



Original Article

Cultural Economics and Intellectual Property: Tensions and Challenges for the Region

Miranda Forsyth*

Abstract

The Pacific islands region is currently experiencing an intensification of interest in culture as an enabler, rather than an inhibitor, of development. The emerging field of cultural economics seeks to chart ways in which culture can lead to both economic development and also to other goals, such as positive social relationships, community cohesion and maintenance and enjoyment of cultural heritage. However, bringing together these different range of goals at times involves tensions, often manifested in differences between individual autonomy and family and community obligations, generational focus and clashes of cultural logics. This paper investigates these tensions through the lens of intellectual property, an area where competing ideologies and perspectives of entitlement often come head to head. It identifies and reflects upon four areas of tension that will have to be navigated as the region experiments with both global models of intellectual property and national and local regulatory mechanisms.

Key words: cultural economics, intellectual property, traditional knowledge, Pacific islands

* State, Society and Governance in Melanesia Program, School of International, Political and Strategic Studies, ANU College of Asia & the Pacific, The Australian National University, H.C. Coombs Building #9, Canberra, ACT 0200, Australia; email <miranda.forsyth@anu.edu.au>.

1. Introduction

The Pacific Islands region is currently experiencing an intensification of interest in culture as an enabler, rather than an inhibitor, of development. In many ways, such a reconceptualisation also entails a critique of current models of development that focus heavily on economic growth, opening up to broader conceptions of what is sometimes termed ‘well-being’ or ‘livelihoods’.¹ The emerging field of cultural economics engages with these broader discussions as it seeks to chart ways in which culture can lead to both economic development and also to other goals, such as positive social relationships, community cohesion and maintenance and enjoyment of cultural heritage.²

1. This is happening both by Pacific Islander policy-makers and in the literature about the region. For examples of the former, see Regevanu, Ralph, ‘The Traditional Economy as a Source of Resilience in Vanuatu’, presented at the ‘Pacific Islands and the World’ Conference in Brisbane, 3 August 2009, available at: <http://aidwatch.org.au/publications/the-traditional-economy-as-the-source-of-resilience-in-melanesia>; Sandra Tarte, ‘A New Regional Pacific Voice?’ *Pacific Islands Brief* Number 4, 28 August 2013; Vanuatu National Statistics Office (2012) *Alternative Indicators of Well-Being for Vanuatu*, available at <http://www.vnso.gov.vu/>. For examples of the latter, see the excellent summary in and George Curry and Gina Koczberski, *Engaging with Capitalism: Cases from Oceania Research in Economic Anthropology*, Volume 33, 335–52; and Miranda Forsyth, *Alternative Development Paradigms in Vanuatu and Beyond*, SSGM In Brief 2014/25, available at http://ips.cap.anu.edu.au/sites/default/files/SSGM%20IB%202014_25%20Forsyth%20Proof%202.pdf

2. Throsby, David (2010), *The Economics of Cultural Policy*. Cambridge: Cambridge University Press.

However, bringing together these different ranges of goals at times involves tensions, which are often manifested in differences between individual autonomy and family and community obligations, differences in generational focus (i.e. those alive now vs past and future generations) and clashes of cultural logics. Intellectual property is a useful lens through which to view some of these issues as it often given rise to points of friction where competing ideologies and perspectives of entitlement come head to head. For example, it highlights the dilemmas associated with preserving cultural values and heritage on the one hand and seeking to build commercial opportunities based upon them on the other. Moreover, questions of intellectual property policy are often at the heart of programs that seek to develop the creative industries and cultural tourism, which are also an intrinsic part of a cultural economic approach. This article therefore identifies and reflects upon four areas of tension that will have to be navigated as the region experiments with both global models of intellectual property and national and local regulatory mechanisms.

The first tension is that between protecting the rights of artists and custodians of cultural heritage, while not inhibiting the use of cultural heritage and art as a source of inspiration for further innovation and creativity. The second tension arises from the shared and interconnected nature of much cultural heritage in the region as a whole. The third set of tensions arise from the different international, regional, national and local regulatory frameworks that are at play in this area, such as the differences in approach between the Agreement on Trade Related Aspects of Intellectual Property (TRIPS) and the The United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on Safeguarding Intangible Cultural Heritage. The fourth area of tension, which in many ways underlies many of the others, is the differences in conceptions of what intellectual property regulation means throughout the region. These tensions are explored through reference to fieldwork on the issues of intellectual property and development in the countries of Vanuatu,

Samoa and Fiji between 2011 and 2014. To contextualise this discussion, the article provides a brief introduction to the intellectual property systems in the region.

First, however, the vexed issue of terminology should be attended to. The article refers to traditional knowledge, expressions of culture and cultural heritage largely interchangeably. Although much has been written about the boundaries of these different concepts, it is not necessary to go into great detail for the purposes of this article.³ Rather, the three terms are used here to refer to knowledge, know-how, practices, creative expressions and all forms of culture that Pacific Islands people consider they have particular relationships with and rights over. The term ‘global intellectual property system’ is used to refer to the regulatory framework over intellectual property that is entrenched throughout most of the world by a series of treaties including TRIPS and those administered by the World Intellectual Property Organisation (‘WIPO’).

2. A Brief Introduction to the Intellectual Property System of the Pacific Island Countries

Intellectual property regulation, like most forms of regulation in the region, is a plural endeavour. Most states in the region either have inherited colonial-era legislation or new legislation that is consistent with the Agreement on TRIPS,⁴ which coexists with complex unwritten customary norms and understandings around intangible valuables that are often collectively referred to either as ‘traditional knowledge and expressions of culture’ or ‘cultural heritage’. While there is a tendency towards categorising the latter as having been passed down from generation to generation and the former as relating to new knowledge

3. See for example see for example Anton’s summary in Christoph Antons (ed) *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (2009, Kluwer Law International), 1–4.

4. A good overview is provided by Farran, Sue, *South Pacific Intellectual Property Law* (2011) Supplement 51 International Encyclopaedia of Laws, Kluwer International, The Hague, 1–97 (Third edition).

and artistic expressions, such distinctions are problematic because creativity, innovation and knowledge development are ongoing processes that elide such binaries.

Many states in the region are also subject to a number of international obligations that impact upon intellectual property rights regulation, such as TRIPS, the Convention on Biodiversity, the International Treaty on Plant Genetic Resources for Food and Agriculture, and more recently the Nagoya Protocol on access and benefit sharing of genetic resources, although these are rarely fully complied with. Although existing in legislation, and administered by a growing network of intellectual property offices across the region, state-based intellectual property laws are currently largely unused by the populations of the region;⁵ the number of intellectual property cases in court is extremely low, and patents, designs and trademarks are overwhelmingly being registered by international owners rather than locals.⁶

Enforcement of the laws by the state is currently extremely limited, due to a combination of lack of prioritisation and lack of capacity in the police force and prosecution. In Fiji, where there has been the most activism to date with regard to copyright enforcement, for example with the establishment of a specific enforcement unit within the Fiji Intellectual Property Office, there has only been one successful prosecution to date.⁷ Civil actions by individuals are also extremely limited owing to the small markets, meaning that it is most often not worth the expenses for international rights owners to bring proceedings. This has led to a culture of impunity with regard to breach of copyright in particular.⁸ Fiji is also the only

country in the region to have its own collecting society, which is heavily supported by the Australian Performing Rights Association ('APRA').⁹ The development of legislation and national intellectual property (IP) policy in the region is strongly influenced by technical assistance from WIPO and Intellectual Property Australia, and hence reliant upon external models and approaches.¹⁰ However, the last few years have started to see the development of national laws that are becoming more tailored to the needs of the region.¹¹

The Pacific Islands region also have been developing legislation to protect traditional knowledge for the past decade, starting with the drafting of the Pacific Model Law for the Protection of Traditional Knowledge and Expressions of Culture 2002, and the Pacific Model Traditional Biological Knowledge, Innovations and Practices Act 2001. This has now proceeded to the stage of draft national legislation in at least five countries,¹² but to date only the Cook Islands has actually passed a Traditional Knowledge Act. Vanuatu and Samoa both include provisions that relate to indigenous knowledge in their state intellectual property laws.¹³ While the earlier model laws have been critiqued on the grounds that they marginalise customary authorities, introduce problematic conceptions of ownership and depend heavily on state administration,¹⁴

the recent election campaign, was assaulted by four army officers.

9. New Caledonia also has a collecting society but it is not an independent country.

10. WIPO has funded the development of national Intellectual Property policies in at least Samoa, Tonga, Solomon Islands, Cook Islands, Fiji and Vanuatu. However, some have not as yet been finalised and most are not currently publicly available.

11. See for example Samoa's *Intellectual Property Act 2011* which is relatively simple and contains mechanisms such as utility patents which are more likely to be of use in the region than patents.

12. Vanuatu, Samoa, Solomon Islands, Fiji and Palau.

13. For example Part 7 of Vanuatu's *Copyright and Related Rights Act 2000*, and section 30 of Samoa's *Copyright Act 1998*.

14. Miranda Forsyth, 'How can Traditional Knowledge Best be Regulated? Comparing a Proprietary Rights Approach with a Regulatory Toolbox Approach' (2013) 25(1) *The Contemporary Pacific* 1–31.

5. See <http://www.paclii.org/pacific-ip/>

6. Statistics are available at http://www.wipo.int/ipstats/en/statistics/country_profile/, although these are likely to be incomplete.

7. *Director of Public Prosecutions v Ali* (2013) FJHC 357

8. This impunity appears to be felt even at the highest levels, see: <http://www.abc.net.au/news/2014-10-01/fiji-man-allegedly-bashed-by-officers-after-sending-abusive-text/5782892>. This newspaper report states that Amnesty International claims that it has 'credible evidence' that a songwriter who had had an angry exchange of text messages with Mr Bainimarama, the President of Fiji, alleging that his songs were used without permission during

some of the national legislation being developed appears to be finding central roles for customary institutions.¹⁵ There is also a treaty on traditional knowledge under the Melanesian Spearhead Group but it is not as yet operational.¹⁶ All such legislation vests rights in certain individuals or groups to prevent others in their country, and possibly the region, from using various aspects of traditional knowledge and expressions of culture.

In addition, a number of countries have been engaged in creating databases of traditional knowledge. These typically have a series of access restrictions that allow the custodians of that knowledge to determine who is entitled to access it. One example is Fiji's cultural mapping database, and another is the 'tabu room' at the Vanuatu Cultural Centre. Databases and registers have long been associated with defensive intellectual property protection,¹⁷ but are being used in the region primarily as a means of safeguarding or preserving cultural heritage and identifying endangered traditional knowledge and expressions of culture. However, the prioritisation of the written record in land cases across the region suggests that such registries are also likely to play a role in determination of rights in the future.

A final legal mechanism in operation is the UNESCO Convention for the Safeguarding of the Intangible Cultural Heritage which has been ratified by a number of states in the region. Importantly, this convention has quite different policy goals to the intellectual property treaties just outlined. Under article 11 (a) of that Convention states are obliged to '(a) take the necessary measures to ensure the safeguarding of the intangible cultural heritage

present in its territory'. The Convention also establishes a Representative List of the Intangible Cultural Heritage of Humanity. To date, there have been two entries from the region into this List: Tongan Lakalaka (dances and sung speeches) and Vanuatu sand drawing. In regard to the sand drawing example, while the initial registration opened up new funding avenues and led to a revitalisation of sand drawing through a series of festivals, this momentum has not been able to be maintained by the state. However, the international recognition given to sand drawing has generated more interest in the art among ni-Vanuatu youth, and sand drawing has been incorporated into the national curriculum by the Ministry of Education.¹⁸

3. Four Tensions Involving the Creative Industries and Commercialisation of Traditional Knowledge in the Region

3.1 *Protecting Creators' and Custodians' Rights over Works and Facilitating Access and Use of Them by the Public*

The first tension to highlight is one that exists between a desire to protect the rights of creators and custodians of both cultural heritage and new works, and the desire to facilitate the use of such material as a source of inspiration for further innovation and creativity, or to nurture other values dependent on access to cultural works.

If exclusive rights are awarded to individuals and groups over aspects of cultural heritage, or indeed new works, this necessarily limits the way in which they are able to be used by others. In the context of the western intellectual property system, this tension is expressed in debates around the concept of the 'public domain'. The policy ideal is said to be to find a balance between exclusive rights of authors and the interests of users and the general public, with the intention of fostering, stimulating and rewarding creativity and innovation. As Sell and May state 'in one sense this

15. Guido Pigliasio discusses Fiji's draft legislation in 'Are the Grassroots Growing? Intangible Cultural heritage Lawmaking in Fiji and Oceania'. In *Made in Oceania: Social Movements, Cultural Heritage and the State in the Pacific*, K. Rio and E. Hviding, eds. pp. 322–337. Oxford: Sean Kingston.

16. This treaty is discussed in Miranda Forsyth, 'The Traditional Knowledge Movement in the Pacific Island Countries: the Challenge of Localism' (2011) 29(3) *Prometheus* 269–86.

17. For example, India's Traditional Knowledge Digital Library.

18. Interview with Edgar Hinge, Vanuatu Cultural Centre, 8 October 2014.

history has been a contest between monopoly power or private rights (limiting public access) and the public—regarding intent to free the flow of information (at the costs of the rights of the individual intellectual creator).¹⁹ For this reason, in the global system, there are certain limitations made on the exclusive rights awarded, such as limited time frame, ideas alone not protected by copyright, fair use exceptions and so forth. Mechanisms such as compulsory licenses and copyright collecting societies are also used to attempt to facilitate access to works that may otherwise be rendered non-accessible to the public through intellectual property mechanisms. It should be noted, however, that entrenched interest groups regularly distort this policy ideal in favour of the owners of intellectual property rights, who are increasingly large corporations rather than individual artists.²⁰

In the context of the Pacific Islands, these issues take on added complexity due to the ongoing importance of cultural heritage as a source of inspiration for new creations, the absence of the concept of a public domain, different temporal scales in customary understandings over rights over intangible cultural heritage and the region's state of economic development. These issues can be illustrated by some sets of comments in relation to music made by speakers at a conference on cultural economics held in Suva, Fiji in March 2014. One speaker recounted a story of visiting the island of Rabi in Fiji, which houses a community of Banabans who have been dispossessed from their traditional home in Kiribati as a result of extensive phosphate mining last century. She noted that during her visit, she observed the youth in the community make extensive use of their mobile phones to down-

load and play local music from Kiribati, and share it with each other. She remarked on how important access to this music is for maintaining their cultural identity. She also observed that, in general, there is little disposable income on the island and the youth cannot afford speakers or amplifiers and so make temporary ones by cutting out the bottoms of polystyrene cups. Another speaker discussed the issue of music production in Fiji, highlighting both the real difficulties for local musicians to earn a living from their music and also the success story of one particular band, Black Rose, that is able to charge many thousands of dollars per live performance. This presenter described how he had supported the development of this group, and noted that a turning point was their exposure to Western music.²¹

These two examples highlight some important economic and social realities that have important consequences for the debate over intellectual property regimes in the region. For instance, the pricing mechanisms that are used by music producers in the developed world make their music inaccessible to the vast majority of the residents of the region except through illegal copying. However, it is clear that access to this music is a crucial part of the development of the music industry in the region. Artists in the region are thereby placed in the unenviable position of having to use pirated works while campaigning for better protection of their own music. Membership of the WTO by many countries in the region means that legislation that protects only local musicians would contravene the national treatment requirements of TRIPS. In addition, it appears that although foreign rights holders are generally reluctant to pursue their rights in countries in the region, they will do so if they can capitalise on new mechanisms created by local artists. For example, APRA provides

19. Christopher May and Susan Sell, *Intellectual property rights: a critical history*, 2006, Lynne Rienner Publishers: Boulder: Colorado, pp. 468.

20. This is particularly evident in the politics around the negotiation of the intellectual property chapter of the Trans Pacific Partnership Agreement. See for example Kylar Loussikian, 'Regional trade pact puts Australia in "absurd" position, say experts' *The Conversation*, 14 November 2013, available at <http://theconversation.com/regional-trade-pact-puts-australia-in-absurd-position-say-experts-20299>

21. Webb observes that today 'Melanesians are becoming more globally mobile and connected. Most contemporary Melanesian music is derived from systems and styles once borrowed'. *Pop, politics and regional pride: The virtualization of space in contemporary Melanesian song*, available on http://www.academia.edu/6066902/Pop_politics_and_regional_pride_The_virtualization_of_space_in_contemporary_Melanesian_song

much needed operational assistance to Fiji Performing Rights Association (FPRA), but in return FPRA collects royalties in Fiji on its behalf for all Australian rights holders. Similarly in Vanuatu, once the local musicians succeeded in having the Copyright Act gazetted in 2011 and started to try to enforce it, they were advised that they also needed to enforce it on behalf of foreign rights holders as well.²² This means that selective enforcement of rights by local artists is also unlikely to resolve this tension.

A further issue is that the mechanisms that have been developed in the global North to address the balance between creators/custodians rights and user access may not be workable in the region. For example, there are a number of real obstacles to the establishment and operation of collecting societies in many of the countries in the region. In order to be useful, collecting societies need to be able to generate enough income from royalty payments to cover their administrative costs and still be able to make distributions to rights holders. The small size of the market in most Pacific Island countries militates against this. For example, in Fiji which has the most established tourism sector in the region, FPRA has 624 Fijian members, and in 2013, it distributed a royalty of \$245,052. Half of this went to Australian rights holders under the reciprocal agreement with APRA, meaning that each member in Fiji received an average yearly royalty payment of \$FJ190.00.²³ While FPRA is continuing to grow at an impressive rate (15% in 2013), it seems unlikely that it will be able to generate enough revenue to provide significant income for its members under current conditions. These conditions include the fact that it is currently limited in its collection of royalties to negotiations with major music users, a few of whom have failed to date to co-operate. The current environment of impunity towards copyright infringement

tends to undermine the feeling of obligation to negotiate a licence.

Another balancing mechanism used in the IP system developed by the global North is to award limitations of time to the grant of monopoly rights, following the logic that new works and inventions will ultimately go into the public domain where they are free for use by all. However, in Pacific Island countries, as in many indigenous cultures worldwide, understandings of rights over cultural heritage operate according to a very different temporal logic, and these rights are seen as continuing indefinitely.²⁴ In pre-contact times, this ongoing conception of rights was mitigated by exchange mechanisms and attribution rights that were facilitated by the small-scale nature of communities and their social organisation. However, over the past 100 years, communities in the region have moved around and mixed together at unprecedented rates. Missionisation, blackbirding, introduced epidemics and more recently urban drift have undermined the ability of these traditional social mechanisms to balance out the eternal monopoly. Further, as mentioned above, customary norms and understandings are now being written into state legislation, which in turn changes both their nature and also the mechanisms that must be used to obtain consent for use of traditional knowledge and expressions of culture. For example, state authorities now play an important role in obtaining consent from custodians of cultural heritage, and written requests, forms and fees are all envisaged as being involved.²⁵ The freedom that is currently experienced by many artists, fashion designers and artisans in drawing from their cultural heritage to create new works may be impeded by an awareness that there is a requirement to fill out a form and apply through a state authority for

22. Interview with Joe Tjiobang Bong, 26 July 2011, Port Vila, Vanuatu.

23. Interview with Eremasi Tamanisau, Chairman, Fiji Performing Rights Association, Suva, Fiji, 16 July 2014.

24. See Boateng, B. (2013), *The Hand of the Ancestors: Time, Cultural Production, and Intellectual Property Law*. *Law & Society Review*, 47, 943–73.

25. See Miranda Forsyth, 'The Traditional Knowledge Movement in the Pacific Island Countries: the Challenge of Localism' (2011) 29(3) *Prometheus* 269–86.

permission—with the threat of criminal sanctions in the case of non-compliance.²⁶

As a result, as part of the debate over the relevance of cultural economics, it is important to ask how a balance between the rights of custodians of cultural heritage and the broader public can be ensured, especially given the potential removal of much traditional knowledge from the public domain through proposed *sui generis* legislation. Some of the questions that therefore arise are: Should all traditional knowledge be protected or only some categories (such as secret or sacred knowledge)? What sort of copyright laws would work in the context of the region? What sort of collective licensing schemes could work in the Pacific Islands context? How important is the concept of the public domain for the Pacific Islands, if at all? What sorts of limitations (if any) should there be on the exclusive rights of authors and custodians of cultural heritage? What sorts of mechanisms should be used to communicate the protections that are in place to the broader public, domestically, regionally and internationally?

3.2 *The Regional Nature of Cultural Heritage*

The second tension arises from the shared nature of much cultural heritage in the region, such as tapa (bark cloth), kava, canoes and woven pandanus mats. Although traditional knowledge and cultural heritage is often conceived of as being very locally grounded, certain aspects of it are quite widely diffused. This is not surprising given the common history of settlement in the region by the Lapita peoples who gradually spread out across the whole region in a series of waves of migration, and the history of trading, voyaging, warfare and inter-marriage in the region. Although many communities and groups are aware of the shared nature of some aspects of cultural heritage and natural resources, other groups are often unaware that ‘their’ knowledge, heritage and natural resources are also

26. Such as are, for example, envisaged in the current draft of the Vanuatu Traditional Knowledge Bill.

claimed by others, and can view claims by others as misappropriation. Indeed, Manuel Ruiz argues that shared and widely disseminated traditional knowledge is the rule rather than the exception in the context of indigenous peoples’ culture and livelihoods.²⁷

This regional aspect also gives rise to questions about the types of protection or rights that are granted over diffuse knowledge and heritage, and how benefit sharing could operate in a multicountry context. For example, there is currently research proceeding on the development of a remedy for human immunodeficiency virus based on a plant used for medicinal purposes in Samoa and also around the region.²⁸ Although the traditional knowledge was provided by a Samoan healer in the context of the pharmaceutical development, it is not inconceivable that if substantial profits eventuate (the legal situation is uncertain), other countries may feel that they should also have a share.

The historical and current exchanges of material and intangible cultural products between the different countries in the region give rise to a variety of different responses. Some are concerned that indiscriminate blending of a number of different traditions in dance performances (such as homogeneous ‘Polynesian’ performances) for the tourist market has led to a loss of identity and devaluation of traditional dance. In contrast, an informant spoke about the Rotuman experience of having lost much of their traditional tangible and material culture, and their attempts to recover it through reviving the traditional trade connections between Rotuma and Tonga, Tahiti

27. Manuel Ruiz Muller, *Protecting Shared Traditional Knowledge: Issues Challenges and Options*, ICTSD Issue Paper No. 39, 2013, available at <http://www.ictsd.org/sites/default/files/research/2013/11/protecting-shared-traditional-knowledge.pdf>, 2.

28. Today studies are continuing, with the intention of submitting prostratin for approval to the (USA) FDA to begin Phase 1 Clinical trials in 2015 or 2016. It was reported in September 2013 that this is likely to occur in 18–24 months. <http://www.healthline.com/health-news/hiv-prostratin-from-tree-bark-could-be-aids-breakthrough-090913>. See also Robinson, Daniel (2012) http://www.abs-initiative.info/uploads/media/ABS_Best_Practice_Pacific_Case_Studies_Final_01.pdf

and elsewhere. Similar cross-regional revival activities have taken place in relation to tattoo, traditional navigation, pandanus mats and tapa production. Regional issues also arose in discussions about the claim by Fiji Airways to trademark designs based on traditional Fijian motifs, which have also been claimed by Samoans and Tongans.²⁹ The shared cultural heritage of the region, while being an important reserve of cultural resources, thus also has the potential to provoke disagreements over 'ownership' when new forms of commodification are introduced. Strathern (1999, p.129) argues 'Cultural identity is something to which everyone can lay claim; but when cultures are given a homeland and become identified with particular territories or countries, the cultural difference may work to exclusionary or asymmetric effect'. This comment resonates particularly with the region's history of having had particular territorial boundaries imposed through the colonisation process. Such arbitrary divisions have been, and continue to be, challenged by academics such as the late Epeli Hau'ofa, who described the region as 'a sea of islands'.³⁰

Another relevant issue is how to deal with situations where one community has authorised a particular use of an aspect of shared cultural heritage that is offensive to another group claiming the same rights?³¹ It is expected that different groups and different individuals within those groups will have different ideas about the appropriate boundary between custom and commoditisation. For example, it has recently been announced that

Disney intends to release a film set in a prehistoric Oceania that is likely to draw from a number of aspects of cultural history and mythology from around the region. Preliminary research indicates that Disney negotiated some contracts with certain communities around the region, but to what extent can individual communities authorise the use of cultural heritage that is also claimed by others? The challenge for policy-makers is to provide appropriate forums for these debates to be held in constructive ways. The solution proposed by the Melanesian Spearhead Group (MSG) Treaty on Traditional Knowledge is to give questions of ownership to the MSG secretariat to decide.³² However, this is highly problematic given the secretariat's lack of capacity in this area and the absence of criteria to make such determinations. Ruiz suggests that one solution may be the establishment of an international or a national fund that can then be used to support conservation and sustainable use projects.³³ A regional fund may also be considered for the Pacific Islands, although questions of fair use of the fund's resources would need to be negotiated.

These issues are further complicated by considerations of the rights and responsibilities of those living abroad: a considerable issue given the size of the Pacific diaspora. As Strathern (1999, p. 168) observes, 'The difficulty of identifying cultural ownership must include the fact that cultures are not discrete bodies; it is "societies" that set up boundaries. Social communities may claim common cultural identity, and claim rights in corporate images, but it does not of course follow that cultures reproduce as populations do. Recent diaspora for instance, not to speak of global spread, have familiarized anthropologists with the notion of dispersed communities'. For example, one of the animators of the aforementioned film is an American of Samoan heritage. His identification with this heritage can be viewed on the one hand as a way to legitimise Disney's appropriation of the aspects of the region's cultural heritage in the

29. See the excellent article by Koya, C. http://www.academia.edu/3411465/Koya_C.F_2013_-_Anthropological_Evidence_of_the_15_Fijian_Masi_Designs_pre-dating_Fiji_Airways_Logo_Creation

30. Hau'ofa, E. 1994. Our Sea of Islands. *The Contemporary Pacific* 6(1):147-61

31. In Australia this issue arose in March 2014 whereby a planned exhibition depicting an ancient Aboriginal songline was abruptly cancelled after one group of elders complained that it was not appropriate, although the exhibition had been authorised by other tribal leaders. <http://www.theaustralian.com.au/arts/visual-arts/songline-show-canned-over-threat/story-fn9d3avm-1226866825320#mm-premium>

32. See Forsyth 2011, above.

33. See Muller 2013, above pp.17.

film.³⁴ However, it also raises important questions over his entitlements to freely draw from this cultural reserve, which is of great significance to him.³⁵ The tensions between the different ways that artists living overseas may wish to use their cultural heritage and those still living ‘back home’ was also commented on by Tongan artist Vaimoana Niumeitolu who has also migrated to the United States. She is currently working to establish a cultural centre in New York where there can be dialogue about such issues, recently observing:

. . . people say ‘you have no right to do something, you can’t even speak the language. . . . It is not just about art, it is about hair, appearance, language, etc. I love that, these are exactly the types of conversations that I want people to have and to learn from. . . . Sometimes [other Pacific diaspora artists] they go back to their home countries and then they return and say “people don’t accept my artwork.” I want to nurture the opportunity to have conversations about that. Of course my art comes from the streets of South Bronx so it is different to the artwork of someone living in Tonga. . . . I am all for creation. I am all for respecting our traditions as well. But I live in a completely different world to someone raised in Tonga’.³⁶

In addition, awareness of opportunities for commercial exploitation of cultural heritage may make some communities less willing to participate in cultural revival programs, as they may not wish to risk losing their claims over that type of heritage. A few specific questions to highlight here are: What sorts of rights should be recognised over widely shared traditional knowledge in the region, and to whom? What types of claims and responsibilities do communities living outside of their traditional place have over intangible cultural heritage? What mechanisms can be used to articulate and manage the different claims?³⁷

34. <http://www.thewhatitdo.com/2014/10/23/get-to-know-disneys-new-polynesian-princess-moana-and-its-samoan-animator-david-derrick/>

35. *Ibid.*

36. Interview with Vaimoana Niumeitolu, 15 April 2014 (telephone, Canberra and NY).

37. The MSG Treaty provides that any competing claims to TK between its member countries will be resolved by

And, how can revival programs, positive sharing and exchange of cultural heritage and new artistic productions in general be facilitated within a new commercial and market-based paradigm?

3.3 The Choice of Regulatory Tool

The third set of issues involve the different regulatory tools that are available in this area, including private contracts, minimum standards of remuneration for musicians, mandatory local content provisions (for broadcasting stations and also for artwork in hotels), UNESCO living treasures approaches, global intellectual property regimes such as copyright and Geographical Indications of Origin, *sui generis* traditional knowledge legislation, a variety of international conventions, cultural mapping and national cultural databases. While it is important to have a wide regulatory toolbox to choose from, it is also important to determine how these different systems may interact, both positively and negatively, and both between themselves and within the context of existing local and indigenous intellectual property systems (such as systems of taboos, customary law, secrecy and craft guilds). It is also important to be aware of the very different policy paradigms that these tools are often embedded within.

The question of whether commercialising culture is compatible with safeguarding or preserving it is best answered by acknowledging the different agendas these two objectives have, and then working to find a path that advances both, or identifying areas where priorities need to be made. In the same way, it is important to be aware of potential conflicts in approach and orientation of different intellectual property mechanisms, and to advance cautiously in seeking to balance different agendas and viewpoints, rather than assuming that all

the MSG secretariat, with no procedures for doing so provided. This is discussed in detail in Forsyth 2011, above and also Miranda Forsyth, ‘Do You Want it Gift-wrapped? Protecting Traditional Knowledge in the Pacific Island Countries’ in Peter Drahos and Susy Frankel (eds) *Indigenous Peoples’ Innovation: IP Pathways to Development* (ANU ePress, 2012).

the different types of regulation in this area will work together in positive ways.

In making these observations, I draw upon a body of social-legal analysis that is concerned with the effects that laws can have on society, and in particular in privileging certain types of rights (such as individual, commoditised property rights) over others (such as communal and customary rights). For example, a number of scholars working in this area have shown that transforming customary title into individual title has tended to result in the dispossession of women.³⁸ In the same way, there is a risk that codifying rights over traditional knowledge in state legislation may result in the exclusion of women from accessing and using traditional knowledge.³⁹ This body of research also suggests that legislation, or indeed any forms of regulation, facilitates the advance of certain interests and policy directions over others, although the political nature of such processes are seldom acknowledged. As Parry (2002, p. 684) argues:

‘Although all forms of law are cultural constructs, law-making and legal interpretation are rarely understood as subjective processes, but rather as normative ones informed and structured by a “deep” logic and rationality and underpinned by a set of underlying principles that are universally shared’.

There is a real potential for regulatory schemes in this area to work against each other or at cross-purposes, as the different institutions engage in what is sometimes called ‘norm entrepreneurialism’. It is very rare that

any new regulatory mechanism is neutral; it is almost always likely to advance the interests of certain groups over others, and to result in the focus on one objective over another, although this may not be apparent in discussions that take place at the level of general principles. Everyone wants to ‘protect’ traditional knowledge (and there are many conceptions of what protection entails),⁴⁰ but determining *how* and *for whom* involves a far more complex discussions. For example, *sui generis* legislation can be very effective in making statements to the world about the rights a nation considers that its citizens have over their knowledge and intangible cultural heritage. Indeed, the draft international treaties and domestic legislation that have been developed over the past few decades in the Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore (‘IGC’) and elsewhere have been crucial in developing the moral capital that has allowed negative publicity campaigns, such as the one in 2013 that resulted in Nike removing its new range of leggings resembling Samoan tattoo from the market on the grounds of cultural insensitivity, to be successful.⁴¹ However, the fact that these movements have had to use the vehicle of international and national law has had important consequences upon the way in which the message has been packaged. It has meant, for example, stressing idealised views of what traditional knowledge is, presenting it as a static body of knowledge handed down from generation to generation by a community localised in a particular place, glossing over inter-community differences,⁴² and a gradual whit-

38. Siobhan McDonnell, Exploring the Cultural Power of Land Law in Vanuatu: Law as a Performance that Creates Meaning and Identities, *Intersections: Gender and Sexuality in Asia and the Pacific* Issue 33, December 2013; Monson, R 2011, ‘Negotiating Land Tenure: Women, Men and the Transformation of Land Tenure in Solomon Islands’, in Janine Ubink (ed.), *Customary Justice: Perspectives on Legal Empowerment*, International Development Law Organization in conjunction with Van Vollenhoven Institute, University of Leiden, Rome, pp. 169–85.

39. This point is discussed in greater detail at Miranda Forsyth, ‘How can the Theory of Legal Pluralism Assist the Traditional Knowledge Debate?’ (2013) *Intersections: Gender and Sexuality in Asia and the Pacific* Issue 33, available at <http://intersections.anu.edu.au/issue33/forsyth.htm>

40. See Lawrence Kalinoe, Promulgating Traditional Knowledge Sensitive IPR Legislation In Papua New Guinea And Related Developments In Pacific Island Countries: A Reflection On The Past Three Years Volume 27 Article (2000) MLJ 6; <http://www.paclii.org/cgi-bin/sinodisp/journals/MLJ/2000/6.rtf>

41. Vaimoana Tapaleao, Nike pulls Pacific-style tattoo gear, NZ herald, Thursday 15 August 2013, http://www.nzherald.co.nz/business/news/article.cfm?c_id=3&objectid=10912088

42. See Miranda Forsyth, ‘Lifting the lid on “the community”: who has the right to control access to traditional knowledge and expressions of culture?’ (2012) 19 *International Journal of Cultural Property* 1–31.

ting away of roles for customary institutions. For example, Tobin has observed that the IGC draft treaties have been increasingly 'shorn' of their references to customary law, and that the European Union's 2012 draft treaty for the implementation of the Nagoya protocol makes no reference at all to customary law and restricts protection to a small fraction of traditional knowledge.⁴³ The economic focus that is being adopted in regard to the regulation of traditional knowledge is also resulting in the marginalisation of customary law, which is seen as being too uncertain to be used within a market based system in which the concern is to ensure ease of use for the 'buyers'.⁴⁴

Further, not all international regulatory mechanisms and narratives work in the same direction and are often driven by different rationales and policy objectives. Some promote exclusive rights, while others promote sharing, co-production and participation. For example, the Food and Agriculture Organisation of the United Nations has had a great deal of difficulty getting countries to contribute genetic resources under the International Treaty on Genetic Resources for Food and Agriculture, in part due to the counter-narrative of biopiracy and concepts of state sovereignty over genetic resources promulgated by the Convention on Biodiversity. In some circumstances, *sui generis* legislation can also work to disempower customary institutions through the state's appropriation of the role of supreme authority over traditional knowledge, and through requiring the use of non-customary practices such as written consent forms, registration and so forth. Finally, there is a danger that in focusing heavily on one particular area, such as misappropriation, support is overlooked for other

43. Tobin, Brendan 2013, 'Bridging the Nagoya Compliance Gap: The Fundamental Role of Customary Law in Protection of Indigenous peoples' Resource and Knowledge Rights' 9(2) *Law, Environment and Development Journal* pp. 144–62, pp.161.

44. For a discussion (and refutation) of the perception of customary law as 'uncertain' see Miranda Forsyth, 'How can the Theory of legal Pluralism Assist the Traditional Knowledge Debate?' (2013) *Intersections: Gender and Sexuality in Asia and the Pacific* Issue 33, December 2013 <http://intersections.anu.edu.au/issue33/forsyth.htm>

areas, such as the maintenance of local systems for preserving, using and sharing knowledge as this is not the focus of the global IP system. For example, the protection of genetic resources and their associated traditional knowledge is increasingly being dominated by an emphasis on benefit-sharing agreements.⁴⁵ As pointed out by an increasing number of scholars, however, one problem with this is that the focus on monetary compensation has led to the sidelining of the need for nurturing traditional and local knowledge and innovation,⁴⁶ and has also led to numerous cases of community conflict.⁴⁷

It is also very clear that different sorts of capacity exist throughout the Pacific Islands region which is crucial to take into account in intellectual property policy. For example, in countries such as Fiji, the state is relatively strong and legislative reform may therefore be an appropriate primary approach. In other countries, legislation may have minimal, or even negative, effects. As Jowitt comments, laws:

. . . may be expensive and time consuming to make. And, whilst they may look good on paper, they have limited impact on the day to day behaviours of people. Unfortunately, in the USP member countries we already have too many laws that sit on the books 'doing nothing'. These are not only old laws, but new laws that assume the existing, flawed, legal system, is fully functional. Passing of inappropriate new laws can lead to

45. See WIPO, Intellectual Property, Traditional Knowledge And Traditional Cultural Expressions/Folklore A Guide For Countries In Transition (2013), available at http://www.wipo.int/export/sites/www/dcea/en/pdf/tk_guide_e.pdf; Kanchana Kariyawasam, 2008, 'Protecting Biodiversity, Traditional Knowledge and Intellectual Property in the Pacific: Issues and Challenges', *Asia Pacific Law Review*, vol. 16, no. 1, pp. 73–89, p.84.

46. Robinson, D (2008) 'Beyond "protection": Promoting traditional knowledge systems in Thailand' in Gibson, J. (ed) *Patenting Lives: Life Patents, Development and Culture*. Ashgate, Aldershot. pp. 121–38.

47. See for example Peteru, Clark 2008, Access and Benefit Sharing issues in the Pacific: The Fable of the Mamala Tree, Presentation, available at <http://gibr9.hrc.govt.nz/presentations/Clark%20Peteru.doc>, Vermeulen, Saskia, 'The Nagoya protocol and customary Law : the paradox of narratives in the law' *Law, Environment and Development Journal*, vol. 9, no. 2, 2013.

'law reform fatigue', or increase the sense that law is largely irrelevant. It can also lead to the (unfortunately sometimes correct) belief that law is somehow an 'optional extra' to be followed or ignored at whim.⁴⁸

Similarly in many countries, customary systems of government and conflict management have been eroded and may even be non-functioning, but in others they still remain the primary regulatory mechanism in the lives of the vast majority of the citizens. In such countries, they should therefore be considered as being an important source of regulation, although it must be acknowledge that the complexity of achieving such deep pluralism in practice is considerable.

One way of moving forward in this area to take into account the complex regulatory framework is to ask the following questions: What are the specific aims for regulation in this area? What regulatory tools are available that best advance these aims and for which the capacity to implement exists? How will these tools interact with other regulation (state, customary and private) in this area? How can positive and reinforcing linkages between different regulatory institutions (international, regional, domestic and customary) best be fostered? If regulatory mechanisms exist that are problematic in attaining these objectives, how can these problems be overcome or minimised? It is critical that there are opportunities for ongoing dialogue between different groups, including those who represent cultural institutions and civil society, about the regulatory framework, so that different viewpoints can be expressed and negotiated.

3.4 *Different Conceptions of What Is Entailed by 'Intellectual Property Rights'*

The final set of tensions is fundamental to the development of cultural industries and to promoting innovation in the region to stimulate development. These arise from the very different conceptions of intellectual property rights

48. Anita Jowitt, 'Future of Law in the Pacific' (2008) 12(1) *Journal of South Pacific Law* 43, 47.

traditionally held in the region and those underpinning the global model. As a ni-Vanuatu agricultural scientist commented in the context of discussions over rights over genetic resources, 'in *kastom* we pay once and are under an obligation to recognise the place it comes from, whereas in the white man's system, the aim is to make the maximum amount of money within the time allowed under the grant'.⁴⁹ The anthropological literature also makes it clear that creativity and innovation in many Pacific Island communities was conceived of fundamentally differently to the 'creative individual' model propagated by the West.⁵⁰ Creativity was and still is often regarded as being passed down from spirits or ancestors, and not as originating in an individual (which would indeed have completely devalued it).⁵¹

Indigenous intellectual property regimes are also motivated by very different concerns to global intellectual property rights, in particular prioritising communal economic and spiritual well-being. As such, they resonate with the observation of Curry, a human geographer, that one cannot separate the economy and society from each other in Melanesia because 'the economy is intensely social and the social is

49. Interview with Roger Malapa, Vanuatu Agricultural Research and Training Centre, Port Vila, 14 October 2014 (author's translation from Bislama).

50. See Jacob Simet, 'Copyrighting Traditional Tolai Knowledge?' in Kathy Whimp and Mark Busse, *Protection of Intellectual, Biological and Cultural Property in Papua New Guinea* (Asia Pacific Press 2000), pp. 62–80, 2000; Lawrence Kalinoe and James Leach (eds) *Rationales of Ownership: Transactions and Claims to Ownership in Contemporary Papua New Guinea* (Sean Kingston Publishing 2004); Eric Hirsch and Marilyn Strathern (eds) *Transactions and Creations: Property Rights and the Stimulus of Melanesia* (Berghahn Books 2005); Monica Stern, 'Music in Traditional Exchanges in North Vanuatu' (2013) 36 *Pacific Studies* (2013) 59, pp 64–65; Lamont Lindstrom, 'Big Men As Ancestors: Inspiration and Copyrights on Tanna (Vanuatu)' (1990) 29 *Ethnology* 313–26; and James Leach, 'Modes of Creativity and the Register of Ownership' in Rishab Ghosh (ed) *CODE: Collaborative Ownership and the Digital Economy* (MIT Press 2005).

51. I have discussed these differences in length in the article Miranda Forsyth and Blayne Haggart, 'The false friends problem for foreign norm transplantation in developing countries' *Hague Journal on the Rule of Law* (2014) 6 (2) pp. 202–29.

intensely economic'.⁵² In addition, the systems of regulation both reflect, and are bound up with, questions of relationships between different groups and between individuals and the group. In this respect, they reflect a relational ontology, namely a worldview or basic assumptions about the kinds of entities thought to exist in the world.⁵³ In some respects, these differences of approach reflect broader regional discussions about alternative development pathways to the dominant neoliberal market-based paradigm. The opportunity for the Pacific Islands to develop a new intellectual property policy that charts its own course through the contested waters of this field will ideally occur in tandem with the exploration of such new conceptions of development.⁵⁴

4. Intellectual Property and the Future of Creative Industries in the Pacific Islands Region

The use of culture as a means of development in Pacific Island countries is a welcome new development. However, it also carries with it the potential for friction and tension, as broad aspirations are realised in terms of economic benefits by different segments of the communities that make up the region. Intellectual property is likely to be an area of considerable contestation, as it is a space where many different regulatory frameworks and objectives are currently swirling around. It is also an area where certain rights are protected and others are ignored, which both empowers some groups and disenfranchises others. This article has reflected on some of the tensions that will have to be navigated as the region experiments with both global models of intellectual property protection and local and customary regulatory mechanisms. It has also suggested that

there is a need for a far more critical approach to the suitability of the global proprietary rights model for the region. This in turn invites a real exploration of other models of intellectual property, such as open access, open source and indigenous/local/customary mechanisms. In this regard, the current focus on legislation and state institutions by regional and national institutions concerned with intellectual property policy⁵⁵ is too limited, especially given the relatively constrained reach of the state in many parts of the region. There is therefore a need to engage with existing customary/local mechanisms to craft regulatory solutions that take into account the real capacity limits of the region.

In addition, whatever regulatory mechanism and sets of norms are finally identified, there is a crucial need for the public at large to be made aware of them, or at least for the channels of information to be clearly identified. Lack of clarity about intellectual property laws can have a chilling effect on people's views about what rights they have with regard to certain knowledge, regardless of the actual wording or extent of those rights.

Finally, it may be worth considering David Throsby's concept of cultural sustainability, namely the idea that the artistic and cultural needs of the present generation need to be met without compromising the needs of future generations to meet their own artistic and cultural needs.⁵⁶ This idea has direct relevance to intellectual property policy, as it demonstrates how regulatory structures need to balance the

52. George Curry, 'Moving Beyond Postdevelopment: Facilitating Indigenous Alternatives for "Development"' (2003) 79(4) *Economic Geography* pp. 405–423, p. 419.

53. Arturo Escobar, 'Latin America at a Crossroads' *Cultural Studies* (2010) 24:1, 1–65, pp. 4.

54. Miranda Forsyth, 'Alternative Development Paradigms in Vanuatu and Beyond', SSGM In Brief 2014/25, available at http://ips.cap.anu.edu.au/sites/default/files/SSGM%20IB%202014_25%20Forsyth%20Proof%20.pdf

55. For example, the Secretariat for the Pacific Commission's Regional Culture Strategy Investing in Pacific Cultures 2010–2020 Strategy in its objective of protecting and promoting cultural rights sets out a number of goals, most of which are based on legislating international models. Further the emphasis in the indicators is almost entirely at the state level, through the development of legislation and state regulatory agencies and registration bodies, and the use of global forms of IP protection such as Geographical Indications of Origin and copyright. Similarly in the list of partners involved, no mention is made of community leaders or groups or traditional leaders or institutions, NGOs or anyone much at the local level at all. This focus is also shared by national IP offices around the region.

56. Throsby, David (2010), *The Economics of Cultural Policy*. Cambridge: Cambridge University Press.

objectives of supporting the interests of artists and custodians of cultural heritage today, while ensuring the continuation and evolution of local knowledge systems and traditional expressions of culture that will serve as a body of inspiration for future generations. In such a context, few claims to particular rights should

be taken for granted, rather a balancing exercise is required in which the different voices and interests, of those past, present and future, can be heard and considered.

February 2015.