

*Fitting Square Pegs Into Round Holes – The Vexed
Question of Harmonizing International Legal
Regulation of Traditional Cultural Expressions Under
Intellectual Property Law*

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Topic: Fitting Square Pegs Into Round Holes – The Vexed Question of Harmonising International Legal Regulation of Traditional Cultural Expressions in Intellectual Property Law

Introduction

LEGAL REGULATION OF TCEs

The movement to protect and regulate use of traditional cultural expressions¹²⁴(TCEs)¹²⁵ arose out of experiences encountered by indigenous societies as visitors to their communities translated their cultural manifestations into outputs that not only violated the spiritual and traditional mores of the communities, but also became protected by intellectual property law in favor of the visitors, leaving the creative authors of the original cultural expressions without moral or economic benefits for providing the foundational works. From events as diverse in time and space as the 19th – 20th century recordings of the music of the Ojibwa of northern Minnesota by ethnomusicologist Frances Densmore who gained fame in the Bureau of American Ethnology for that work housed in the Library of Congress and the famous Native American photos of Edward Curtis over the same period; the pictures of Hopi spiritual rites taken by missionary Reverend H. R. Voth of the Mennonite mission in the early 20th century, which brought him enduring valuable rights and recognition for his collection of pictures¹²⁶; to Michel Sanchez and Eriq Mouquet fusing digital samples of the music of Ghana, Solomon Islands and other African tribal communities obtained from a cultural heritage archive where ethnomusicologists had

¹²⁴ In this paper, the words ‘expressions of folklore’ and ‘traditional cultural expressions (TCEs)’ are used interchangeably. Because of the breadth of scope of the subject, this paper does not deal with traditional knowledge in the context of medicines, science and technology but confines itself to literary and artistic expressions. The World Intellectual Property Organization (WIPO) refers to *Traditional Knowledge (TK), genetic resources (GRs), and traditional cultural expressions (TCEs) or ‘expressions of folklore’ as economic and cultural assets of indigenous and local communities and their countries*. <http://www.wipo.int/tk/en/> accessed on 9th March 2011

¹²⁵ Kamal Puri in ‘*Indigenous Knowledge and Intellectual Property Rights – The Interface*’ defines ‘expressions of culture’ as denoting living, functional traditions, rather than mere souvenirs of the past.; See page 119, Chapter 7 of ‘*Intellectual Property Rights and Communications in Asia, Conflicting Traditions*’, Ed PradipNinan Thomas, Jan Servaes, Sage Publications 2006

¹²⁶ See Michael Brown, *Who Owns Native Culture?* Harvard University Press, 2003

recorded music and deposited their recordings, to create successful 'Deep Forest' works with no attribution and returns to the original musicians¹²⁷; indigenous societies were confronted with spiritual, social and economic challenges that birthed the move to regulate their own traditional knowledge, genetic resources and expressions of folklore with intellectual property rights.

This move is no different from the response of Western societies to the piracy that the growth of technology and the internet facilitated against pharmaceutical products, entertainment and software entertainment and software industries, leading to negotiation of global standards for protecting intellectual rights through the TRIPS agreement. But while arriving at TRIPS was achieved in the 8 year Uruguay round of the GATT, culminating in the creation of the WTO to administer the agreement, the issue of a global regime for TCEs through intellectual property rights remains unresolved to date. It is currently expressed in obscure interpretations of one section of the Berne Convention and an array of models laws for national copyright legislations, Declarations such as the Mataatua Declaration on Cultural and Intellectual Property Rights and the Bellagio Declaration, both of 1993, key paragraphs in the 2007 UN Declaration the Rights of Indigenous Peoples, several cultural Conventions by UNESCO, with the latest document being the Swakopmund Protocol of the African Regional Intellectual Property Organisation in August 2010. And these scattered compendia have been achieved over approximately 40 years of concerted efforts with an objective –to establish that expressions of folklore are not material in the public domain¹²⁸ to be

¹²⁷ See Torsen Molly and Anderson Jane, *Intellectual Property and the Safeguarding of Traditional Cultures, Legal Issues and Practical Options for Libraries, Museums and Archives*; WIPO Publication December 2010

¹²⁸ **Carlos Correa**, *Traditional Knowledge and Intellectual Property, Issues and Options surrounding the protection of traditional knowledge*, page 3, The Quaker United Nations Office (QUNO), Geneva/ Rockefeller Foundation, November 2001 - defines the public domain in these words - 'Public domain in the IPRs field generally includes any information not subject to IPRs or for which IPRs have expired. Thus, to the extent that TK is not covered under any of the IPRs modalities, it

appropriated without consent, but continually evolving creative works, even if by unknown authors, and for which its owners should obtain intellectual property rights that enable them to prevent their appropriation without consent, and receive compensation when used.

CONSTRAINTS TO THE REGULATION OF EXPRESSIONS OF FOLKLORE

Authorship

The effort to place the regulation of folklore within intellectual property law has been dogged by controversies. The first is conceptual and succinctly expressed in the words of Michael Brown ‘*Who owns native culture*’¹²⁹? Indeed, in the fundamental issue of even defining what the scope, content and character of folkloric expressions are, there have historically been wide divergences. It is however agreed that the stock of folkloric creativity spans folk literature such as proverbs, riddles, myths, legends, and fables, folk art such as murals, sculptures, jewelry, carvings; folk songs, musical instruments; folk medicine including processes of extraction and procedures of administration of medicines, folk agriculture, folk industries such as pottery making, textile weaving, hair braiding and sculpture, cosmetology, and many more¹³⁰. The 1976 Tunis Model Law on Copyright for Developing Countries defines folklore as ‘*all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and*

would belong to the public domain and be freely exploited. However, this technically correct view ignores the fact that TK may be deemed subject to customary laws that recognize other forms of ownership or possession rights’ - see <http://www.quno.org/geneva/pdf/economic/Discussion/Traditional-Knowledge-IP-English.pdf> accessed 8th December 2011

¹²⁹ Harvard University Press, 2003

¹³⁰ Mrs. P.V. Valsala G. Kutty, in *National Experiences With The Protection of Expressions of Folklore/Traditional Cultural Expressions: India, Indonesia and The Philippines*’ WIPO/GRTKF/STUDY/1, dated November 25, 2002; cites the Standard Dictionary of Folklore edited by Marian Leach as providing 25 definitions of folklore. See also Palerthorpe Stephen, VerhurstStefaan; *Report on the International Protection of Expressions of Folklore Under Intellectual Property*, page 6, Program In Comparative Media Law and Policy, University of Oxford, October 2000, Contract Number ETD/2000/B5-3001/E/04

*constituting one of the basic elements of the traditional cultural heritage*¹³¹. WIPO currently classifies traditional cultural expressions, or expressions of folklore (along with traditional knowledge and genetic resources) as *‘economic and cultural assets of indigenous and local communities and their countries’*. And so the debate looks at this creative framework and articulates a misfit between communally authored expressions emanating from the cultural aspects of human living transmitted trans-generationally, and the arena of time locked private rights that intellectual property protects.

While IP law grants to and protects rights of identifiable authors of original and creative works, folkloric expressions in their broad strokes are created by communities. The identification of members of indigenous communities can be a complex exercise involving private tribal law rules on matri- or patri-lineages, easily obfuscated by inter-ethnic marriages. So it stands to reason that even the basic question of *‘which people form a particular native community?’* is not easily answerable. Emphasizing this circumstance is the fact that folkloric expressions are often not fixed and changed subtly over long periods of time, obscuring the exact moment of innovation for folkloric works that grow out of community activity.

The response to this argument is one articulated by scholars such as Betty Mould Iddrisu, the current Attorney General of Ghana. They clarify that cultural expressions are created on several levels. Although originating from communities, their evolution, especially in contemporary society, is often the work of smaller identifiable groups, including the groups and individuals from whom those who create protected works obtain their

¹³¹ Section 18

information and knowledge¹³². Thus, when dealing with TCEs, it is important to distinguish between works that are amorously created by the entire group, such as the communal naming of kente designs in Ghana, those created by select groups such as select societies of Shamans or agricultural collectives, and those that are traceable to even narrower groups such as carvings produced within an art enclave. When distinction and clarity is engaged in such articulation, it becomes clear that certain TCEs are not much different from works already protected by intellectual property rights such as geographic indications, trade secrets, and the marks of collectives.

The second argument is that creativity necessarily presupposes authorship, even if the author is not known. In the narrow corridor of unpublished works, this reasoning is backed by Article 15 (4) of the 1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works, which gives states the mandate to vest works of unknown authors of unpublished works in a national authority subject to a declaration made to WIPO on who that national authority is. This interpretation has led to the designation of national authorities as trustees for expressions of folklore in Copyright Laws¹³³. By defining folkloric works as “*all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities...*”¹³⁴, the Tunis model law brings a territorial lock to folkloric expressions, thus obviating the diffused and dispersed character of communities as authors.

¹³²Betty Mould Idrissu’s view that all folkloric works are necessarily the creation of the community at large is out of date because it is recognised that works of folklore were created by individuals, if enjoyed and used communally. See ‘*The Experience of Africa*’, WIPO-UNESCO World Forum on the Protection of Folklore, 1997, 18 WIPO Publication No. 758

¹³³In Ghana’s 2005 Copyright Act, Act 690, the President is designated as that authority.

¹³⁴Section 18

Duration of IPRs

But the ‘misfit’ controversy goes beyond the recognition of authorship to one of the core policy reasoning behind the grant of intellectual property rights – that intellectual property rights are conferred for a period of time, so that the knowledge created becomes part of the intellectual commons after the expiration of that period. This encourages the exposition of creative and useful information, while preventing rights owners from having an absolute and indefinite grip on the new information and expression of ideas. While IPRs such as copyrights and patents are conferred for defined periods¹³⁵, folkloric expressions are developed over long periods, often spanning centuries and decades. Thus even if the moment of original creation may be identified for a particular work and attributable to a particular group of persons, the spate of time it takes for its evolution into different expressions will likely push each stage of the work into the public domain, making it unprotectable by IP law.

There is a clear response to that argument when it comes to expressions that are source indicators or secrets. Protection of marks in trade mark law and that of secrets in trade secret law are not constrained by time such as happens with copyrights and patent grants and so the blanket argument of ‘time misfit’ is not altogether valid. It is in the arena of copyright and patentable TCEs that there is no clear response. What some states such as Ghana have done to maintain control over cultural heritage through IP law is to legislate a position that grants protection over folkloric expressions in perpetuity in their copyright statutes.¹³⁶ This has technically been made possible by the wording of Article 7 (6) of the

¹³⁵ Under Article 7 (6) of the Berne Convention, copyrights are for the lifetime of the author and 50 years after their death, a period of time that may be extended through national legislation

¹³⁶ See provisions on folkloric expressions in Ghana’s Act 690

Berne Convention which allows States to fix copyright protection for a period longer than in the Convention, and Article 18 (1) which provides that the Berne Convention applies to “*all works which, at the moment of [the Convention’s] coming into force, have not yet fallen into the public domain in the country of origin through the expiry of the term of protection.*” The argument is made that works in the public domain are works for which no one can claim authorship, or whose protection has expired, whereas TCEs are continually evolving within defined communities and as such, at no time do they fall in the public domain.

The perpetual protection of folkloric expressions in copyright law is also supported by the 1976 Tunis Model Law on Copyright for Developing Countries which declares ‘works of national folklore protected by all means....without limitation in time’¹³⁷ and the 1985 Model Provisions for National Law on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, both developed under the auspices of WIPO and UNESCO.

A second approach has been to introduce a model of dealing with TCEs within the ambit of the law of contract instead of intellectual property law. Kamal Puri¹³⁸ points out an approach taken in the draft of a Model Law for the Protection of Traditional Knowledge and Expressions of Culture in 2002 under the auspices of the Pacific Islands Forum Secretariat and the Secretariat of the Pacific Community, together with UNESCO. The rights created in this Model Law fall into two categories: traditional cultural rights – which is

¹³⁷Section 6(2)

¹³⁸Pages 124 to 126, ‘*Indigenous Knowledge and Intellectual Property Rights – The Interface*’ Chapter 7 of ‘*Intellectual Property Rights and Communications in Asia, Conflicting Traditions*’, Ed Pradip Ninan Thomas, Jan Servaes, Sage Publications 2006

the protection provided to traditional knowledge and expressions of culture, and moral rights. Traditional cultural rights, while analogous to current intellectual property rights in that they grant exclusive rights to reproduce, publish, perform and make available online traditional knowledge and cultural expressions, are distinguishable in that they are inalienable and perpetual. The rights created are in addition to and not in substitution of existing intellectual property rights. To access such TCEs, detailed procedures require applying to a 'Cultural Authority' that has function in relation to identifying traditional owners and acting as a liaison between prospective users and traditional owners or dealing directly with the traditional owners and ensure that prior informed consent for non-customary use of TCEs as well as well profit sharing arrangements for derivative works are reached between the prospective user of the TCEs and the traditional cultural rights holders.

It is noteworthy that even in jurisdictions that purport to strictly apply IP rules within their known architecture, exceptions have been made to this basic rule of duration in the cultural arena. By the operation of legislation, royalty rights from use of parts of the famous work "Peter Pan" subsist in perpetuity under United Kingdom copyright law for the benefit of a charitable cause¹³⁹, and Molly Torsen and Jane Anderson report of a proposal put forward in 2003 in Australia to grant perpetual protection for the artwork of the

¹³⁹http://en.wikipedia.org/wiki/Peter_and_Wendy#Copyright_status informs that '...1988, former Prime Minister James Callaghan sponsored a Parliamentary Bill granting a perpetual extension of some of the rights to the work, entitling the hospital to royalties for any performance, publication, or adaptation of the play...'. Section 301 of, and Schedule 6 to, the Copyright, Designs and Patents Act 1988: *'The provisions of Schedule 6 have effect for conferring on trustees for the benefit of the Hospital for Sick Children, Great Ormond Street, London, a right to a royalty in respect of the public performance, commercial publication, broadcasting or inclusion in a cable program service of the play 'Peter Pan' by Sir James Matthew Barrie, or of any adaptation of that work, notwithstanding that copyright in the work expired on 31 December 1987'*

renowned indigenous artist Albert Namatjira¹⁴⁰. The US's Copyright Term Extension Act of 1998 is believed to have been aimed at extending copyright protection over works held by the entertainment industry¹⁴¹. These examples show that the central principle of limited duration in copyright law may, albeit in rare circumstances, be changed to support the larger interest.

Tangibility and Fixation

Another noteworthy divergence between the architectures of intellectual property law and folkloric expressions is that IPRs are conferred on tangible and fixed works, while many expressions of folklore, such as dances, stories, recipes and medical procedures are usually not fixed in form through writing or recording. In claiming a right to a particular expression, a real problem could arise as to the boundaries of the creative expression. The Berne Convention leaves room on this matter, which makes copyright law the one regime of IP law amenable to protection of folkloric works – Article 2 (2) makes it a matter of national legislation to prescribe whether works will or not be protected unless they have been fixed in some material form. Section 5 (bis) of the Tunis Model law builds on this and categorically elides fixation as a requirement of protect ability for only expressions of folklore. It should however be valid concession from existing IP architecture that the law consistently evolves doctrines to support elasticity in the boundaries of protection in other IP areas such as the doctrine of equivalents in patent law, and substantial similarity in copyright and trademark and as such, there exists enough framework for IP protection to be given to TCEs in whichever arena of IP they fit.

¹⁴⁰Torsen, Andersen, page 37 *supra*, citing from M. Rimmer (2003), 'Albert Namatjira: *Copyright Estates and Traditional Knowledge*' Australian Library and Information Association, June 2003, 1-2.

¹⁴¹http://en.wikipedia.org/wiki/Sonny_Bono_Copyright_Term_Extension_Act#cite_note-1

Rights of Peoples

The phenomenon of protecting traditional cultural expressions with property law is supported in human rights law. Article 15 (c) of the International Covenant of Economic, Social and Cultural Rights lays the foundation for the right to the products of one's creative authorship as a human right. Article 31 of the UN Declaration on the Rights of Indigenous Peoples affirms the right to creative output as a right of peoples- and frames the operation of the right within intellectual property law. It says- *Indigenous people have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control and protect and develop their intellectual property over such cultural heritage, traditional knowledge and traditional cultural expressions.*

The thrust of these human rights instruments is shored up by UNESCO Conventions for protecting cultural expressions from appropriation and distortion. These are the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (1970); the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage (1972); UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (1995), the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage (2003), and the UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions (2005).

The human rights argument underscores the validity in recognising the creative and intellectual outputs of a known or unknown author, or a group, through communal living under IP law. To my mind, it is further justified if one appreciates that communities interacting closely enough to produce creative works through joint efforts fit into modern frameworks of corporate structures, bound by what is akin to the common mission, vision, values and goals found in corporate organisations. The reality of the need to compel the conferring of intellectual property rights on the creative outcomes of communal living is expressed in the third of the Bellagio Declaration of 1993 – *‘increasingly, traditional knowledge, folklore, genetic material and native medical knowledge flow out of their countries of origin unprotected by intellectual property, while works from developed countries flow in, well protected by international intellectual property agreements, backed by the threat of trade sanctions’*. James Boyle puts it more expressively: *“Curare, batik, myths, and the dance ‘lambada’ flow out of developing countries . . . while Prozac, Levis, Grisham, and the movie Lambada! flow in . . .” The former are unprotected by intellectual property rights, while the latter are protected.*¹⁴²

The challenge arises from how to fit ‘rights of peoples’ neatly into the architecture of intellectual property law, a matter provoked by human rights law, and resolvable in intellectual property law, which makes the length of resolution of TCEs within IP law a conundrum.

Copyrights or Intellectual Property Law

Perhaps the greatest controversy that has slowed the achievement of harmony in the international regulation of TCEs has come from the trend of states situating their regulation

¹⁴²*Shamans, Software, and Spleens: Law and the Construction of the Information Society*. Harvard University Press 1996

in copyright law. By 1994, twenty four developing countries had enacted copyright legislation protecting expressions of folklore^{143, 144}. An explanation may be found in the predominant conceptualization of folkloric expressions within artistic, literary and scientific works and the early protection of works by unknown authors in the Berne Convention. The 1976 Tunis Model Law on Copyright for Developing Countries and 1982 WIPO/UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions were framed to fit within copyright legislation. The UNESCO Recommendation on the Safeguarding of Traditional Culture and Folklore adopted at the 1989 UNESCO General Conference gave the following broad examples of expressions of folklore: *“language, literature, music, dance, games, mythology, rituals, customs, handicrafts, architecture and other arts”*. attenuating the positioning of folkloric expressions within copyright law. However expressions of folklore span every aspect of human resourcefulness, and do not constitute a genre of a particular store that makes them amenable to regulation in any one area of IP law, such as copyright. As much as they are often artistic, literary, graphical, or made up of performances, which technically ought to make them protectable under copyright law, they could be of a source indicating nature which would make them amenable to protection in trade mark law, or even consist of carefully guarded commercially viable secret processes, which should qualify for protection

¹⁴³Tunisia (1967, 1994); Bolivia (1968, 1992); Chile (1970); Iran (1970), Morocco (1970), Algeria (1973); Senegal, Kenya, Mali, Burundi, Cote D'Ivoire, Sri Lanka, Guinea, Barbados, Cameroon, Colombia, Congo, Madagascar, Rwanda, Benin, Burkina Faso, Central African Republic, Ghana, (1985) Dominican Republic, Zaire, Indonesia, Nigeria, Lesotho, Malawi, Angola, Togo, Niger, Panama (1994). See Long, D'Amato, p. 159-160, *CULTURAL RIGHTS: APPLICATIONS* Supplement to Course book in International Intellectual Property, West Group, 2002

¹⁴⁴ For legislative texts of countries regulating traditional cultural expressions through the law of copyright and current sui generis regimes, led by the Swakopmund Protocol, see <http://www.wipo.int/tk/en/laws/folklore.html> accessed 27th February 2011

in trade secret law, or inventive and utilitarian in character such as should qualify for grant of patents.

By the 1990s, it had become evident that copyright law could not by itself, appropriately and adequately protect expressions of folklore and WIPO/UNESCO initiatives involved regional consultations for the development of an appropriate legal framework after the April 1997 UNESCO/WIPO World Forum on the Protection of Folklore held in Phuket, Thailand. This led to nine global fact finding missions¹⁴⁵ and four regional consultations for developing countries on protection of folklore in Africa, Asia Pacific, Arab Region, and Latin, Americas and Caribbean countries in 1999,¹⁴⁶ in the quest to find an appropriate legal architecture for regulation of folkloric expressions which will ensure that its users achieve the objectives of a balanced IP system. The significant outcome from those consultations was not a query about the fit of TCEs into IP law, but the practical measures needed for collection, classification, identification and documentation of TCEs in order to ensure not only their conservation and dissemination, but their effective protection through various forms of IP law. The mission to move the discussions forward is currently being handled by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions set up by the WIPO General Assembly, and it remains actively engaged in this more than 40 year old endeavour to achieve a global consensus for a workable framework.

¹⁴⁵1998-1999 Fact- finding Missions – WIPO’s nine fact finding missions on traditional knowledge, innovations and creativity took place in 27 countries: 4 developed, 19 developing and 4 least developed dispersed in North America, Central America, South America, West Africa, Southern and Eastern Africa, Caribbean Countries, Arab Countries, South Asia, and the South Pacific, thus covering gathering information globally

¹⁴⁶ Richard Owens, “Protection of Traditional Knowledge: A Global Intellectual Property Issue,”
See also http://www.wipo.int/edocs/mdocs/tk/en/wipo_ipk_rt_99/wipo_ipk_rt_99_2.ppt

In the meantime, units of the international community are creating sui generis hybrid models as can be found in Panama, Philippines' and the Swakopmund Protocol of the ARIPO.

Conclusion

Through all these debates, there is an over-arching voice of restraint. In recognising communally created expressions as intellectual assets to be protected by intellectual property rights, would we not be encroaching on the intellectual commons of the public domain? Scholars such as James Boyle and Michael Brown ask. Michael Brown has suggested that we should not be asking '*who owns native culture*' but '*how can we promote respectful treatment of native cultures and indigenous forms of self-expression within mass societies?*' I disagree with him. And I do so because by reason of the structure of the globalized economy, now firmly grounded in TRIPS, which operates on the issue of 'who gets capital from what?' the matter of ownership is paramount when it comes to any form of creative venture and enquiries about same. Hernando de Soto in his '*The Mystery of Capital, why capitalism triumphs in the west and fails everywhere else*¹⁴⁷' has made clear the extreme leakage that poorer societies experience just by a failure to articulate in clear terms, who owns what. As long as what has always been agreed as outside the scope of intellectual property rights is 'the idea' and never the manifestation, and rights are centred around those who produce new expressions, and to the extent that traditional cultural expressions have been authored from ideas, they are creative works and may be protected by intellectual property law, if agreement is reached about other conditions necessary for conferring entitlements. The challenge remains in how consensus on these conditions are achieved internationally for a global framework, and how effectively national

¹⁴⁷Basic Books, 2000

legislatures use existing instruments to achieve the best means of protection while encouraging and rewarding creativity and innovation.

The motivation for the task remains strong, whether it is found in the need to preserve the authenticity of cultural expressions and restrain their distortion and inappropriate communication, or to receive market value rewards for their creation. A visit to the website of Sotheby's and Christies' auction houses reveals the high values placed on native arts in world markets today. A 2006 painting named *Waltitjatt* by Australian Aboriginal artist Tommy Watson is recorded as having been sold for \$197,160 at an auction sale in Sydney, and yet he is described as traveling between Irruntya, a small community of 150 people, and Alice Springs, a regional center, and reportedly receives approximately \$1000 per painting from a local art gallery. An Australian Torres Strait Islander drum is said to have been sold for a world record sum €818,400 at Christie's in Paris in 2006. A Blackfoot Beaded Hide Man's wearing shirt sold at Sotheby's New York for \$800,000; and Sotheby's October 2006 sale of American Indian art achieved a total of \$7 million and is said to have set a new world record for the sale of a Native object - a Tsimshian face mask - for \$1.8 million¹⁴⁸. Judith Miller's *Tribal Art*¹⁴⁹ provides a collector's guide to tribal art complete with the significant values placed on a vast array of artistic works, used as part of daily life in indigenous communities, and yet desired at a price by the world community. In such an economic arena, it is not expected that efforts to ensure that the creators of folkloric works are recognized and adequately compensated will abate unless achieved. One of the objectives of the 2005 UNESCO Convention on the Promotion and Protection of the Diversity of Cultural Expressions bears special attention in the current discussion –

¹⁴⁸Torsen Molly & Andersen Jane, *supra*

¹⁴⁹Dorling Kindersley Ltd, 2006

‘...Recognizing the importance of traditional knowledge as a source of intangible and material wealth, and in particular the knowledge systems of indigenous peoples, and its positive contribution to sustainable development, as well as the need for its adequate protection and promotion...’

Thus the efforts to protect and promote the traditional knowledge of indigenous peoples as a source of material wealth is an endeavor that is coalescing from several angles, especially when one considers the contribution made to the discussion by Article 31 of the UNDRIP in 2007, two years after the UNESCO Convention for the Promotion and Protection of the Diversity of Cultural Expressions.

GLOSSARY

ARIPO	African Regional Intellectual Property Organisation
Bellagio Declaration	Declaration following Bellagio Conference on Intellectual Property
Berne Convention	1971 Paris Act of the Berne Convention for the Protection of Literary and Artistic Works
GATT	General Agreement on Trade and Tariffs
IGC	Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions
IP	Intellectual Property
IPR	Intellectual Property Rights
SWAKOPMUND	Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore
TRIPS	Trade Related Aspects of Intellectual Property Rights Including Trade in Counterfeit Goods
TUNIS MODEL	Tunis Model Law on Copyright for Developing Countries
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Economic, Social and Cultural Organisation
UNESCO REC.	Recommendation on the Safeguarding of Traditional Culture and Folklore
WIPO	World Intellectual Property Organisation
WIPO/UNESCO	Model Provisions - Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions
WTO	World Trade Organisation