through the same web site. In particular the objectives of these Draft Convention directly applicable to folklore are already set forth in *Article 1 – Objectives* under letters g) to foster respect for the diversity of cultural expressions and raise awareness of its value at the national and global levels; and f) to strengthen international cooperation and solidarity in a spirit of global partnership with a view, in particular, to fostering the capacities of developing societies to protect and promote the diversity of cultural expressions.



Cultural Contents and Artistic Expressions',<sup>1144</sup> is witness to the interest that arose around the protection of cultural property, and in particular of cultural diversity, since folklore could be said to share both aspects.

UNESCO, even though not involved directly in the issue regarding copyright and folklore, through the instrument of a Recommendation, which is flexible and not legally binding, promotes and raises public awareness of the necessity of protecting and safeguarding folklore. UNESCO had already established some conventions to generally protect cultural heritage (these include the Convention on Means of Prohibiting and preventing the Illicit Import, Export and Transfer of Diversity of Cultural Property, 1970; the Convention concerning the protection of World Cultural and National Heritage, 1972; and the Declaration on the principles of International Cultural Co-operation, 1966.<sup>1145</sup> This document was adopted by the UNESCO's General Assembly).<sup>1146</sup>

However, the Recommendations 1989 represented an added value and a step forward from the 1982 Model Law in the sense that it provided a means to focus attention on the necessity of understanding the importance of the use of a proper terminology in providing a definition for folklore. It also brought folklore into the realm of more UN agencies. In doing so, Noriko Aikawa<sup>1147</sup> maintains that the goals of UNESCO are clearly stated through these recommendations and that they include the aim to sustain cultural diversity in the world. The intent of operating at the cultural level in protecting the creative source, of cultural and artistic expressions, is made even clearer under the UNESCO 'Universal Declaration on Cultural Diversity,' where at article 12 the role of UNESCO in relation to folklore is stated:

'UNESCO, by virtue of its mandate and functions, has the responsibility to:

a- Promote the incorporation of the principles set out in the present Declaration into the development strategies drawn up within the various intergovernmental bodies;

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<sup>1144</sup> At the 2nd Session of the Meeting of Government Experts currently being discussed (31 January-12 February 2005). News available at <http://www.unesco.org/culture/>.

<sup>1145</sup> Intellectual property Needs and expectation of Traditional knowledge Holders, WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (2001) at 51-52.

<sup>1146</sup> Prior to these documents copyright was found to be the instrument for protection of folklore by many governments (i.e. in 1973 the Government of Bolivia submitted to the Director-General of UNESCO the request that UNESCO begin to examine the state of folklore and make a proposal for an addition to the Universal Copyright Convention) as reported in Honko 'Copyright and Folklore' paper presented at the National Seminar on Copyright Law and Matters, Mangalore University, Mangalore, Karnataka, India, on February 9, 2001.

<sup>1147</sup> 'L'action de L'UNESCO en faveur de la Savegarde et de la Promotion de la Culture Traditionnelle et Populaire' UNESCO-WIPO Forum Phuket, 1997, p.189.

b- Serve as a reference point and a forum where States, international governmental and non-governmental organizations, civil society and the private sector may join together in elaborating concepts, objectives and policies in favour of cultural diversity;

c- Pursue its activities in standard-setting, awareness raising and capacity-building in the areas related to the present Declaration within its fields of competence;

d- Facilitate the implementation of the Action Plan, the main lines of which are appended to the present Declaration'.<sup>1148</sup>

This UNESCO Declaration shows a clear political intent. It is more a 'declaration of principles' than a real law, but it does bring political pressure to the countries that adhere to it.<sup>1149</sup> Therefore, it is another more general norm which it is adopted by representative of Member States usually at the end of a Forum.<sup>1150</sup> In fact, a declaration as well as the recommendations and policy statements, have the purpose to gather political consent over some important topics, as the protection of folklore. This instrument has been successfully used by the UN agencies and WIPO highly recommends the possibility of adopting one on folklore and traditional knowledge.<sup>1151</sup>

In this regard, the Recommendations, despite being 'less formal' than declarations,<sup>1152</sup> address the problem of identifying the owner of such traditional

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<sup>1148</sup> The whole text of the Declaration is reported under UNESCO web site at <http://www.unesco.org>.

<sup>1149</sup> 'In United Nations practice, a 'declaration' is a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated, such as the Declaration of Human Rights. A recommendation is less formal. Apart from the distinction just indicated, there is probably no difference between a 'recommendation' and a 'declaration' in United Nations practice as far as strict legal principle is concerned. A 'declaration' or a 'recommendation' is adopted by resolution of a United Nations organ. As such it cannot be made binding upon Member States, in the sense that a treaty or convention is binding upon the parties to it, purely by the device of terming it a 'declaration' rather than a 'recommendation'. However, in view of the greater solemnity and significance of a 'declaration', it may be considered to impact, on behalf of the organ adopting it, a strong expectation that Members of the international community will abide by it.' (Report of the Commission on Human Rights, United Nations document E/3616/Rev. I, paragraph 105, eighteenth session, Economic and Social Council, 19 March -14 April 1962, United Nations, New York).

<sup>1150</sup> *Ibid.* 'Declarations are another means of defining norms, which are not subject to ratification. Like recommendations, they set forth universal principles to which the community of States wished to attribute the greatest possible authority and to afford the broadest possible support'. (e.g. Universal Declaration of Human Rights, adopted on 10 December 1948).

<sup>1151</sup> The WIPO drafter of the 6<sup>th</sup> Report defines the event of a declaration of folklore as having a 'catalysing effect' for the building of a future international treaty, at 18.

<sup>1152</sup> Report of the Commission on Human Rights, United Nations document E/3616/Rev. I, paragraph 105, eighteenth session, Economic and Social Council, 19 March -14 April 1962, United Nations, New York).

knowledge.<sup>1153</sup> They are also able to provide criteria that function as valid support in the creation, promotion and preservation of diverse cultures, which, without specific rules, could be exploited, misappropriated and finally disappear at a loss to the whole world.<sup>1154</sup>

Like declarations, the choice of using a recommendation as a legal instrument to grant protection at an international level for folklore has its own political implications. Recommendations, like model laws, declarations and guidelines, belong to the 'soft law' category, which has been fully described under the paragraph 'Soft Laws And Customary Laws As Parallel Systems To Treaty Laws – sub-paragraph b' as an indispensable instrument to raise awareness on sensitive matters, in which different interests and values are at stake. In fact, a recommendation does not have, *per se*, the characteristic of a binding law and therefore it can be a flexible instrument to achieve international consensus before a treaty is in place.<sup>1155</sup>

If we take as an example the Recommendations of UNESCO, we can see how this Organisation, like many other international or political bodies, makes use of such legally non-binding instruments. The UNESCO Recommendations specifically bring forth arguments for pressure groups which can then intervene in the political debate at their respective national levels.

Abada in his 1997 article makes clear that the text of the 1989 Recommendation has not been formulated to become a compulsory law, rather than to dictate some guidelines for national states. In particular, these guidelines can help them in building a system where folklore could find some form of protection.<sup>1156</sup> The 1989 Recommendation, in essence, sets out to achieve an international

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<sup>1153</sup> Recommendations 1989 lett. B.

<sup>1154</sup> Recommendations 1989 lett. C and D.

<sup>1155</sup> UNESCO gives the following definition of Recommendations available at '[http://portal.unesco.org/en/ev.php-url\\_id=12026&url\\_do=do\\_topic&url\\_section=-471.html](http://portal.unesco.org/en/ev.php-url_id=12026&url_do=do_topic&url_section=-471.html)  
'Although..... not subject to ratification, the mere fact that they have been adopted entails obligations even for those Member States that neither voted for it nor approved ....[they] are instruments in which 'the General Conference formulates principles and norms for the international regulation of any particular question and invites Member States to take whatever legislative or other steps may be required in conformity with the constitutional practice of each State and the nature of the question under consideration to apply the principles and norms aforesaid within their respective territories' (Article 1 (b)). ....., recommendations are intended to influence the development of national laws and practices.'

<sup>1156</sup> S. Abada calls it a 'texte sommaire de caractère general' S. Abada 'La Recommendation UNESCO de 1989 et les Perspectives de la Protection Internationale du Folklore' in UNESCO-WIPO Forum Phuket, 1997, p.231. For the enforcement of guidelines see what reported under paragraph Soft Laws and Customary Laws as parallel systems to treaties.

protection for expressions of folklore through national law<sup>1157</sup> while levelling up the debate internationally.

However, the problem of the effectiveness of these instruments can still be questioned. The consistent parallel in these recommendations, like many other soft laws, is that public awareness and agreement on common principles can be easily reached in a short time. More difficulty is found in the practical implementation of those principles into a convention.

If it is true that though the recommendation suggests that an international protection of folklore comes through the implementation of fair national laws, it remains laconic, however, on how different rules should address issues like harmonisation and unification. As noted, these are important and fundamental topics in today's modern, globalised society.

Overall, the use of these soft law mechanisms, first the Model provisions and then, subsequently, the Recommendations, show the difficulty of immediately using hard law mechanisms, which could result in a legally binding common model. In principle, the message that these non-binding legislative instruments want to convey is that folklore has its own importance for not only the people who do produce it, but also for the whole of mankind. Following this, through these instruments it is made clear that folklore is not synonymous with a simple and anonymous culture, but with the patrimony of national and world cultural heritage. International treaties and binding laws pass through these soft-laws, which can pressure national legislators to adapt those laws which are not appropriate.

Despite the importance of creating a network between national authority, continental authority and municipal authority,<sup>1158</sup> it is clear that the 1989 instrument is far less ambitious than its predecessor, primarily because many gaps are left on how and through which means international harmonisation on folklore should be achieved. Moreover, there is still missing a uniform definition of what folklore really is, which is too simply described under heading A.

Moreover, the first UNESCO draft leaves to the national legislator the identification of 'someone' to whom the copyright protection of folklore could be extended. However, the draft still speaks too much in individualistic terms, and does

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1157 UNESCO, Recommendation on the Safeguarding of Traditional Culture and Folklore adopted by the General Conference at its twenty fifth session. Paris 15<sup>th</sup> November 1989, available at [http://www.UNESCO.org/culture/laws/paris/html\\_eng](http://www.UNESCO.org/culture/laws/paris/html_eng).

1158 *Point C) of section E of the Recommendation 1989. Dissemination of Folklore UNESCO Recommendation 1989. See also the conclusion of the Recommendations on lett. G. International co-operation. Available under the UNESCO web site*  
[http://www.UNESCO.org/culture/laws/paris/html\\_eng](http://www.UNESCO.org/culture/laws/paris/html_eng).

not move away from the old definition of copyright. There is almost no consideration for communal property and the use of customary laws.

Furthermore, this effort came only from inside UNESCO. A more technical definition of folklore may have come from outside UNESCO. In fact, UNESCO as an agency is not specialised in providing answers from an intellectual property point of view, nor regarding the relationship between copyright and folklore and folklore in the trade era. As such, the international dimension has left too much room to the national legislator in the identification of a 'competent authority' that can translate within national laws the language of these recommendations.

More attention should have been given to identifying which 'supranational' authority could be responsible for responding to the immediate needs of Indigenous communities in protecting their cultural background world-wide. Too much faith has been given to the national legislator to find solutions for the protection of folklore workable at a national level.

Unfortunately, to protect folklore at an international level, international rules of harmonisation and unification must be put in place. This can only be possible if international actors work together. Above all a 'supranational' agency is needed to co-ordinate in this direction the efforts of all these stakeholders.<sup>1159</sup>

In practice both these documents from 1982 and 1989 have not introduced important changes towards the protection of folklore. To their credit though, they have brought forth, at a professional international level at least, the very problem itself and the need for a solution. What is left unclear is still the question of who is the owner of the rights of folklore. Who can be defined as the 'author' and to whom should protection be granted. How can the use of folkloric works be regulated.

#### **6.4.3. Guidelines or Model Provisions**

'Legislative guidelines' or 'model provisions' are also a useful instrument which could overcome some obstacles caused by the lack of an international uniform approach to folklore.<sup>1160</sup> The 'Tunis Model Law for Copyright in Developing Countries (1976)' and the 'Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and other Prejudicial Actions

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<sup>1159</sup> However UNESCO is proposing a possible agency willing to take the lead in the protection of folklore. This could be a possible interpretation of the words under *G. International co-operation* sub lett. (f) 'take necessary measures to safeguard folklore against all human and natural dangers to which it is exposed, including the risks deriving from armed conflicts, occupation of territories, or public disorders of other kinds', available at [http://www.UNESCO.org/culture/laws/paris/html\\_eng](http://www.UNESCO.org/culture/laws/paris/html_eng).

<sup>1160</sup> For instance, in the area of unfair competition, WIPO has in the past developed Model Provisions on Protection against Unfair Competition (1996) and a Model Law for Developing Countries on Appellations of Origin and Indications of Source (1974).

(1982)' have been appreciated by many member states which have adopted part of these norms in their national laws.

The 'Model Provisions of 1982', especially, were drafted as the possible norms of an international treaty, but there was no consensus at that stage on the necessity to make them part of a treaty. Nevertheless, many Member States,<sup>1161</sup> in replying to the Fact Finding Missions (FFMs) questionnaire in 2001, have expressed the need to develop new Model Provisions based on the existing ones. This request has been adopted by the latest ICG Session, while the same requests were ignored during the Third Session (2002), where they did not receive the approval of the Committee. However, there are those who are against the application of soft laws, mainly for their non-binding nature, and who consider these instruments as inadequate substitutes for treaties.<sup>1162</sup> There are also those who believe that before applying soft laws it is better to overcome several dichotomies created by the inter-linking of ethics, the discretionary power left to the courts, policy, and administrative bureaucracy. Nevertheless, soft laws still remain useful instruments<sup>1163</sup> in helping to produce more established laws.

While WIPO has already made use of soft laws to overcome the lack of a legal Convention on folklore, a collaboration between WTO and WIPO towards the implementation of soft laws on folklore is desirable. Only in this way could progress in the protection of folklore be monitored, allowing for common principles to be transformed into valid regulatory instruments. Moreover, a joint collaboration could act as a measure of positive and negative responses when a future international treaty for the protection of folklore would be set forth. Overall, the dialogical nature of soft laws still follows the direction of improving harmonisation and unification. Relevant improvements to the protection of folklore can be only reached through diplomacy and by balancing different interests and values.

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<sup>1161</sup> WIPO/GTRK/IC/6/6 p.19.

<sup>1162</sup> L.R. Helfer 'Symposium/Article: Whither The Udrp: Autonomous, Americanized, or Cosmopolitan?' [Fall 2004] 12 *Cardozo J. Int'l & Comp. L.* pp.504-05. The author refers to the UDRP as a schizophrenic system created by soft laws. See also F.L. Kirgis and edited by R.B. Bilder book review: 'Jan Klabbers *An Introduction to International Institutional Law* (2002)' [January 2004] 98 *A.J.I.L.* pp.217-18. Kabbler's idea of soft law is quite negative when it comes to the process of enforcement at an international level. 'Soft laws are not a guarantor of happiness' Klabbbers states at page 342 Kirgis criticizes this approach. Soft laws can always serve as useful source of future binding legal instruments.

<sup>1163</sup> See M. Reisman 'The Concept and Functions of Soft Law in International Politics', in *Essays In Honour Of Judge Taslim Olawale Elias* pp.135-36 (E. Bello & Bola Ajibola eds. 1992); see also K.W. Abbott and D. Snidal 'Hard and Soft Law in International Governance' [2001] 54 *Int'l Org.* 421 where softness has a function of obligation, precision and delegation.

#### **6.4.4. The UNESCO-WIPO Forum on the Protection of Folklore and the Plan of Action**

Folklore is not just a national problem but more an international question. The problem also functions in reverse: without international folklore protection it is impossible to achieve folklore protection at the national level.

Pursuant to the Recommendation made during the 1996 Diplomatic Conference, the WIPO-UNESCO World Forum on the Protection of Folklore was held in Phuket, Thailand, in April 1997. A theme which recurred was the discussion of Indigenous peoples' folklore. After a decade of silence it was re-launched by the United Nations International Decade on Indigenous Peoples.<sup>1164</sup> Many needs and issues related to intellectual property and folklore were discussed during this meeting. The meeting also adopted a 'Plan of Action' which identified the following priorities for the protection of folklore:

'(a) the need for a new international standard (since the rules applied were at this stage the one of TRIPs and WTO logic of trade) for the legal protection of folklore; and

(b) the importance of striking a balance between the community owning the folklore and the users of expressions of folklore.<sup>1165</sup>

In order to make progress in addressing these needs and issues, the Plan of Action suggested *inter alia* that 'regional consultative *fora* should take place....'<sup>1166</sup>

Some national legislators have introduced legislative measures able to protect and preserve expressions of folklore: some of them comply with the UN rules set in the recommendations and model laws, while others follow the rules as set in TRIPs by WTO<sup>1167</sup>. However, many of them felt that this was not sufficient to achieve full and world wide protection for expressions of folklore. Therefore, during the joint sessions of the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the WIPO Committee of Experts on a Possible Instrument for the Protection of the Right of Performers and Producers of Phonograms, held in Geneva in February 1996, the delegations of a number of developing countries proposed that

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1164 First international decade of the world's Indigenous people was on 1995-2004. See <http://www.un.org/rights/Indigenous/backgrounds1.htm>.

1165 See WIPO Publication Number 758 (E/F/S).

1166 The Plan of Action records that '(t)he participants from the Governments of the United States of America and the United Kingdom expressly stated that they could not associate themselves with the Plan of Action.'

1167 Developing countries and developed countries applied different standards in the protection and some developed country did not applied standards at all (e.g. U.S. and UK).

the issue of protection for expressions of folklore should be re-addressed at an international level.<sup>1168</sup> In the end, the Committees recommended the Governing Bodies of WIPO adopt provisions able to protect folklore in all its forms.<sup>1169</sup>

The intervention of UNESCO was required by some delegations due to the subject matter of the proposed forum.<sup>1170</sup> The Forum adopted the strategy to examine folklore on a continental level through a selection of areas of the world in which folklore should be protected.<sup>1171</sup> Notwithstanding the differences in how the problem of folklore should be addressed in the several countries, what comes from the forum document is the need to find a common strategy. What has been achieved so far is the setting up of various fact finding missions to provide a detailed overview of the different needs, solutions and approaches in the various regions of the world. Some suggestions have also been made as to the way forward, but at present all that has really emerged is the need for a common strategy.

#### **6.4.5. WIPO Fact-Finding Missions**

Following the suggestions included in the Plan of Action adopted at the WIPO-UNESCO World Forum on the Protection of Folklore, 1997, WIPO and UNESCO organised four Continental Consultations on the Protection of Expressions of Folklore in 1998-1999. As well as proposal for future work, each of the Continental Consultations adopted resolutions or recommendations which identify intellectual property needs and issues, related to expressions of folklore.<sup>1172</sup>

During 1998 and 1999, WIPO conducted fact-finding missions to identify as many intellectual property-related needs as possible and the expectations of traditional knowledge holders (the 'FFMs'). The FFMs were conducted in 28 countries between May 1998 and November 1999. The results of the missions have

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<sup>1168</sup> See the Preface of the UNESCO-WIPO World Forum on the Protection of Folklore, Phuket, Thailand, April 8-10, 1997.

<sup>1169</sup> *Ibid.*

<sup>1170</sup> *Ibid.*

<sup>1171</sup> Following the structure of the forum four main areas of interests can be identified. They are Africa, Asia and Pacific Region, Latin America and Caribbean Region, North America and Western Europe.

<sup>1172</sup> The regional consultations were held for African countries in Pretoria, South Africa (March 1999); for countries of Asia and the Pacific region in Hanoi, Viet Nam (April 1999); for Arab countries in Tunis, Tunisia (May 1999); and for Latin America and the Caribbean in Quito, Ecuador (June 1999). The four regional consultations were attended by 63 Governments of WIPO's Member States, 11 intergovernmental organisations, and five non-governmental organisations. Documents available at <http://www.WIPO.int>. WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO/FOLK/ASIA/99/1; WIPO-UNESCO/FOLK/ARAB /99/1; WIPO-UNESCO/FOLK/LAC/99/1. The full Report is available at <http://www.wipo.int/tk/en/tk/ffm/report/index.html>.



been published by WIPO in a report entitled 'Intellectual Property Needs and Expectations of Traditional Knowledge Holders', also known as the 'FFM Report'. Many actors have participated in the work of WIPO: Indigenous and local communities, NGOs, governmental representatives, academics, researchers and private sector representatives were among the groups of persons consulted on these missions.

From the WIPO fact finding missions (1998-1999) emerged the necessity to find two types of protection. The first type of protection is in answer to a group of Indigenous peoples that wished to benefit from the commercialisation of their cultural expressions. These peoples wished to exclude non-Indigenous and non-traditional competitors from the market in order to be compensated for what they produce. This attitude towards the production of their cultural expressions is known as positive protection.

On the other hand, defensive protection is defined when Indigenous groups do not wish to share economic interest on the goods they produce and when they simply consider those goods non-commercial. Indeed for these groups, the commercial exploitation of their goods will cause concern for the threat it poses to the very existence of their culture.<sup>1173</sup>

The analysis of FFM brings to light the need to draw a common legal framework between all these many different national approaches to the critical matter at hand.<sup>1174</sup> The FFM can be a good methodological starting point to be used, recalled and further analysed by WIPO during the ICG sessions. It is therefore understandable, at this stage, that the acknowledgement by the national legislator for the need for the protection of folklore became a fundamental indicator for the international legislator.

## **6.5. Towards an International Convention for the Protection of Folklore? A Comparison with National Laws**

UNESCO and WIPO efforts have always been in favour of encouraging developing countries especially to reform or to update - but in most cases to create - their copyright law in order to protect expressions of folklore to the best possible

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<sup>1173</sup> WIPO/GRT F/IC/ 3/10 p.13. The nature of intellectual property protection and the distinction between positive and defensive protection strategies is also discussed in document WIPO/GRTKF/IC/5/12, at paragraphs 20, 28 and 41-44.

<sup>1174</sup> Or not approach to the matter as U.S. and UK.

degree.<sup>1175</sup> The primary goal in developing countries has been to find the best way to facilitate their access to foreign works protected by copyright while ensuring appropriate international protection for their own works. This is also one of the reasons which moved the international legislator to revise the Berne Convention in 1971. It was deemed appropriate to provide states with the text of a model law to assist states in conforming to the Convention's rules with their national laws.<sup>1176</sup>

The first attempts by national legislators to regulate the phenomenon of folklore through the use of copyright laws in Tunisia in 1967, in Bolivia in 1968, and in Chile, Iran and Morocco in 1970s.<sup>1177</sup> Many of these countries have updated their legislation since then and have tried to find a more modern set of rules for the protection of folklore.<sup>1178</sup> Many other countries have recently come to the conclusion that folklore should be protected through the use of copyright laws.<sup>1179</sup>

There is not always uniformity, not even in terms of denomination and definition. Folklore is seen by some legislators as an expression<sup>1180</sup>, by others as a work of folklore<sup>1181</sup>, by others as simple folklore,<sup>1182</sup> whilst yet some other legislators prefer not to give any definition to folklore at all.<sup>1183</sup> Only recently, does progress seem to have been made in the direction of recognising a common definition for works of folklore. In that respect, the recently drafted 'Preliminary

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1175 S. Abada 'La Recommendation UNESCO de 1989 et les Perspectives de la Protection Internationale du Folklore' in UNESCO-WIPO Forum Phuket, 1997 pp.229-30 and in the conclusion at page 232. See also the preamble of the Recommendation on Safeguarding of Traditional Culture and Folklore, Paris, November 1989 available from UNESCO web site at [www.UNESCO.org/culture/laws/paris/html-eng](http://www.UNESCO.org/culture/laws/paris/html-eng).

1176 M. Ficsor 'Attempts to Provide International Protection for Folklore by Intellectual Property Rights', paper presented at the WIPO-UNESCO World Forum on the Protection of Folklore, Phuket, Thailand, April 8-10, 1997, p.17; S. Ricketson *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (OUP 1987) pp 313-15.

1177 *Ibid.*

1178 See Tunisia's Copyright Law (1994) (available at <http://www.agip.com/laws/tunisia/c.htm>).

1179 E.g. Copyright Law (1990) of China and Copyright Law (1994) of Vietnam.

1180 This is the preferred expression used by WIPO. We also remember how the Model Provisions used the words 'expressions' and 'productions' rather than 'works' to distinguish from the works which are protected by copyright. This can be seen as an attempt to create at an early stage a new *sui generis* right for the protection of folklore. However the Model Provisions, as seen above, do not include in the 'expression of folklore' any other right that is not artistic such as 'traditional beliefs', scientific views or merely practical traditions'. See M. Ficsor, 'Attempt to provide international protection for folklore by intellectual property rights' in UNESCO-WIPO Forum Phuket, 1997 p.218.

1181 The majority of the national laws.

1182 Folklore is seen as 'works of folklore' by Benin, Indonesia, Kenya, Mali, Morocco, Senegal, Tunisia and Zaire, as reported in M. Ficsor 'Attempt to provide international protection for folklore by intellectual property rights' in UNESCO-WIPO Forum Phuket, 1997 p.215.

1183 Such as for example the Copyright Law of China.

Draft Convention on the Protection of the Diversity of Cultural Contents and Artistic Expressions',<sup>1184</sup> already examined under chapter 2, can provide help in creating a useful and valid definition for works of folklore.

### **6.5.1. Protection of Folklore through Unpublished Works**

As addressed under the chapter analysing the United States, the analysis of possible legislative solutions for the problem of folklore within the copyright means of protection have led to exploring which sort of protection could be granted to works of folklore through the proceedings of anonymous works. This was done by examining the way the theme is understood by the national legislator. In this chapter a more in depth international analysis of these rules will be presented.

The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works (the 'Berne Convention') made an attempt to introduce copyright protection for folklore at the international level. As a result, Article 15(4) of the Stockholm (1967) and Paris (1971) Acts of the Berne Convention contains the following provision:

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

(4)(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union.

What is most relevant is the fact that most national laws<sup>1185</sup> do not mirror the present definition in Article 15(4)(a) of the Berne Convention, in which folklore is covered by the general notion of literary and artistic works. They do not refer to reasonable grounds on which it can be presumed that the unknown author is a national of the country concerned. The fact that the author of the right is unknown

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<sup>1184</sup> As referred above the draft is currently discussed (31 January – 12 February 2005) at the 2nd Session of the Meeting of Government Experts. News available at <http://www.unesco.org/culture/>.

<sup>1185</sup> With the only exceptions of Algeria and Morocco as reported in M. Ficsor 'Attempt to Provide International Protection for Folklore by Intellectual Property Rights' in UNESCO-WIPO Forum Phuket, 1997 p.215.

on its own prevails in many laws. Whilst in others, the traditional heritage aspects cover most of the definition.<sup>1186</sup>

With the introduction of the special provision on 'unpublished works' the Berne Convention grants protection for folklore, according to the intentions of the revision. However, almost all of the laws are very much linked to the concept of Western copyright and, as mentioned before, that relates only to traditional literary and artistic creations. Other expressions of folklore are not covered.<sup>1187</sup>

Once a right has been established it requires a right-holder or 'owner'. The majority of these national laws identify a 'national authority' as the 'owners of the right'. This is also shown by the fact that many national authorities demand payment of fees when folklore is used for profit-making purposes.<sup>1188</sup>

In conclusion, progress has been made in order to guarantee protection to folklore but it is still uncertain how all the elements of the system work. For some countries, the preference is still with the use of copyright law, albeit maybe with a more enlarged concept.<sup>1189</sup> Others achieve this protection through the use of neighbouring rights. Others still are starting to explore the possibility of a *sui generis* right.<sup>1190</sup>

### **6.5.2. The WPPT and the Possibility to Protect Folklore through the Right of Performers**

Many works of folklore - folk tales, poetry, songs, instrumental music, dances, live plays - take the form of regular performances. The adoption of the WIPO Performances and Phonograms Treaty (the WPPT) December 1996 granted protection, although partial, to these performances and therefore, to the folkloric works encompassed within. The international recognition of protection for performers, as is also the case in many other countries, the performances of such expressions of folklore finally may also enjoy protection.

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<sup>1186</sup> See S. Abada, 'La Recommendation UNESCO de 1989 et les Perspectives de la Protection Internationale du Folklore', in UNESCO-WIPO Forum Phuket, 1997 p.231.

<sup>1187</sup> M. Ficsor, 'Attempt to Provide International Protection for Folklore by Intellectual Property Rights' in UNESCO-WIPO Forum Phuket, 1997 p.216. The author identifies that only Benin and Rwanda have a broader definition including scientific and technological 'folklore'. 'Some national laws go so far in the assimilation of folklore creations to literary and artistic works that they do not contain any specific provisions concerning the right protected in respect of folklore creations'.

<sup>1188</sup> See *Ibid* p.216. The author refers to the fact that in some countries payment of fees is compulsory (Benin, Cameroon, Central African Republic, Chile, Congo, Ghana, Guinea, Morocco, Senegal), where in other countries the payment of fees may be required (Algeria, Mali, Rwanda and Tunisia).

<sup>1189</sup> B. Amani 'Facts, Fiction or Folklore...', [August 1999] 13 I.P.J. p237 and chapter 3.

<sup>1190</sup> P. Drahos 'Indigenous Knowledge and the Duties of Intellectual Property Owners' [1997] 11 I.P.J. pp.179-201.

However, the notion of 'performers'- and the notion of 'performances' following indirectly from the notion of 'performers' - set forth under Article 3(a) of the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organisations, 1961 (the 'Rome Convention') was apparently not conceived with the protection of works of folklore in mind.

'Performers' means actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, or otherwise perform literary or artistic works.

As expressions of folklore do not correspond to the concept of literary and artistic works, the definition of 'performers' in the Rome Convention does not seem to extend also to performers who perform expressions of folklore. However, the WIPO Performances and Phonograms Treaty (the WPPT), provides that the definition of 'performer', for purposes of the Treaty, includes the performer as an 'expresser' of folklore.<sup>1191</sup>

In order to properly explore the theme of folklore, and especially the problem highlighted by the fact that two Conventions seem to dictate different rules of protection, the WIPO Committee of Experts on a Possible Protocol to the Berne Convention and the Committee of Experts on a Possible Instrument for the Protection of the Rights of Performers and Producers of Phonograms, recommended the organisation of an international forum ( the WIPO-UNESCO World Forum on the Protection of Folklore, 1997) to explore issues concerning the preservation and protection of expressions of folklore, intellectual property aspects of folklore, and the harmonisation of different continental interests.

Despite all these efforts, no satisfactory pattern of protection has emerged. Thus it is primarily at the international level that work needs to be done. This is demonstrated by the fact that the protection of folklore was again taken up in the 1990s when the WIPO Treaties were under discussion. This shows that there was a significant need to do more.

The result is important, but it clearly does not cover the subject comprehensively. Indeed, some additional intellectual property protection is offered to performers of expressions of folklore via Article 2(a) of the WIPO Performances and Phonograms Treaty of 1996<sup>1192</sup>. This same Treaty extends moral rights; economic rights in their unfixed performances; a right of reproduction, distribution, rental; and a right of availability to the same performers. The fact that expressions

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<sup>1191</sup> On April 15, 2003 States had ratified the WPPT. The WPPT came into force on May 20, 2002. See WIPO/GRTKF/IC/5/3Annex p.26.

<sup>1192</sup> Also known as the WPPT 1996.

of folklore are included in the WPPT confirms the fact that expressions of folklore are not works, however, and protection is given to performers of expressions of folklore under the concept of neighbouring rights. In that sense, the additional protection casts a doubt on the usefulness of the main copyright provisions in this context. While this can be accepted as a reflection of the current state of the law, it is by no means clear that this is also the way forward. Change may indeed be inevitable on this point.

### 6.5.3. Other Means of Protection within Intellectual Property

Some, albeit limited, protection can already be offered by existing intellectual property rules. In reviewing the theme of protection for expressions of folklore by intellectual property, it should be clear that it can only be usefully applied with respect to the economic, and not the ethnic or religious aspects of folklore. Indeed, endeavouring to protect ethnic or religious issues by intellectual property, would stretch intellectual property beyond its recognised objectives of fostering creativity and investments. Despite this important limitation, some possibilities remain.<sup>1193</sup>

To a certain extent, *trademark law* can be used to protect certain expressions of folklore, such as designs or symbols. The advantage of this is that there is no novelty requirement and it can be renewed without limitation. The disadvantage is that protection only relates to actual or intended use for certain categories of products or services. No overall protection is made available for expressions of folklore as such.

Certain expressions of folklore, such as graphical marks on any surface and three-dimensional plastic forms, can be offered protection by the laws on *industrial designs*. However, the novelty and originality criteria, the criteria for individual ownership and the time limit for application for protection, are difficult to reconcile with the nature and the specific needs of protection for expressions of folklore.

The laws on *geographical indications* could be applied to certain tangible folklore products such as carpets, textiles or figures. The main advantage is that any such protection can be assigned to a territory rather than a natural or legal person.<sup>1194</sup> This positive aspect needs, however, to be set against the following negative one: this protection does not grant exclusive rights. In this regard it relates to the actual good or service itself, and will only prevent others from using the indicator. That

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<sup>1193</sup> These are also set out recently in the Document Submitted by the European Community and its Member States to the Third Session of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (WIPO/GRTKF/IC/3/11/Annex), WIPO, Geneva (2002), p.2.

<sup>1194</sup> Art. 22 TRIPs.

means that the same expression of folklore could still be reproduced or performed under a different name.

The concepts of unfair competition or unfair trade practice may provide, in those countries where they exist, protection against any form of wrongful commercial use of expressions of folklore. Moreover, their scope could be used against industries that profit from folklore but disregard its traditional nature.<sup>1195</sup>

## **6.6. The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore: Towards an International Convention?**

This paragraph will underline the current processes and efforts in achieving a consensus over the creation of a legally binding international agreement or convention. Following that, the work carried out by the WIPO agency in underpinning this specific goal will be examined through the analysis of the special WIPO ICG Committee (Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore). The reasons why these meetings are so important is that without a solution at that level, a convention can never be put in place. The ICG Committee grants that political presence that is indispensable if a durable and legally binding convention is to be reached. As recalled in the introduction, in late 2000 the Member States of WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore ('the Committee') for the purpose of Member State discussions on these subjects.<sup>1196</sup>

During its meetings, the Intergovernmental Committee addressed both policy and technical issues within the IP system. The delicate relationship between the rights of holders of traditional knowledge and custodians of traditional cultures were also examined. The WIPO Secretariat had assistance from the Specialised Committee which helped in gathering material, news and data based on national experience surveys<sup>1197</sup> used to set the basis for possible international protection of

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<sup>1195</sup> Art 10 bis Paris Convention 1883.

<sup>1196</sup> The Committee's sessions are usually attended by over 400 representatives from Member States, IGOs and NGOs. As reported in the documents WIPO/GRKTF/IC/3/10 and WIPO/GRKTF/IC/4/3.

<sup>1197</sup> See <http://www.WIPO.int/globalissues/igc/documents/index.html> and the WIPO document WIPO/GRKTF/IC/5/3 Annex p.28 where it is reported the national experiences of 66 Member States, surveyed through a questionnaire issued by WIPO in 2001, and a set of case studies. One of these comprises practical studies of actual cases in which Indigenous Australians have sought to use intellectual property to protect their TCEs. The latter studies are entitled 'Minding Culture – Case Studies on Intellectual Property and Traditional, Cultural Expressions' and they are available on WIPO's website and as WIPO/GRKTF/IC/Study2. In addition, WIPO has also published a study of

folklore. The benefit of the birth of this body can be found not only within the WIPO dimension but also as an instrument to make the world aware of the difficulty in protecting folklore.<sup>1198</sup>

The following paragraphs present an in-depth assessment of the analysis of the results achieved by the ICG Committee.<sup>1199</sup>

### 6.6.1. Enhancing National Level Approach as 'Priority Action'

The first meetings of the WIPO Intergovernmental Committee were characterised by moving forward the dialogue and level of co-operation achieved after the 'Model Laws 1982'. In particular, primary consideration was given to the development of a strategy, the necessity of finding a common definition of folklore and the importance of affirming a national level approach.<sup>1200</sup> In doing so, WIPO set a Plan which included the following actions:

- a) a report of the current forms of protection available for expressions of folklore;<sup>1201</sup>
- b) the documentation of expression of folklore;<sup>1202</sup>
- c) work to address and understand the subject matter for which protection is sought, and, put differently, which elements of expressions of folklore deserve protection;<sup>1203</sup>
- d) information on which areas of the population are concerned with the protection of expressions of folklore;<sup>1204</sup>

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practical experiences in India, Indonesia, and the Philippines. The Committee has received detailed briefings by New Zealand, Nigeria, Panama, the Russian Federation, Tunisia and the Secretariat of the Pacific Community on their recent legislative experiences with the legal protection of folklore. experiences in India, Indonesia, and the Philippines. The Committee has received detailed briefings by New Zealand, Nigeria, Panama, the Russian Federation, Tunisia and the Secretariat of the Pacific Community on their recent legislative experiences with the legal protection of folklore. experiences in India, Indonesia, and the Philippines.

<sup>1198</sup> The Committee has considered detailed Secretariat analysis of the use of existing intellectual property and *sui generis* approaches for the legal protection of folklore, see documents WIPO/GRKTF/IC/3/10 and WIPO/GRKTF/IC/4/3).

<sup>1199</sup> Until now the Committees have met seven times. The last session was held in Geneva on November 2004.

<sup>1200</sup> The same approach of this meeting mirrors the one adopted by the 1982 Committee: the knowledge over folkloric works and national experience was not enough to set an international approach yet. More information should have been taken at a national level before addressing the issue of a possible international convention. See WIPO/GRT F/IC/ 3/10 p.6. See also the results achieved at the WIPO ICG First Session April 30 - May 3, 2001.

<sup>1201</sup> WIPO/GRT F/IC/ 1/13, para. 156.

<sup>1202</sup> WIPO/GRT F/IC/ 1/13, paras. 159, 161.

<sup>1203</sup> WIPO/GRT F/IC/ 1/13, paras 159, 163, 165.



- e) the identification of the objectives of protection of folklore;<sup>1205</sup>
- f) the collection and review of information on national experiences with the protection of expressions of folklore, including the implementation of the Model Provisions.<sup>1206</sup>
- g) the assessment of the use of existing intellectual property and common law tools, including in respect of handicrafts;<sup>1207</sup>
- h) further work on terminological issues and,<sup>1208</sup>
- i) the adoption of a *sui generis* regime to protect expressions of folklore.<sup>1209</sup>

### **6.6.2. From National to International, Could a Database Collection of World-Wide Folkloric Works Help?**

Although priority actions were properly set, there was still no agreement in identifying which 'priority actions' should prevail. The results of The National experience and the results of the questionnaire<sup>1210</sup> made during the WIPO FFMs 1998-1999<sup>1211</sup> was a sufficient measure of the overall experiences at a national and continental level. The national approach in building an international consensus over works of folklore was also examined during the WIPO ICG Third Session.<sup>1212</sup>

This session is titled 'Final Report on National Experiences with the Legal Protection of Expressions of Folklore' and addresses the need to move from a national based approach to an international one, while taking into consideration the combined national experience. Issues such as globalisation, folklore's relevance to trade and copyright and human rights are all recurrent issues.

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<sup>1204</sup> WIPO/GRT F/IC/ 1/13, para. 165.

<sup>1205</sup> *Ibid*.

<sup>1206</sup> WIPO/GRT F/IC/ 1/13, paras. 160,163,165-66, 168-69.

<sup>1207</sup> *Ibid*, para. 160,168.

<sup>1208</sup> *Ibid*, paras. 171-72.

<sup>1209</sup> *Ibid*, para. 161.

<sup>1210</sup> WIPO ICG Second Session December 10-14, 2001.

<sup>1211</sup> The result of this session and the comments over the questionnaire formed the basis of a Report named 'Preliminary Report on National Experiences with the legal Protection of Expression of Folklore' WIPO/GRT F/IC/2/8. It is named Preliminary Report because at that stage (September 30 2001) only 32 Member states responded at that stage to the WIPO questionnaire. On January 31 2002 other 32 responses have been filed to the Secretariat. This report does not comment on the various experiences but it simply reports them. It will not be the purpose of this chapter analyse the content of the national responses. Copies of the submitted questionnaires can be found on the web at the page <http://WIPO.int/globalissues/igc/questionnaire/index.html>.

<sup>1212</sup> WIPO Headquarter, Geneva 13 - 21 June, 2002.

Moreover, the Report stresses the necessity of a database of national and continental rules, and practical experiences in the field of traditional knowledge and folklore, as well as the need to provide and benchmark an inventory of existing databases of disclosed traditional knowledge. Furthermore, research over the possibility of implementing *sui generis* systems for the protection of folklore and traditional knowledge are initiated.<sup>1213</sup>

The Report which followed the meeting of the Committee set forth four main tasks.<sup>1214</sup> It is relevant to remember that these tasks have to be framed in a context of an eventual plan of action, more than in the context of actions which must be taken. In that respect, the wording of the Committee speaks in terms of 'possible tasks'. The first two tasks set forth are for helping to establish national systems which could regulate the matter of folklore. These possible actions are identified as enhancing the legal and technical expertise and providing assistance, especially those countries (mainly developing countries) that wish to protect folklore but which do not have the necessary means to set up such a system.<sup>1215</sup>

However, the proposed system has still too many political concerns which undermine action. Moreover the attitude towards developing countries is still quite passive. The Committee rules that a specific form of help is required but that developing countries must ask directly that help. Although the freedom of the State to decide is saved, it remains in doubt that this sort of aid will ever be implemented.<sup>1216</sup>

During the third session, it is worth noting how much consideration is given to the implementation of the system already in place at a national level dimension. However, the international dimension is still present in the background, and one of

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<sup>1213</sup> A draft agenda with the details items is available at the web site <http://www.patent.gov.uk> e-notice IPPD/25/200231 May 2002 World intellectual property organisation - Intergovernmental committee on intellectual property and Genetic resources, traditional knowledge and folklore.

<sup>1214</sup> This can be found at Section III titled 'General Summary, Conclusions and Suggested Tasks'.

<sup>1215</sup> WIPO/GRT F/IC/ 3/10 p.5. The whole proposed tasks are summarised in the Annex and they are distinguished as follows:

'Possible Task 1: Enhanced legal technical assistance for the establishment, strengthening and effective implementation of existing systems and measures for the legal protection of expressions of folklore at the national level.

Possible task 2: Updating the Model Provisions, 1982.

Possible Task 3: Extra territorial protection.

Possible Task 4: Practical case study on relationship between customary laws and protocols and the formal intellectual property system'.

<sup>1216</sup> WIPO/GRT F/IC/ 3/10 pp.5,13.

the four tasks is dedicated to exploring possible measures for an international dimension of folklore. The words used by the Committee are as follows:

‘The Intergovernmental Committee examining elements of possible measures, mechanisms or frameworks for the functional extra territorial protection of expressions of folklore...’

### **6.6.3. The Consolidated Analysis Gathered from the National Experience**

After the Committee achieved results on the ‘Preliminary Systematic Analysis of National Experiences with the Legal Protection of Expressions of Folklore’,<sup>1217</sup> it requested that the WIPO Secretariat prepare a consolidated analysis as an updated version of this earlier analytic work. This consolidated analysis came after the experience gathered at a national level during the previous sessions of the ICG, and also after consultations with Member States, NGOs and local communities.<sup>1218</sup>

#### **6.6.3.1. The Policy Context of the ‘Consolidated Analysis’**

In the Annex of the Fifth Session Report, which aims to draw a legal and political framework for the protection of folklore, there is an important discussion on the obstacles and impediments to its protection and an assessment of the link between IP and folklore. The main issues raised are: (i) preservation and safeguarding of tangible and intangible cultural heritage; (ii) promotion of cultural diversity; (iii) respect for cultural rights; and (iv) promotion of creativity and innovation – including that which is tradition-based – as ingredients of sustainable economic development.<sup>1219</sup>

The ‘Consolidated Analysis’ started with the assertion that folklore is a cultural matter and that traditions are a source of creativity and innovation. This is an important affirmation. Until then, folklore was portrayed as a derivative and therefore as an imitation and reproduction rather than an original work, depriving it of any protection. The paper goes even further, asserting that folklore is an inspiration not just for the communities who generate it but also for society as a whole which can benefit from the discoveries and the traditions of the community.<sup>1220</sup>

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<sup>1217</sup> This was the result achieved during the ICG Fifth Session, July 7 - 15, 2003. See the documents WIPO/GRTKF/IC/4/3. and WIPO/GRTKF/IC/5/3 ‘Consolidated Analysis of The Legal Protection of Traditional Cultural Expressions’ pp. 3-9.

<sup>1218</sup> WIPO/GRTKF/IC/5/3 ‘Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions’ p.2.

<sup>1219</sup> M. Blakeney ‘Intellectual Property and Economic Development’ [1998] 4 Int Trade Law & Reg 1.

<sup>1220</sup> *Ibid*, pp.3-4.

## 6.7. International Laws: *Sui generis*, Copyright and Common Values

### 6.7.1. IPRs and *Sui generis*: Systems to Be Explored

The 'Consolidated Analysis', and the elements gathered at a national level brought new factors to be considered in the aim to establish an internationally binding agreement on the protection of folklore.<sup>1221</sup> However, the analyses of the Fifth WIPO ICG Sessions seem mainly to focus on underpinning a possible solution to the copyright and *sui generis* legislation,<sup>1222</sup> and are therefore more generally speculative than a practical analysis.

A possible solution on a binding agreement was found in the application of a 'multi-faceted menu of options', using intellectual property rights (i.e. copyright) in combination with some *sui generis* means of protection.<sup>1223</sup> This is a relevant decision because it is the first time that the WIPO Committee expresses itself using this kind of concrete wording. It does seem that categorization of folklore and its identification is, finally, no longer the only priority. It is time to seek an international protection as well as an approach to specific means of this protection.

The proposal of a 'practical manual', requested and approved by the Committee during the third Session became a new priority for the WIPO Secretariat, whose aim is now to identify users and holders of folklore.<sup>1224</sup> The content of this 'manual' should be essentially destined to the users and holders of folkloric works. Thus, a variety of TCEs should be considered, both tangible and intangible. A precise line should be established between 'traditional' cultural heritage (the pre-existing work), which is folklore *strictu sensu*, and modern folklore, artistic and literary reproduction based on existing works.

#### 6.7.1.1. An International Convention to Protect Folklore

Also at the latest ICG Session, a number of Member States have requested urgent and necessary intervention at an international level in the matter of folklore,<sup>1225</sup> through an *interim* use of some intellectual property aspects.

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<sup>1221</sup> WIPO/ RT KF/IC/ 4/3 p.2.

<sup>1222</sup> WIPO ICG Fourth Session held on Geneva on December 3.9.2001.

<sup>1223</sup> WIPO/ RT KF/IC/ 4/3 pp.2-3.

<sup>1224</sup> WIPO/ RT KF/IC/ 4/3 pp.5-5. See also the WIPO/GRKTKF/IC/3/10, paragraph 155 and WIPO/GRTKF/IC/5/3 paragraph 294).

<sup>1225</sup> The ICG Sixth Session March 15 – 19. See the report of the fifth session of the Committee (document WIPO/GRTKF/IC/5/15, *inter alia* paragraphs 19, 123- 24, 127, 130, 135-37, 139, 141-42, 148-49, 151, 153, 164-65 and 197).

Nevertheless, no agreement has been reached. There are countries that believe the adoption of an international instrument of protection would be premature, especially if it is done before the efficacy of international property instruments in protecting folklore can be proven. About half of the member states appear to be reluctant to give their consent to the approval of a new international IP Treaty, which will constitute a 'third pillar' after Berne and Paris.

In any case, an international instrument of protection will help to provide a stronger and better harmonised international legal framework which will seamlessly link copyright and folklore. Moreover, the development of national and continental approaches for the protection of folklore is moving in the direction of the work carried out at a WIPO level. The importance in co-ordinating national and continental approaches is crucial if differences between the various systems are to be overcome. This will also help to clarify the limit of the international dimension. As addressed in the WIPO VI ICG Report, the international framework could be built only if synergetic impulses are given at a national and continental level and where values, definitions and terms of protection are reached at that stage.

Folklore is a phenomenon which is always evolving and taking different forms, especially now with the increased use of technology, globalisation and a world-wide market. Hence, the instruments of protection should be adequate. Encouragement should be given to researchers, operators and the national legislators to explore new routes of protection and to harmonise common principles and rules on intellectual property law. Indeed, the foundations of an international instrument of protection must be based on those already existing exchanges of experiences and efforts in place at a continental, national and local level.

#### **6.7.1.2. Copyright or *Sui generis* Legislation at an International Level?**

The WIPO document prepared for the 5<sup>th</sup> Session Report titled 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions' WIPO/GRTKF/IC/5/3 leaves the reader with the question: better a *sui generis* system or the use of the existing IP means like copyright?

The possibility of using the existing instruments of protection, such as copyright, would allow immediate protection to many works of folklore, while the building of a new system will definitely be time consuming. The risk, in this latter case, is that there many works of folklore which could possibly fall under public domain with no guarantee for the rights of the holders of those works.<sup>1226</sup> Some

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<sup>1226</sup> 'Public domain is a legal artefact, not a natural phenomenon. The line shifts not only with the views of particular judges but also with national boundaries and with cultural attitudes' definition provided by P. Goldstein in *Copyright's Highway* (Stanford University Press 2003) p.10.

countries<sup>1227</sup> sustain that a revision of IP rights could be sufficient to grant protection to folklore. However, at this stage it still very difficult to establish if a *sui generis* system could work better than a system based on revised copyright rules. Furthermore, this seems to be only a matter of policy choice.<sup>1228</sup>

However, either system should take into account that a few steps should be followed to grant protection to works of folklore. Firstly, the ideal 'protection system' should draw together either a defensive or a positive protection, with a preference to combine both strategies. Secondly, since works of folklore are often oral works they do not meet the requirements of fixation typical of copyright legislation. Thirdly, works of folklore are derivative in nature, and thus not original, so even in this case they could not be eligible for copyright protection.<sup>1229</sup> Finally, the bottom line is that folkloric works are communal in origin.

Preservation and the safeguarding of cultural heritage should be given a priority in the policy making. The policy framework should take into account national, continental and international systems and how these systems interact with one another. This theme will be discussed in the next paragraphs.

#### **6.7.1.3. The Necessity of a Legal and Cultural Policy Framework<sup>1230</sup>**

The importance of protecting folklore for what it represents for many Indigenous people and local communities was underlined during the ICG Session held in Geneva on March 2004.<sup>1231</sup> On that occasion it was affirmed that customary laws should also be taken into account in drafting an international legally binding convention. It was stressed that folklore should be protected not *per se*, and for its economic potential, but also as a cultural interest and right belonging to an identified group of people.<sup>1232</sup> It was also affirmed that in protecting these interests, the whole country will benefit.

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<sup>1227</sup> E.g. Tunisia.

<sup>1228</sup> D.J. Gervais 'The Internationalization of Intellectual Property: New Challenges from the Very Old and the Very New' [ Spring 2002] 12 Fordham Intell. Prop. Media & Ent. L.J. p.970 where the author points out at the negative effects of implementing a *sui generis* legislation affirming that 'A *sui generis* system should be a solution of last resort, because it usually indicates that instead of finding out why the system does not work'.

<sup>1229</sup> Generally, existing *sui generis* systems they do not require originality. For example, the Model Provisions make no reference to an d originality requirement; consequently, nor do many of the national copyright laws which have implemented them. Similarly, there is no explicit originality requirement in the Panama Law and in the Pacific Regional Framework.

<sup>1230</sup> This is the title of one of the document submitted buy the Secretariat -WIPO/GRTKF/IC/6/3.

<sup>1231</sup> ICG WIPO/GRTKF/IC/6/3.

<sup>1232</sup> See the definition of Indigenous peoples and local communities under chapter 1.

The instrument on copyright and IP in general must be used to pursue these objectives.<sup>1233</sup>

In the chapter titled 'A Legal and Cultural Policy Framework attached to the sixth session'<sup>1234</sup> a problem is raised by the fact that many folkloric expressions and works of folklore, based on pre-existing historical folkloric works, are made by an individual who despite not being a member of the relevant community not only receives copyright protection but is recognised as the 'owner' of the right over folkloric works. The copyright system based on the recognition of single values is at stake. How can a community prevent distortion of pre-existing folkloric work and how can it benefit from any commercialisation of it? The 6<sup>th</sup> Report underlines the importance of these questions and forms the hypothesis that some solutions to the problem could be found by applying international standards at a national level. However, a broad consensus must be reached before then.

#### 6.7.1.4. Options for Protecting Traditional Cultural Expressions

One proposal discussed during the ICG fifth Session was to let the WIPO Secretariat prepare a Report on the 'Menu of Options', where the panorama of the existing mechanisms of protection would be disclosed.<sup>1235</sup> The Report addresses how this 'Menu of Options' will help to build the basis for the development of international measures. Furthermore, an 'open analysis' would allow all the participants to the ICG Committee to share their experiences by way of information exchange. This data collection of experiences will shape the framework of future international instruments.<sup>1236</sup>

In the section titled, 'Options for Protecting Traditional Cultural Expressions', the sixth Report laid down range of possible options which could help the development of new measures for the protection of folklore. These options are analysed in particular to find if they could help move to the creation of a different set of rules. These options have been inspired by the experience gathered at a national level and by the several mechanisms in place, nationally and continentally, to protect

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<sup>1233</sup> However, a critical approach regarding this WIPO position has been adopted by the American Folklore Society (AFS), which voiced many reservations during the Sixth Session regarding the use of intellectual property regime applied to categories of cultural traditions. See Paper issued by AFS at Fourth Committee Session.(reported at WIPO/GRTKF/IC/6/3 p.25).

<sup>1234</sup> ICG WIPO/GRTKF/IC/6/3 p.24.

<sup>1235</sup> WIPO/GRTKF/IC/5/3 at point 31. It is also proposed that this 'Menu of options' will become part of the 'practical Guide' which was approved by the Committee at its third session (see WIPO/GRTKF/IC/3/10, par. 155 and WIPO/GRTKF/IC/5/3 par.294).

<sup>1236</sup> WIPO/GRTKF/IC/5/3 covering document 'Consolidated Analysis of the Legal Protection of Traditional Cultural Expressions' at 3-9.

folklore. These options cover IP means; adapted IP rights; and new, stand-alone *sui generis* systems, as well as non-IP options. As noted in the previous paragraphs, some Member States' representatives participating in the meeting have asserted that current IP systems are useful to some extent and in this way are meeting the needs of Indigenous and traditional communities.

This approach is not only motivated by policy reasons. In fact, it is obvious that it is much easier to reform existing means of protection than to create completely new ones. The use and the experience of existing intellectual property means could serve as an immediate practical purpose, avoiding long formal procedures of implementation of new systems.<sup>1237</sup> The WIPO specialised Committee sustains this position by affirming that 'the resources offered by intellectual property have not yet been sufficiently exploited by the holders of traditional cultural knowledge or by the small and medium-sized businesses created by them'.<sup>1238</sup>

However, many countries participating at the ICG Session, maintain the incompatibility of the intellectual property instruments to works of folklore. They leave the door open to the possibility of revision of intellectual property mechanisms through the introduction of *sui generis* elements, in order to accomplish the exigencies of the Indigenous communities.<sup>1239</sup> As stated in the Report, the two main approaches are not necessarily mutually exclusive, and a two-track approach could be pursued. It is necessary to complement the existing instruments of protection with new mechanisms. This is what the WIPO Committee meant during the 5<sup>th</sup> Session in addressing the necessity of a multi-faceted menu of options.

Moreover, the WIPO Committee, in order to express an opinion that mirrors closely the interests expressed by the various delegations present at the meeting, has listed several approaches which could be followed by national and international legislators. The WIPO Committee underlines that each option does not exclude the other, and further that they can be combined together. The following list should not

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<sup>1237</sup> This opinion is shared by i.e. the Group of Latin American and Caribbean States (GRULAC), which consider IP laws one option among several. Moreover it taking the lead in mainstreaming this kind of approach the European Community (WIPO/GRTKF/IC/1/13, paras. 20 and 165), Canada (WIPO/GRTKF/IC/1/13, paras. 46 and 166), Norway (WIPO/GRTKF/IC/1/13, para. 33), U.S. (WIPO/GRTKF/IC/1/13, para. 49), Poland (WIPO/GRTKF/IC/1/13, para. 156), the Asian Group (WIPO/GRTKF/IC/2/10 and WIPO/GRTKF/IC/2/16, para. 170).

<sup>1238</sup> WIPO/GRTKF/IC/1/5, Covering Document II, p.2.

<sup>1239</sup> The Countries that share this position are mainly developing countries i.e. Ethiopia (WIPO/GRTKF/IC/1/13, para. 50), Asian Group (WIPO/GRTKF/IC/2/16 para. 170), Thailand (WIPO/GRTKF/IC/2/16, para. 172). African Group (WIPO/GRTKF/IC/4/15, para. 62), Brazil (WIPO/GRTKF/IC/4/15, para. 63), Venezuela (WIPO/GRTKF/IC/4/15, para. 65), Colombia (WIPO/GRTKF/IC/4/15, para. 67), Russian Federation (WIPO/GRTKF/IC/4/15, para. 68), Iran (Islamic Republic of) (WIPO/GRTKF/IC/4/15, para. 69), Indonesia WIPO/GRTKF/IC/6/3 page 29.



be considered exhaustive, as a combined series of options could change as well the borders of a protection.

Approaches, which are left for the time being to the national legislator to investigate, include intellectual property and non intellectual property systems. They can be summarised as follows<sup>1240</sup>:

- (i) Property rights:
  - (a) Use of existing IPRs and possible modifications to them;
  - (b) Stand-alone *sui generis* systems;
- (ii) Unfair competition;
- (iii) Trade practices and marketing laws;
- (iii) Use of contracts and licenses;
- (iv) Registers, inventories and databases;
- (v) Customary and Indigenous laws and protocols;
- (vi) Cultural heritage preservation laws and programs;
- (vii) Common law and other remedies, such as rights of publicity, unjust enrichment, confidential information and blasphemy;
- (viii) Criminal law.

The Report of the 6<sup>th</sup> Session does not give an explanation of the single voices. It simply states what these new systems may coexist. These existing mechanisms could work on a national basis as well as continentally and internationally. It will all depend on the policy adopted. In the next paragraph international protection according to the WIPO drafters and the Committee specialising in folklore will be examined. It will, show how practically the WIPO interests (together with the ones of many Member States) focus on the possibility of implementing binding international rules in order to assure stability and legal certainty on the protection of folklore.<sup>1241</sup>

#### **6.7.1.5. WIPO ICG Committee on TK and TCEs/EoF: the New Mandate**

At the eighth Session, member states had collectively recommended to WIPO the need of broad support to the ICG. The WIPO General Assembly renewed the

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<sup>1240</sup> The list is reported in the 6<sup>th</sup> ICG Report.

<sup>1241</sup> See Press Release 378/2004 available at [http://www.wipo.int/edocs/prdocs/en/2004/wipo\\_pr\\_2004\\_378.html](http://www.wipo.int/edocs/prdocs/en/2004/wipo_pr_2004_378.html) Geneva, March 19, 2004. WIPO Member States Lay Foundations for Protection of Traditional Knowledge. The ICG is now in a position to build on this body of experience and to move to a more concrete level.

Committee's mandate on the basis of that recommendation. The extension of the mandate of the Committee leaves hope by the fact that there is an interest to set up a legally binding instrument. The preferred way to establish this new regime is through the adoption of soft laws. However, many regimes have established soft laws which after being applied bilaterally could also be incorporated into future agreements.<sup>1242</sup> While the necessity of flexibility at the national level was discussed during the previous sessions, it became evident that there is a need to balance this condition with Indigenous peoples' and traditional communities' needs through internationally agreed standards. An improved measure results from the acceptance of the inclusion of common principles and guidelines rather than in discussing issues which are not of common ground. Furthermore, during the last session the participants have been focusing on more practical and effective actions to prevent the misappropriation and misuse of TCEs. This type of approach came through the Government of Norway<sup>1243</sup> during the nine ICG sessions on TKF. The majority of the states present agreed upon this new WIPO mandate. Policy objectives and principles already inserted in WIPO/GRTKF/IC/9/4 have been submitted to the WIPO Secretariat. The unsolved issue is the adherence to a common agreed definition on cultural heritage, which should include religious beliefs, oral traditions, etc. The ninth session should also be remembered for the introduction of the voluntary fund which allows an increase in the participation of local and Indigenous peoples at the WIPO ICG sessions on folklore, and also for making the approval process for binding instruments more transparent.<sup>1244</sup>

## 6.8. Conclusion

Globalisation, technological changes and pressure from the developed and industrialised countries on one side and from developing countries on the other, have shifted the debate on the protection of folklore from a national and continental setting to the international field.

The international character of folklore necessarily implies that protection should be built starting from national laws and then expanded upon by building new levels of protection. As observed in previous chapters, the application of strict copyright laws can be mitigated at a national level only through the introduction of corrective mechanisms. An example is the Australian magistrates recourse to

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<sup>1242</sup> WIPO/GRTKF/IC/9/12 paragraph 54.

<sup>1243</sup> *Ibid*, paragraph 31.

<sup>1244</sup> This constituted item 7 of the Agenda of the ninth Session in accordance with the decision of the Committee at its seventh session (WIPO/GRTKF/IC/7/15, paragraph 63).

customary laws of Indigenous peoples or to common law principles - the moral loss of the Indigenous author.

Cultural diversity, for the EU and for the AU, is an important value to be promoted and protected because it shapes the identity of the European and African citizens.

Folklore can, therefore, find in that ambit some protection because it is both a tangible and intangible expression of this cultural diversity. However, there are still obstacles to strengthening this important value. The difficulty in enhancing cultural diversity as a motto for the EU Constitutional Treaty is the nationalistic reactions that some European countries are starting to fear.

The analysis then moved to a higher level of protection, the international level, to take note of the interaction of international trade and economic power on developed countries which restricts even more copyright applicability and ties it more closely to the logic of Western society.

The works undertaken at an international level to protect traditional cultural expressions (TCEs), mainly by WIPO and UNESCO, suffer from this *status de facto* and fight with difficulty to impose international logic which goes beyond economic and Western values. The intent is to accommodate other values such as those of the traditional communities.

This new dimension is underpinned by the risk that strong influences of international trade, through WTO's pressure in the enforcement of TRIPs and TRIPs plus, will hasten copyright rules to become an even less flexible and unsuitable instrument to protect folklore in an international arena. The TRIPs Agreement, which applies strict commercial and economic copyright laws, is an unsuitable means to protect works of folklore. These, in fact, cannot be considered as products or goods but should rather be seen as culturally tangible and intangible works.

Moreover, the same concept of property, around which the essence of copyright is shaped, is antithetical to Indigenous peoples' culture. In this regard, the communal values of Indigenous communities contrast considerably with the individualistic values of Western society.

In order to create political and public awareness on the theme of folklore and on the danger caused by its illegal commercial exploitation and misappropriation, the United Nations specialised agencies UNESCO and WIPO, have endeavoured to implement several soft laws (for example, the WIPO-UNESCO Model Provisions 1982 and UNESCO Recommendation 1989). These soft laws yield very important contributions for building a more secure path to the international protection of folklore and lay down valuable strategies as well as exploring new and traditional

means of protection. While these laws have been proven not to be 'tailored' systems to be applied universally, their contribution is mainly towards gathering information on different instruments already available at a national and continental level. Full protection for expressions of folklore is still primarily achieved by means of national laws.<sup>1245</sup> These national approaches, their concepts and contents must be first examined comparatively. This explains why the first ICG WIPO Sessions focused mainly on gathering evidence based on national experiences on folklore and all its possible expressions. Indeed, these first ICG meetings were still very much based on the methodological approach of the Model Provisions 1982, which was to encourage the national legislator to comprehend the necessity of setting specific rules of protection. This also helped to make it apparent that many different values and interests should be considered when addressing the theme of folklore.

The national or continental dimensions are essential since intellectual properties are defined and exercised at a national level. These dimensions are also remedies for infringement set by the national legislator. However, since 1994, TRIPs has set international infringement rules. The international dimension of the protection of cultural works must be perceived as a means of harmonising and better clarifying the national approaches. It can be said that international and national dimensions are both important aspects to be examined and integrated with the aim of achieving a binding legal protection to folklore.

Despite all of this, an international convention on folklore has not yet been established. Although many different national approaches exist, the history of WIPO and UNESCO's joint efforts towards the implementation of durable means of protection, conveys the clear message that consensus over a convention cannot be achieved without sustained negotiations.<sup>1246</sup> The past seven meetings of the WIPO ICG Committee are an apt expression of this.

However, these *fora* aided slowly the introduction of some changes that could overcome the lack of existing international protection. Some limited means of protection can be found within the intellectual property field. This restricted protection is expressed in laws governing trademarks, industrial designs, geographical indications, unfair competition or unfair trade practice as well as under

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<sup>1245</sup> See P. K. Yu 'The Harmonization Game: What Basketball Can Teach about Intellectual Property and International Trade' [January 2003] 26 Fordham Int'l L.J. p.253.

<sup>1246</sup> D.E. Long 'Democratizing' Globalization: Practising the Policies of Cultural Inclusion' [2002] 10 Cardozo J. Int'l & Comp. L. p.217. The author states that defining 'the parameters and meaning of IPR protection in the twenty-first century is like trying to cross quicksand. Just when you think you have charted the danger areas, another sinkhole suddenly appears to drag you under'.

the WIPO Performances and Phonograms Treaty 1996 (the WPPT), and provisions related to the protection of unpublished and anonymous works.

Nevertheless, if we wish to establish an international and comprehensive law on folkloric works important gaps still remain to be filled. In working toward this end, Indigenous peoples' values and interests should be taken into account. Customary laws of Indigenous peoples' communities and their own manner of regulating their folklore could inspire and lead the way for a suitable solution and sound protection.

The role of intellectual property and specifically copyright protection applied to folklore depends upon the level of absorbency and adherence to new schemes of social values as the ones represented by Indigenous peoples and their customary laws. It is hard to judge now if copyright protection will be completely erased in favour of a *sui generis* protection. What is clear is that the way traditional copyright rules are set forth, enforced by the iron logic of trade, disregard Indigenous peoples' most valuable cultural and artistic heritage. Moreover, copyright could be rewritten and adapted to embrace new rights for Indigenous communities and their cultural and artistic works. Copyright could find a solution to the problem of an *interim* protection of works of folklore, providing a balanced reading of the formula copyright/public domain, and copyright/fair use.

A co-operative approach at an international intra-agency level is needed, including a co-ordinated effort in sharing information, news, joint forums and debates on the issue of folklore among WIPO, UNESCO and WTO. If this co-operation is not put in place, a single agency will take the lead<sup>1247</sup> compromising the effect of a multi-disciplinary approach to the theme of folklore. It should be noted that folklore has a multi level factorial approach and for this reason compromises between different positions must be achieved.

Furthermore, the same level of co-operation is expected between national and continental administrative and governing bodies in charge of legislating and enforcing a legal protection for works of folklore. Co-operation must also be the goal of Indigenous communities to weave the dialogue and acquire power in contracting with national and continental authorities as well as international counterparts. Moreover, this dialogue and comparison of different interests and

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<sup>1247</sup> UNESCO seems to go ahead with the *Preliminary Draft Of A Convention On The Protection Of The Diversity Of Cultural Contents And Artistic Expressions*, Paris, July 2004 (doc. CLT 2004/CONF.201/CLD.2CLT/CPD/2004/CONF-201/2).

values should never undermine the positions of the weakest party, i.e. the Indigenous communities.<sup>1248</sup>

Overall, the international approach stimulated by the work of WIPO and its specialised Committee on folklore and traditional knowledge is key in the effort to mainstream and help to create an international consensus. The international dimension cannot be achieved in isolation, and every United Nations agency, every country, political unit, continental entity, Indigenous NGO and local community, involved in the field of folklore and intellectual property must be willing to share news and findings and should collaborate with each other.

The experience gained with the protection of folkloric works has shown that it is unlikely that any single 'one-size-fits-all' solution will be adequate to protect folklore comprehensively. In fact, it is necessary to combine a variety of differentiating interests to achieve protection. A multi-optional approach, as addressed during one of the last ICG meetings, could provide a better system of protection, at least while some mechanisms remain unclarified and the relationship between the application of possible modified copyright categories is still obscure. Overall, it can be affirmed that globalisation, technology, modernisation, international trade are not negative *per se*, but that positive rules should be set forth to discipline their relationship with other values foreign to them, for example the folklore of Indigenous peoples.

If a revised copyright still intends to play an important role in regulating folklore, it is also fundamental *in prima facie* to acknowledge who are the key stakeholders - the Indigenous and traditional communities and how their own legal systems work. Moreover, which interests are at stake should also be addressed. Only through an in depth knowledge of the Indigenous world and its own legal system one can acknowledge Indigenous copyright rules. Copyright is not an immutable right, and history has shown it to be an adaptable instrument. Its practical application could be influenced by the political pressure and consequently by the philosophic theories applied to it. In the end, the challenge for future copyright laws to be applicable to Indigenous peoples' folkloric works lies in balancing market efficiency with common social and ethical values.

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<sup>1248</sup> In this regard the issue of co-operation between agencies at a national, regional and international field to succour Indigenous peoples' folklore see Peter K. Yu 'The Harmonization Game: What Basketball Can Teach about Intellectual Property and International Trade' [January 2003] 26 Fordham Int'l L.J. p.255.

## Chapter 7 Conclusions

Folklore has become a topic of great political and economic significance. This is due to the extent of commercial activity relating to folklore, and to the way that folklore relates to Indigenous peoples and traditional communities' human rights, their empowerment and self determination. Moreover, the growth of international trade and global information as a result of globalisation has led to renewed interest in the protection for folklore against misuse and misappropriation. The legal protection of folklore is a challenging issue, although its necessity is no longer questioned. The first of these challenges is the absence of a precise common definition and identification of folklore, and the actors behind the scene. The object of protection should be made clear. If an agreement upon a common definition and the means of identification is not reached, the object of protection will remain vague.

These gaps thus lay out the main obstacle towards protection. This thesis has stated that folklore, or traditional cultural expressions (TCEs), can be simply defined as a creative collective process, whose source of creation is in Indigenous or traditional communities. This assertion represents the starting point of this research, whose aim was to explore whether a legal protection of folklore is possible either through the existing copyright regime or through the establishment of a *sui generis* option.

What should be taken into consideration in any legal protection for folklore is respect of Indigenous peoples' demands. Firstly, Indigenous peoples wish to participate in ruling over and benefit from their works of folklore. Secondly, in cases of preservation, protection and promotion of their cultures, Indigenous peoples wish to exclude others from using or accessing their works. This can be either for the secret and sacred nature of many TCEs or because expressions of folklore made public can be misused and misrepresented with great prejudice to the integrity of the cultural heritage of the community. Therefore, any system drafted to protect folklore should take into account these two exigencies: the wish to participate in the exploitation of their cultural resources as well as the right to exclude the public from obtaining access to them.

The above considerations constitute the root of this work, which attempts to build a legal analysis by comparing different existing means of protection at a national, continental and international level. This multi level structure was conceived to be the most adaptable to the phenomenon of folklore, which begins in a

traditional community within a state and subsequently expands continentally and internationally. The necessity of interrelating these diverse aspects of folklore has first moved us to explore the adaptability of the current intellectual property means within a national dimension, copyright in particular, which ensures effective protection for folklore.

The examination of national copyright laws as undertaken in the chapter 'Protection of Folklore under Copyright Law. The U.S.: Any Help From the Existing Copyright Provisions?' shows that only a few works of folklore can be covered by intellectual property protection. Geographical indications and unfair competition can partially protect Indigenous communities against undue exploitation. Also, the instrument of collective trademarks can benefit the community by recognising community rights and not only of the single author of the work. As observed, however, collective trademarks (i.e. 'Indian made'), provide very limited protection because of their generic nature. In fact, it is difficult to draw a distinction between different communities that live in the same area or are obliged to use the same trademark - one which does not characterise the specific origin of a particular community. In addition, collective trademarks are more suitable for the protection of tangible rather than intangible works. However, these legal instruments are not a total failure, since they can be applied in specific cases of community work.

The analysis of the U.S. Constitution and Copyright Statute stresses the difficulty of applying a strict copyright regime directly to folklore, without softening some of its elements. In fact, copyright, which protects artistic creation, is hardly applicable to works of folklore. Copyright primarily gives protection not to the sources of the creation, but to the artistic creation itself. Its main limit is, then, the attribution to a single author. The Western ideological tradition of copyright conceives the author as a single 'genius'. This concept is, however, not applicable to Indigenous communities, whose lives and creations are a community process and the fruit of a common identity.

Individualism has been promoted for national economic purposes and not only to recognise the natural value attached to the work by the single author. Its proponents think that only through a strong copyright 'faith' would it be possible to motivate developments in art and science, leading to economic development. However, in spite of economic incentives, aspects of Western societies seem more ready to exploit precious cultural and natural resources from traditional communities, especially in developing countries, sooner than develop their own ideas. These communities still preserve their traditions from earlier generations, keeping them alive through a re-innovative creative process. Unfortunately, works of folklore of Indigenous communities remain too often copied. Only after becoming



derivative works are most of folklore works protected. The paradox is that these new works, based on pre-existing ones, highly reward copyright industries without rewarding the Indigenous communities.

Moreover, the conclusion reached in the analysis of U.S. national copyright legislation is that copyright protects material works that must be fixed. The majority of works of folklore are of an oral nature and this represents another obstacle to the application of copyright to intangible folkloric works. In addition, copyright establishes a limited term of protection, that starts automatically if the work meets the criteria for copyright protection will endure the life of the author plus an additional fifty years according to Article 7 of the Berne Convention; however in the U.S. protection is extended to seventy years after the death of the author.

The Australian case law indicated a direction which should be taken in protecting Indigenous peoples' folklore. Moral rights of authorship should be given the same rank as economic rights. Nevertheless, the application of moral rights also follows an individualistic logic. Moral rights should not be bound to copyright so that a communal nature can be achieved which can be applicable to folklore. Furthermore, some other elements can be foreseen, such as the application of customary laws and the community leadership over the administration of a system for the protection of folklore.

The strict territoriality approach of national copyright laws lets us explore a higher level of protection to ascertain whether copyright and intellectual properties in general could be more flexible instruments, or if other forms of protection outside the intellectual property regime can be equally considered. Therefore, the continental model was added to the thesis structure with the purpose of estimating whether supra-national elements and values could work better in the route towards a protection for folkloric expressions.

The EU Constitutional Treaty promotes cultural diversity as the first and most important European value. The same applies to the African Union. However, this new value struggles to be enforced and its political and symbolic implications are not understood by all EU citizens. A clash in values could be seen in the recognition of copyright as property right. However, this should be read as constitutionally limited, not only in respect of the rules of the internal market, but also by principles of non-discrimination, human rights and indeed cultural diversity. Furthermore, the provisions dictated in the Annexes to the EU Constitutional Treaty, dedicated to the Sami people, and the discipline of the EU Development Policy in favour of Indigenous peoples embraced the same values contained in the EU Constitutional Treaty.

On the other hand, the African Union approaches a *sui generis* instrument enabling the nation states to act as a contracting agency between the users of folkloric works and the community. Folklore is expressly recognised by the African Union Charter as patrimony of the public heritage. Therefore, its exploitation could be subject to the payment of a fee. However, the limit of this instrument is that, if not well tailored, it could in principle put in the public domain all sorts of folkloric expressions, even those over which the community denies disclosure. Moreover, it will use economic value as a main criterion: everything that is paid for may be released. The generic policy adopted by the African Union, which establishes the employment of this revenue in favour of the cultural heritage of a nation, cannot help traditional communities to reach sustainable development or preserve their identities. Moreover, concerns are raised especially in those countries where there is a high level of state corruption and where Indigenous peoples do not participate or get access to proceedings regarding their rights.

It would be worthwhile to demand a community's prior consent to use their folkloric works. In order to be effective the 'public domain payant' regime should involve Indigenous peoples' participation and encourage transparency. Indigenous communities should be compensated for the exploitation of their cultural heritage and should be empowered to deny access to those works of folklore which must be preserved for their symbolic nature. This overall process could be sped up through agreements signed between the states and the traditional communities, establishing genuine rules as to who is entitled to benefit from the exploitation and which TCEs cannot be exploited. Moreover, the community should be entitled to any economic reward for commercialised works. Unfortunately, traditional communities in Africa cannot be guaranteed to apply a 'public domain payant' and their rights are not mentioned in any agreements. The positive side of this system is the possibility of disseminating and integrating the culture of folklore. To make it workable, it is fundamental to assure financial compensation to the community and to give respect to their sacred and secret knowledge as well.

The African Union and the European Union, despite adhering to different models of protection, seem to embrace the belief that sustainable development cannot be reached without mainstreaming and protecting cultural diversity. An equal development policy and an exchange of information between institutions and organisations focused to protect it, could strengthen those 'common values' of peace, fair justice and respect for human rights. These principles have been recognised internationally and they constitute at a continental level the basis for sustainable development not just for Indigenous peoples but for the world

community also. These are also the principles embraced by the recent objectives and principles set by the WIPO ICG sessions on folklore.

Therefore, at a supranational level, there are mechanisms that go beyond intellectual properties and copyright means of protection and which leave room for exploring other rights and a combined or inter-disciplinary approach to this matter.

However, its main limitation lies in the lack of Indigenous communities' participation in the process regarding their TCEs. The strength of a continental/supranational regime of protection for folklore depends upon the level of this participation.

The third stage of protection set out in the thesis is that of the international dimension. This is the most advisable in the long term due to the transnational nature of folkloric works that can now be considered a truly global phenomenon. Following reforms made at the WPPT, neighbouring rights can also protect traditional cultural expressions through performances. However, in this case the right of attribution is given to the individual artist who performs the work but not to the community. As regards the limit of the duration of the right imposed by national copyright legislation, the provisions established internationally for unpublished and anonymous works could help in extending the limit of protection. However, they cannot guarantee an unlimited time period to allow works of folklore to survive from one community generation to another.

Hence, at the international level, studies to endorse the establishment of new models are on course, and are more flexible and adaptable to the schemes of folklore, which is always a mutable right. These instruments focus on mainstreaming cultural diversity in order to safeguard the tangible and intangible cultural heritage of Indigenous peoples. In particular, efforts are now being undertaken at UNESCO and WIPO with the goal of drafting an international convention. The attempts in this direction demonstrate that consensus is not easy to achieve. Until now, international organisations have put in place only soft laws and non-binding instruments. However, these organisations contributed to the creation of the right environment to obtain a worldwide consensus for the creation of an international agreement. Moreover, these soft laws uphold many *sui generis* elements to be enforced at a continental and national level, but certain precautions must be used in conceiving and drawing this new right to avoid gaps in the protection.

A better employment of existing instruments such as copyright and other intellectual property rights should not, nonetheless, be abandoned *tout court*. Changes should be made to establish Indigenous peoples' rights over their works of folklore. Any new legal instrument '*sui generis*' should be complementary with any

protection granted to folklore through copyright or intellectual property means. Proprietary rights could co-exist with non-proprietary rights and IP rules with non IP measures.

The way forward towards a protection for folklore should follow precise objectives and be supported by certain principles. First of all, traditional communities should be protected from illicit exploitation of their cultural and natural resources and means of protection should be drafted according to their needs and expectations. It should be recognised that Indigenous peoples enrich cultural diversity, and that this diversity benefits all humanity, not least as a source of great creativity. Therefore the protection of folklore should respond to the expectations of Indigenous communities. Folklore should be internationally recognised as the result of a cultural process, which permeates the life of the community and has an inter-generational character.

Therefore, in seeking a legal protection, folklore should be considered as a collective phenomenon and therefore rights of communal nature should be most adaptable. Folklore should also be conceived as a long-lasting right. Protection should be granted as long as the traditional communities are able to keep alive and make use of folkloric expressions. Any legal instrument put in place cannot refrain from acknowledging and adopting Indigenous customary laws. These laws should be recognised and used in regulating the access to works of folklore, the right to benefit sharing and the right of preservation through exclusion. Traditional communities and Indigenous peoples should have the capacity of self-administration in issues regarding their rights. The penalty for any infringement should also be designed according to customary traditions and rules. It should have a moral nature and be able to distinguish whether the infringer is someone belonging to the community or someone outside it.

Special protection should take into account all factors which could address a more comprehensive approach to the matter of folklore, including human rights, customary rules, cultural diversity and also intellectual property. In particular, copyright should be relocated in its ambit at the UN level under WIPO and not under the WTO. Intellectual property and non-intellectual property instruments should not be considered as mutually exclusive options as recognised by WIPO, but a holistic and comprehensive one. Copyright should also be addressed not only as an economic right but also as a right which combines proprietary rights and moral rights. Moral rights need to grow as proprietary rights too. Copyright should be looked at intrinsically and the way the legislation of developed countries enforces this right should also change in order to take into account not only the logic of the market but also that of the users and of the real authors of the works. It is ultimately

a problem of a balance of rights. The way forward might imply the revision of the Berne Convention, which is a process that will require consensus. In the meantime, the creation and application of soft laws can generate pressure and advocate the need for change: nation states can include part of the text of soft laws into national legislation. No binding instruments can surmount the limit of harmonisation and try to achieve consensus through the use of 'soft commitments', which could become the platform of bilateral agreements and future international treaties. This is the realistic way to bypass the boundaries of harmonisation which can be conditioned by those countries which impose global standards. What should be taken into account is the importance of balance and flexibility to accommodate the right of the owner (author) and the right of the public to have access to the work. Thus, soft laws should be designed to take into account these rights. It is also important to recognise that copyright is not an immutable right and, while an *ad hoc right* is created to protect folklore, copyright should be adaptable to cover protection for some folkloric works which otherwise will be left with no protection at all. However, folklore is not just about property. Hence, there is a need for a regime which assures adequate compensation for the right holder of TCEs and different regimes granting appropriate moral rights. There is also a need to establish a mechanism of balanced access for those folkloric works already in public domain. The recent WIPO ICG sessions on folklore seem to move towards the right path of promoting some specific objectives and principles of protection to be included in a non-binding instrument. Those objectives and principles should represent the framework for a legal protection for folklore. Both objectives and principles can be summarised in a few concise values.

- The value of the promotion, respect and safeguard of traditional communities and their cultural diversity which is expressed also through their works. From this value derives the necessity of empowering communities and contributes to the safeguarding of their traditional cultures. It also includes the necessity of making these measures of protection effective and accessible.
- The value of respect, preservation and promotion of customary laws. Indigenous peoples should be empowered to regulate their rights according to laws developed at the community level, which should not be contrary to recognised human rights standards, and also in line with international and continental agreements.
- The value of good and democratic governance and policy making. Any protection to be drawn should be effective, transparent and should take into account the diverse realities of the beneficiaries. Any policy

concerning Indigenous peoples should take into account the aspirations and expectations of Indigenous peoples. In order to do that, positive and defensive measures should both assist in the process of shaping the new protection. As a positive measure, the sources of folklore, where possible, should be classified. A national or continental authority should be in charge of this classification as well as provide guidelines on how procedures related to the acquisition and enforcement of the right should be laid out and how disputes over penalties and payments of fees should be resolved. Indeed, the community should be always involved in the administration process in order to express its consensus and to evaluate the appropriateness of certain measures.

- The value of flexibility and balance of interests. This is a very important principle. Folklore, as already stated, is the expression of the cultural identity of traditional communities. It is also a main pillar of human innovation and creativity, which is at the basis of sustainable development. To avoid the dispersion of this great resource, and to enhance inter-cultural exchange, it would be decisive to regulate access to information regarding folklore. It is essential to balance the public interest of those who use and benefit from it with the aspirations of Indigenous communities from whom folklore derives. A protection of folklore exists in a delicate equilibrium and flexibility is needed both from the traditional communities as well as from the users.

A comprehensive policy of legal protection for folklore has not been written yet. It is difficult although not impossible to reshape copyright in order to make it a more flexible instrument of protection for Indigenous peoples' folklore. Copyright is not an 'immutable line in the sand' to borrow the expression of a noted academic. However, this is not a simple task. In the long term a revision of Berne might be required. In the short term new soft laws developed in this specific sector and the advocacy of Indigenous peoples' rights could change the current political framework which makes copyright a purely economic and less moral right. It will also be difficult to predict if this new philosophical approach to copyright could work in an international setting, as well as at a continental and national level, to include protection for folkloric works of traditional communities. What is certain is that the way copyright is actually conceived and translated in national and international legislation constitutes, in many ways, an antithesis to the way traditional communities think about their cultures. An international protection should take into account that some values might be sacrificed to leave room to new values which might be on balance more important and in need of a protection. Since cultural

diversity underpins sustainable development, it is therefore necessary to consolidate attempts to protect cultural diversity worldwide. Indigenous peoples' TCEs/EoF are an expression of this cultural diversity which deserves protection, promotion and preservation from attacks by an information society which is often left without precise rules, or at least whose rules often deprive human beings of a sustainable development. This protection could be achieved once national and supranational/continental authorities become willing to prioritise cultural diversity and try to focus on values which are of common interest, rather than following a logic that makes rich countries more powerful to the detriment of poorer nations and communities. In order to establish workable solutions, flexibility and adaptability are needed in new ways of thinking, practising and ruling which do not necessarily correspond to those of the Western world. Whatever protection is applicable to TCEs/EoF either locally, continentally or internationally, it cannot neglect the recognition of diverse cultures and customary rules.

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