Toward A Conceptual Framework for Recognition of Rights for the Holders of Traditional Knowledge and Folklore

William O. Hennessey
Professor of Law and Director of Graduate Programs
Franklin Pierce Law Center

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I. Introduction

Globalization and the information technology revolution are battering away at the borders of sovereign nations from several different directions in the early 21st Century. New trade liberalization agreements, tourism, media, and the growth of the internet have increasingly exposed formerly protected and insular societies in developing countries to the influence of mass market goods and services, technology, and commodified culture originating primarily in, and at least originally, intended primarily for the vast ocean of middle-class consumers in the developed economies of the North. Complaints by American and European companies about rampant intellectual property piracy and counterfeiting in developing countries are an indication of the extent to which world famous brands and Hollywood cinema and music have penetrated foreign lands, supplanting and in some cases even obliterating the traditional cultures and customs of different peoples in the process — particularly in the cities. (If there were no markets for famous brands, films, and pharmaceuticals among consumers in developing countries, why would anybody there bother to copy them?!) At the same time, developing countries are clamoring for access to new medicines developed in the North at affordable cost to

fight the deadly diseases which plague mankind and know no boundaries of class, race, or nation – particularly HIV/AIDS.

Yet the tide flows in the other direction as well. It is interesting to ponder the rapid growth in international awareness of the value, actual and potential, of traditional knowledge and folklore ["TKF"] to the enjoyment and advancement of human well-being, both spiritual and material. Familiarity with traditional knowledge and folklore in the North was, until quite recently, mainly the province of research and scholarship by academic anthropologists and ethnologists. But now more and more, we can observe that traditional healing methods, plant-based and homeopathic medicinal therapies, folk art, drama and music nurtured for generations or even centuries in societies in less-developed countries are also finding their way onto television, into shopping malls, chic salons and health clinics of American surburbs, and into the research parks of multinational pharmaceutical companies. The channels through which this occurs vary, but usually involve the development of technical or cultural products with some sort of "added value", sold in the global markets for many times the price the original TKF product demands in its country of origin. In some cases the original TKF product or knowledge may have been given away for free.[1]

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[1] "Alan Jabbour suggested a taxonomy of four 'inchoate' concerns or anxieties which have led to international proposals for the protection of folklore. First, a concern for the authentication of folklore in the face of the economic, psychological and cultural threat from alien sources. Secondly the expropriation, not only of physical objects, but also the documentary and photographic record of traditio0nal societies. Thirdly, the issue of compensation for appropriation and cultural harm. Fourthly, the issue of nurture, or cultural health."
"In Australia, these concerns have been manifested in five main areas: (a) the infringement of the copyright of individual artists; (b) the copying of works not authorized by Aboriginal groups and communities; (c) the appropriation of Aboriginal images and themes; (d) the culturally inappropriate use of Aboriginal images and styles by non-Aboriginal creators; and (e) the uncompensated expropriation of traditional knowledge." Michael Blakeney, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain, WIPO Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3 (November 1999), p.4

Consequently, it is only logical and natural for the peoples and countries in which the holders of TKF are situated to expect or demand formal recognition for the contribution it makes to that value in some way, just as holders (including but not limited to multinational corporations) of intellectual property assets such as famous brands, pharmaceuticals, global pop music, and mass market software in the developed countries have demanded compensation through their government trade officials for use if their intellectual properties in developing countries. What is sauce for the goose is sauce for the gander, as the saying goes. Does the world community need the equivalent of a TRIPS Agreement for the protection of "trade-related aspects of rights in traditional knowledge and folklore" – a TRTKF Agreement, perhaps? The following discussion surveys recent discussions on what rights the holders of TKF want to be recognized. The purpose of the paper is not to provide conclusive evaluations of the feasibility or efficacy of what holders want. Nor does it deal directly with the difficult questions of defining what individuals or groups could be deemed a holder. Rather, it is an attempt to articulate some framework principles.

According to the organization of this seminar, discussions will be conducted on the application of existing IP Laws, the potential for the establishment of *sui generis* mechanisms beyond existing IP regimes, and the possibilities for and difficulties which may be encountered in the application of customary law and practice and alternative forms of protection.

As a recent WIPO report sets forth:

> "the intellectual property issues related to traditional knowledge cut across the conventional branches of intellectual property law, such as copyright and industrial property. In many cases traditional knowledge holders do not separate "artistic" from "useful" aspects of their intellectual creations and innovations;

rather, both emanate from a single belief system which is expressed in daily life and ritual. [2]

It is the intention of this paper to discuss the various expressions of what rights the holders of TKF want to be recognized by summarizing and reporting some of the views expressed in recent literature, including the deliberations of the Intergovernmental Committee [hereinafter IGC] On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore of WIPO at its First and Second Sessions (held in Geneva 28 April - 3 May 2001 and 10-14 December 2001), including the Member States of the WIPO, States party to the Paris Convention but not members of WIPO, and the European Communities.

II. What Rights do the Holders of Traditional Knowledge and Folklore Want Recognized: Human Rights, IP Rights, Rights of Sovereign States

According to Peter Drahos, "it is now accepted in rights theory that the existence and exercise of some rights presupposes the existence of other rights." [3] One of the theoretical purposes of this paper is to explore the extent to which common principles can be articulated to deal with the rights of all holders of TKF – specifically the holders of the three major topics of TKF, i.e., genetic resources, traditional knowledge, and expressions of folklore. Given the topic and to the extent that the discussion extends beyond existing intellectual *property* rights, the approach which is taken is therefore to focus on the rights *in personam* (of the holders) and not on the rights *in rem* (in the objects of

[2] Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore: Background Document Prepared For The WIPO Inter-Regional Meeting On Intellectual Property And Traditional Knowledge-Chiang Rai, Thailand, November 9 to 11, 2000 (WIPO/TK/CEI/00/INF.5) ¶ 14

[3] Peter Drahos, "The Universality of Intellectual Property Rights: Origins and Development, in Intellectual Property and Human Rights (WIPO and OHCHR 1999) 24, at 31

protection for all parties.)[4] Common Article 1 of the International Covenant on Civil and Political Rights [ICCPR] and of the International Covenant on Economic, Social, and Cultural Rights [ICESCR], reads:

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
> (3) The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The ICCPR and ICESCR have each been ratified, accepted or approved by over 140 countries.[5] More countries of the North have ratified the ICCPR and more of the South the ICESCR. But the language in both Covenants is identical. Thus, the principles of Common Article 1 may be said to be declaratory of customary, or even general, international law. In light of these principles, the holders of TKF have rights which the Member States of either of the Covenants have agreed to protect. However, as Professor Drahos has noted, the Covenants do not express or declare a right to property.[6] It is incontrovertible that there is some right to property in international law. However,

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[4] "Indeed a major problem, which has been identified in analysing traditional knowledge and cultural expression in conventional intellectual property terms, is the observation that "indigenous peoples do not view their heritage in terms of property at all...but in terms of community and individual responsibility. Possessing a song, story or medical knowledge carries with it certain responsibilities to show respect to and maintain a reciprocal relationship with the human beings, animals, plants and places with which the song, story or medicine is connected." Michael Blakeney, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain, WIPO Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3 (November 1999), pp. 5. 10, *citing sources*.

[5] http://www.unhchr.ch/html/intlinst.htm For the general proposition of this section, see Peter Donigi, Indigenous or Aboriginal rights to Property, (Utrecht 1994) pp. 28-40

[6] Peter Drahos, "The Universality of Intellectual Property Rights: Origins and Development, in Intellectual Property and Human Rights (WIPO and OHCHR 1999) 24, at 25

Drahos, in agreeing with that proposition, cites Schermers for the assertion that only need-based property rights rise to the level of fundamental human rights. id. at 25 This observation is not a hindrance to the present discussion at all, however. Appeals to liberal Western concepts of property are part of the problem rather than of the solution. As this paper will conclude, grounding the rights of holders of TKF in property principles may serve to destroy the very human contributions it purports to protect.

Furthermore, the right to control access to and sovereignty over natural resources (including genetic resources) is, vested not in communities or individuals that are holders but in the sovereign states themselves. States assert that they are the only entities that have sovereign rights over any sorts of genetic material and to regulate its access by means of national legislation. . According to the Principle of the Convention on Biological Diversity, Article 3:

> States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.[7]

Also, General Assembly Resolution 1514 (XV) on the Granting of Independence to Colonial Countries and Peoples declares that the rights of peoples is subordinated to the rights of states.[8] More recently, Article 10 of the new International Treaty on Genetic

[7] http://www.biodiv.org/convention/articles.asp

[8] see Michael Blakeney, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain, WIPO Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3 (November 1999), p.4

Resources for Food and Agriculture adopted by the FAO Conference on November 3, 2001 recognizes the "sovereign rights of states over their plant genetic resources". [9]

However, it runs through all three provisions of Common Article 1 of the Covenants that sovereign states have obligations to the holders of TKF ("peoples") within their borders, who are themselves direct subjects of international law.[10]

The relations between the sovereign rights of states and the rights of holders of TKF will thus, inevitably, involve some tension. This must be recognized throughout the discussion of what rights the holders of TKF themselves want recognized. TKF holders have over centuries added considerable value to natural resources – in some cases fundamentally transforming them. Recognizing that tension, and aware of that added value, it is proposed in consonance with the principles declared in the International Convenants that the rights of the holders be extended to include (but perhaps not be limited to) the right to identification, the right to information, the right to participation, the right to sharing of risk and benefit. the right to conservation, and the right to preservation. And in asserting sovereignty over natural resources, states which are "holders" of genetic resources may be in a better position to strengthen the rights of the non-state holders of TKF in their negotiations with exploiters of TKF, creating a "grand bargain" for global cooperation. If they receive genuine assistance from their own

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[9] ftp://ext ftp.fao.org/waicent/pub/cgrfa8/iu/ITPGRe.pdf But the contributions made by farmers to the development of plant genetic resources is not insignificant. The Resolution of the 5th Session of the FAO Conference defines "farmers' rights as::

> rights arising from the past, present and futyure contributions in conserving, improving and making available plant genetic resources, particularly those in centers of origin/diversity. These rights are vested in the International community, as trustee for present and future generations, for the purpose of ensuring full benefits to farmers, and supporting the continuation of their contributions.

FAO Conference Resolution 5/89, Annex II, cited in Michael Blakeney, Protection of Plant Varieties and Farmers' rights 24 EIPR 9, 10 (2002)

[10] see, e.g., Draft Report (WIPO/GRTKF/IC/2/16 Prov.) ¶ 22

governments (instead of competing with them for advantages), non-state holders in traditional societies may retain their human rights in TKF as set forth above for purposes of maintaining their social structures, and at the same time acquire property rights (or more precisely, intellectual property rights) for the purpose of achieving higher levels of economic development in the global economy.

II. A The Right to Identification

The right to identification, consonant with the fundamental principle of self-determination of peoples enshrined in Article 1.2 of the UN Charter and the above-cited Convenants implicates the definition of what individuals and groups may be considered "holders" of TKF.1 1 The definition of "holder" will vary from jurisdiction to jurisdiction, based upon its political and economic system, history, and stage of development, and not the subject of this paper.

The right to identification also includes the right to be acknowledged as the source of TKF in any subsequent publication based on the material or any further use made of it.[11] It should be noted that the right to be identified as an owner of an intellectual property right is expressly recognized in Article 6*bis* of the Berne Convention and Article 4*ter* of the Paris Convention. It also includes the intellectual property rights to identification as to inventorship (patent), to publication, authorship and integrity (copyright and related rights, including moral rights), to commercial reputation , source and sponsorship (trademark), to natural origin (plant variety protection and geographical indications) and to association (unfair competition). Also, "acknowledgement of source"

[11] see, e.g., Operational Principles For Intellectual Property Clauses Of Contractual Agreements Concerning Access To Genetic Resources And Benefit-Sharing WIPO/GRTKF/IC/2/3 (10 September 2001) ¶ 72.

is articulated in Section 5 of the Model Provisions for National laws on the Protection of Expressions of folklore Against Illicit Exploitation and Other Prejudicial Actions prepared by WIPO and UNESCO for any identifiable expression of folklore in connection with any communications to the public.[12]

II.B The Right to Information

The right to information includes information on the availability and scope of intellectual property protection for traditional knowledge. Also included is a right to information necessary to promote effective integration of traditional knowledge documentation into searchable prior art such as a *sui generis* database. (This will be discussed below in the context of using traditional knowledge as a "shield" or "defensive right.) Also subsumed into the right to information is the right to prior informed consent found in the Convention on Biological Diversity Article 15(5), which reads: "Access to genetic resources shall be subject to prior informed consent of the Contracting Party providing such resources, unless otherwise determined by that Party."[13]

Capacity-building can also be seen as part of the right to information. Key to capacity building is access to training and education and to the information necessary to compete effectively in the world intellectual property system. Also, the right to information in the form of capacity building includes access to optimal methods and practices used by civil society organizations and NGOs to collect, store, and organize information which could be profitably learned in order to collect both genetic resource information and information about TKF. Indeed, dual versatility in both optimal methods

[12] see Preliminary Report On National Experiences With The Legal Protection Of Expressions Of Folklore (WIPO/GRTKF/IC/2/8) 28 October 2001, Annex II, p. 5.
[13] http://www.biodiv.org/convention/articles.asp

of information collection and in effective use of existing intellectual property systems is absolutely necessary if the holders of TKF are to avoid transforming their most valuable into information freely available in the public domain.

Where existing intellectual property protection is not available, the development of digital libraries and other forms of documentation of traditional knowledge for patent examination purposes, using information not as a "sword" but as a "shield" is also a critically important component to the right to information. Worthy of note is the activity of the task force on traditional knowledge of the Committee of Experts of the Union of the International Patent Classification [IPC].[14] Clearinghouse mechanisms both for traditional knowledge and folklore are important for building inventories of TKF which might be exploited by the holders. Another example is the Biological Resource Centers Network being established by the OECD to facilitate the transfer of biomaterials, ensure their quality and rationalize and reduce costs.[15]

In summary, the right to information includes thus not only rights to TKF itself, but the right of holders to be instructed to become aware of the value of their TKF and how to protect it, and to conduct their own education and audits, for example, in order to recognize the value of their IP assets and to formulate strategies for its most advantageous exploitation, in the same way that intellectual property owners do. Just as IP owners promote internal awareness of how to "harvest" their inventions, TKF holders have the right to understand how to capitalize most effectively on the value of TKF.

II.C The Right to Participation

[14] Draft Report (WIPO/GRTKF/IC/2/16 Prov. ¶ 26. Also of recent note in this regard is the Progress Report On The Status Of Traditional Knowledge As Prior Art WIPO/GRTKF/IC/2/6 (3 July 2001) ¶¶ 19-22.

[15] Draft Report (WIPO/GRTKF/IC/2/16 Prov.) ¶ 44

The right to participation is inherent in the principle of mutual benefit of the Covenants Common Article 1.[16] Included in the right of participation is the right to be included in discussions with a view to norm-building for protection of TKF. A laudable example is provided by the inclusion of a meeting of shamans at the recent International Seminar on Intellectual Property, Traditional Knowledge and Genetic Resources, in Manaus, Brazil in September 2001.

This right has been formalized in recent instruments of the FAO. Article 9.2(c) of the new International Treaty on Genetic Resources for Food and Agriculture adopted by the FAO Conference on November 3, 2001includes "the right to participate in decisionmaking at the national level, on matters related to the conservation and use of plant genetic resources for food and agriculture."[17][18]

Also, the right to participate in agreements is found in the Convention on Biological Diversity Article 15(4), which reads: "Access, where granted, shall be on mutually agreed terms and subject to the provisions of this Article." Right of participation also harks back to one of the most fundamental principles of general international law – in addition to the principle of mutual benefit in Common Article 1(2) of the ICCPR and ICESCR – the equality of peoples enshrined in Article 1 of the UN Charter. One aspect of the right of equal treatment is of specific importance. It is the right of holders of TKF, whatever their identity, to be equal before the law. Effective access to justice and to impartial dispute resolution is implicit in the right to equal treatment, so that holders of TKF, both in their contract dealings with potential

[16] see generally, Peter Donigi, Indigenous or Aboriginal Rights to Property: A Papua New Guinea Perspective (Utrecht 1994) pp. 48-53
[17] ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/iu/ITPGRe.pdf
[18] It appears, however, that it is the Contracting States only rather than non-state holders which may assert this right. http://www.biodiv.org/convention/articles.asp

commercial exploiters of TKF and in consultations with their own governments in the regulation of genetic resources, have equality in fact and not merely equality on paper.

As stated by the intervention of the Saami Council at the December 2001 IGC Second Session, "Given that indigenous peoples regarded their knowledge and natural resources as springing out from a spiritual, cultural and sometimes religious connection between the people and its land, and whereas this spiritual link was unique to indigenous peoples, the Committee should give indigenous peoples an effective opportunity to participate in its work."[19]

II.D The Right to Benefit Sharing

The right to benefit sharing is articulated in the Common Article 1(2) right to mutual benefit of peoples. The Convention on Biological Diversity has as its basic principles: sovereignty over genetic resources, prior informed consent, and equitable benefit-sharing. Article 8(j) refers to benefit-sharing with the holders of traditional knowledge, whereas Article 15(7) refers to benefit sharing arising from the commercial or other utilization of genetic resources "with the Contracting Party providing such resources."

Article 9.2(b) of the new International Treaty on Genetic Resources for Food and Agriculture adopted by the FAO Conference on November 3, 2001includes "the right to equitably participate in the sharing of benefits qarising from the utilization of plant genetic resources for food and agriculture."[20]

An important study of substance and technical matters introduced at the December 2001 IGC Second Session was the document Operational Principles for

[19] Draft Report (WIPO/GRTKF/IC/2/16 Prov.) ¶ 47
[20] ftp://ext-ftp.fao.org/waicent/pub/cgrfa8/iu/ITPGRe.pdf

Intellectual Property Clauses of contractual Agreements concerning Access to Genetic Resources and Benefit-Sharing.[21] This report includes model clauses and guidance for contractual practices on access and benefit-sharing for genetic resources. But access and benefit-sharing issues go far beyond just genetic resources. And it is worth considering whether general principles of licensing which are applicable to a broad range of intellectual property rights are perhaps preferable to specific model clauses. Professional courses in licensing and technology are part of the right to information and capacity building and should be encouraged both for holders of TKF and for the organizations which support them.

Over and above the interests of the companies and entrepreneurs who are the potential users of TKF, it is in this right to benefit sharing that the tension between the state's sovereign rights over its genetic resources and the holder's right over TKF is strongest. This tension is illustrated to some extent between Articles 6 and 7 of the Andean Community Decision 391: Common Regime on Access to Genetic Resources.[22] It is also present in the relationship between rights of holders of traditional knowledge mentioned in CBD Article 8(j) and rights of Contracting Party providing genetic resources mentioned in CBD Article 15(7). Genetic resources, undiscovered and inchoate, clearly remain the property of the state in which those resources are located. However, when a group or individual discovers and uses, improves, or adds value to genetic resources and becomes a "holder" of traditional knowledge through such activity, then the holder may expect some recognition for doing so. Also, the distinction between commercial exploitation and non-commercial exploitation needs study. If a holder itself,

[21] WIPO/GRTKF/IC/2/3

[22] Andean Community Decision 391: Common Regime on Access to Genetic Resources see http://www.sice.oas.org/trade/JUNAC/decisiones/DEC391e.asp

rather than an outside individual or company, engages in large-scale exploitation of TKF, is that commercial or non-commercial?

Observers have noted that adequate conditions must be created to recognize the added value of traditional knowledge to the product, thereby allowing communities to receive directly the benefits of that improvement. The knowledge and innovations of indigenous and local communities implies an added intellectual value that had been incorporated in the natural state of the product or process, whether by individual or collective means.[23]

II.E The Right to Conservation of Natural Resources including Genetic Resources

The right to conservation of resources is articulated in Common Article 1's right of peoples freely to dispose of their natural wealth and resources. It has been noted that bio-diversity and the traditional knowledge associated with using it in a sustained manner create the conditions for comparative advantage for the countries of that region.[24]The Convention on Biological Diversity Article 8(j), provides:[25]

Each Contracting Party shall, *as far as possible and as appropriate*:…

> *Subject to its national legislation*, respect, preserve, and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application *with the approval and involvement of the holders of such knowledge, innovations and practice*s and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations, and practices;…*[emphasis added*]

[23] Report (WIPO/GRTKF/IC/1/13.) ¶ 37.

[24] Draft Report (WIPO/GRTKF/IC/2/16 Prov. ¶ 20.

[25] http://www.biodiv.org/convention/articles.asp

This is broader than merely the right to share the benefits arising out of the instrumental value of utilization of genetic resources or even of the deontological value of the natural resources themselves. There is a belief that intellectual property protection may lead to the preservation of genetic resources and for the prevention of genetic material erosion.[26] Forests valuable for their biodiversity are less likely to be clear cut for The causal connection between intellectual property protection, with its public policy of promoting creation of new knowledge and technology, and the public policy of conservation of genetic resources and prevention of genetic erosion has not yet been demonstrated. However, the public policies of the MEA's support the proposition that holders of TKF are in the best position to assure that plant diversity, particularly in connection with traditional agricultural varieties, is conserved. The right to conservation of the natural environment is intimately implicated in the right of peoples to the preservation of their culture.

II.F Right to Preservation (of Culture)

The right to preservation (of culture) is articulated in International Covenants' Common Article 1 in the right or peoples to freely pursue their economic, social and cultural development and its prohibition against depriving a people of its own means of subsistence. Customary law may provide protections for TKF holders, but with a price. The right to preserve culture may come into conflict with the rights of others, even members of the holder community, to economic development and modernization. Holders may not be in agreement as to what rights they want recognized. Sir Michael Somare, the first Prime Minister of Papua New Guinea (from 1975 1980) observes:

[26] Draft Report (WIPO/GRTKF/IC/2/16 Prov.) ¶ 17.

> Free market economies in any developing country require the promotion of individual rights, as opposed to the collective rights of the clan or the social unit. This entails the breaking down of traditional norms which have been passed down through thousands of generations and which have bound the clan or the social unit in a web with its own socio politico-economic base. These traditional norms are substituted by individuality, but not by the required mental conditioning as is known to the population of developed countries, producing in those countries just societies. There is a fine line to draw between those who are advocates of free market economies and those who, though agreeing to free market economy as an ultimate goal, wish to limit individual freedom for the benefit of a recognized minority group. In this respect a Papua New Guinean politician is required to tread carefully through this quagmire of differing, sometimes opposing and powerful interests. It is not an easy task.[27]

In a recent study done for the Union of British Columbia Indian Chiefs in Canada, Christine Morris, a member of and advocate for the Kombumerri Clan aborigine community of Australia has written:

> But most importantly, and this is a point that is reiterated in all forums by Indigenous Australians: Land is the most important reference point in one's worldview. Land therefore, like the Law, is always prefaced. Land is not valued directly for its utility value but rather because it is our teacher - it teaches us to be human, it gives us our place, and fulfils the human longing to be needed for something meaningful. Within the Indigenous world in which I mix, the Law provides rules and regulations that allow me to be part of a clan. The Law does not protect my chattels or even my individual being, but rather protects a social system in which the individual feels safe and nurtured. It is a system that gives me a lot of responsibility and very few rights.[28]

The excerpt is a cogent expression by a member of a traditional community of a deontological value which transcends utility. The Land is more than its economic value. The Law itself transcends utility for such peoples. Protection of the social system in which members of the community feel safe and nurtured is valued in and of itself. The right to protect that system is not only inalienable, but incapable of measurement in economic terms. For a member of the community to attempt to divert this wellspring of

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[27] Peter Donigi, Indigenous or Aboriginal Rights to Property: A Papua New Guinea Perspective, (Utrecht 1994), p.9

[28] Christine Morris, A Whale of A Story, <http://users.ox.ac.uk/~wgtrr/whale.htm>

safety and nurture for economic gain and to remain a member of the community would be open to challenge as a violation of the community's most fundamental precepts. But what if such a member were to disclose its effects to outsiders without economic payment? Would that not be equally offensive to the community? According to Morris:

> In my present project I have had time to assess the laws that [a]ffect Indigenous cultural productions. From an Anglo-Australian legal perspective cultural breaches come under civil law – that is copyright or IPR. However under customary law they come under (in Anglo terminology) criminal law. I will clarify this by saying that penalties under customary law such as the exclusion from a community or their rights to produce cultural knowledge are equivalent to a death sentence. It is essential that this difference be understood. Those who breach the law of cultural appropriation must understand that in European culture it is merely an economic issue and therefore civil (only in a minor number of cases has it become a criminal offence.) However, in Australian Indigenous societies, to breach that law is criminal. Because the customary law penalties were always instant and severe – just as nature is merciless for good reasons, so was customary law. Once you reduce the severity of a law, I would argue, you also reduce the respect for the very thing it is to protect. To reduce customary law issues to economic or compensatory level immediately engenders the great Western myth that everyone and everything has a price.… Therefore, in relation to stories I would suggest that they must be kept in their place as teachers of the next generation and must not enter the political or business world. The restrictions on their use must be as always an oral transmission by knowledgeable people. The penalty for the breach being as is ordained under customary law.[29]

Russell Barsh has observed a similar attribute among Native American peoples.

> Among indigenous peoples who choose to continue close physical, social, and emotional relationships with their ancestral landscapes, the land creates a universe of shared meanings. The songs, dances, recitations, and ceremonies of the people are tied to particular landmarks, and each performance continues a process of endlessly remembering, renewing, and revising relationships within ecosystems which are themselves forever reiterating yet changing. The landscape not only contains the imprints of past lives, but continually moves people to sing new songs. Landscape is the central integrating principle of culture and artistic expression…
>
> The recitation (in words, music, dances, and ritual symbolism) of a community's history of local relationships with other beings within the land is also the title deed to the land. Knowing the songs and ceremonies is cogent evidence that a

[29] id.

> person is connected with the land, and has a right to reside there subsisting on the flesh the earth and her non-human relatives. Periodic recitations also reaffirm respect for the ancestors, both human and non human, who created the landscape through their efforts and deaths. These periodic recitations are important in order to continue to be able to perform the stories of the ancestors at the specific landmarks where they once lived, fought, found their visions, and created. Geographer Yi-Fu Tuan has described this cosmological paradigm as geopiety. Geopiety, however, is more than a "religion" in the usual sense of that term. Indigenous peoples view their landscapes as vast libraries of scientific, historical, and ethical knowledge that also contain emotion-charged personal stories and visions. Landscapes contain empirical insights about the history of ecological processes, as well as subjective spiritual messages for every individual and every family.…
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> Active journeying and performing elicit the knowledge of the landscapeand reveal what people must continue to do to care for it properly. "For a living culture based on spirit of place," an Australian policy study concluded that, "the major part of maintaining culture and therefore caring for place is the continuation of the oral tradition that tells a story." The intangibles associated with a landscape, including its specific songs, stories, dances, symbols, and ecological knowledge, are all indispensable for the maintenance of appropriate human relationships with the place and its non-human inhabitants. Collectively, the artistic works, such as songs and symbols, form the operating manual for the landscape. Community control and reproduction of intangibles must therefore be included in efforts to maintain the physical integrity of the place as an element of national cultural heritage. The importance of maintaining indigenous knowledge systems, as the foundation of caring for cultural landscapes, is particularly clear where the landscape, albeit superficially "natural," is in actuality an artifact of human activity.[30]

What Barsh and Morris are reporting is reflected in the WIPO Preliminary Report On National Experiences With The Legal Protection Of Expressions Of Folklore where the divergent interests of some holders who wish to benefit from the commercialization of their cultural expressions and a second group with to control or prevent use by others is recounted. The first group is described as seeking “positive protection” and the second “defensive protection.” [31]

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[30] Russel L. Barsh, Grounded Visions: Native American Conceptions Of Landscapes And Ceremony, 13 St. Thomas L. Rev. 127, 130 (2000)

[31] (WIPO/GRTKF/IC/2/8) 28 October 2001, ¶32,

It is urged that this right of preservation of the cultural dimension is entitled, in the hierarchy of rights of holders of TKF, to a paramount position. Preservation not just of biodiversity, but diversity of language, myths, dances, ritual ceremonies, and cultural memory must be fostered by any system of protection for TKF holders. To sacrifice the right to preservation of culture in exchange for economic advantage is bound to destroy the very things the system of laws is being designed to protect.

III.Existing Intellectual Property Protection for TKF

An extensive list of existing IP mechanisms for the protection of TKF have been identified. They include, particularly, collective and certification marks, geographical indications, patents, copyright and related rights, and trade secrets under the WIPO conventions.

III.A. Marks to Denote Goods Emanating from a Collective

Rights in certification marks and collective marks may be acquired and used in the United States under the trademark statute known familiarly as the Lanham Act. In theory, collective marks and certification marks are different. They are both created by the statute but are defined separately, and separately from trademarks and service marks.[32] Certification marks cannot be used on goods or services by the party which owns the mark. Rather, the owner of a certification mark certifies the use of the mark by others as to regional origin, material, mode of manufacture, quality, accuracy, or "other characteristics." If the registrant fails to control use of the mark, engages in production or marketing of any goods or services to which the certification mark is applied, permits the use of the mark for purposes other than certification, or discriminately refuses to certify

[32] Lanham Act , Section 45, 15 US Code Section 1127

goods or services of any party who maintains the standards or conditions of certification, the registration may be cancelled.[33] The registrant must maintain control over use of the certification mark and must certify "all comers." Applicants for certification marks must make publicly available the standards for receiving certification. One cannot get a certification mark registration for offering the service of certification. Most authorities agree that the standards for maintenance of a valid certification mark are quite stringent.

Collective marks are marks used by members of an association, group or organization which owns the mark. They include collective trademarks, collective service marks, and collective membership marks. Collective trademarks and service marks indicate that the goods or services come from a member of an organization which controls use of the mark. A collective mark registration may be cancelled in cases where a collective mark was registered by or assigned to a member rather than the collective, or where the registrant permits others to use the mark in such a way as to misrepresent the source of the goods or services.[34] The "legitimate control" element means that, for practical purposes, a collective trademark or service mark is treated like a certification mark by the courts. But unlike certification marks, there is no requirement for collective mark owners to allow "all comers" to use the mark. An individual member (including a corporate member) of an organization cannot at one and the same time own a collective mark and use it on its own goods or services. In the case of "collective membership" marks, both an organization and its members may make use of the mark -- but only to indicate membership in the organization.

[33] Lanham Act, Section 14(5), 15 U.S. Code Section 1064(5)
[34] Lanham Act, Section 14(3),15 U.S. Code Section 1064(3)

Thus, a collective membership mark registrant can sell goods which function to indicate membership in the organization -- primarily to members of the organization -- but cannot be primarily in the business of selling goods and services. From the perspective of the U.S. court decisions, as long as the public assumes that any goods or services bearing the collective membership mark are licensed or approved by the organization, the collective mark remains valid. If the organization does not control others -- including members of the organization -- using the collective mark or "insignia" on goods and services, so that the public loses the perception that the organization and its members alone are the only source or sponsor of such goods, the organization will be found to have "abandoned" its rights in the collective mark. The right comes not from registration, but from what the public perceives. As in politics, appearance is reality in the world of trademarks. Both certification and collective marks have been used by a number of environmental NGOs to help them achieve their goals. I scanned registrations and applications in the United States Patent and Trademark Office for collective and certification marks over the last few years by groups who are interested in some area of environmental protection or environmental activity. There are many profit and non-profit organizations who have already availed themselves of trademark, collective mark, and certification mark protection under the Lanham Act.[35] There is room for many more.

III.B. Geographical Indications

[35] An example is the "Smart Wood Program" -- a certification program of the Rainforest Alliance NGO. Information about the Smart Wood Program is found at <http://www.smartwood.org/>. The term “cognac” has been found to be a common law certification mark by a U.S. court. A regime of “authentication marks” in the nature of a certification mark, limited to “certain manifestations of traditional knowledge” has been proposed by the Australian intellectual property office. *see* Michael Blakeney, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain, WIPO Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3 (November 1999), p.11

"Indications of regional origin" are protected in the United States only as collective or certification marks. The true system known as "geographical indications" under the TRIPS Agreement or, more narrowly for foodstuffs and wines as "appellations of origin" in Europe, has a long history. "Geographical indications" is a new term for an old concept, illustrated by Darjeeling tea, and Carrara marble (but not Kentucky Fried Chicken!) What is indicated is merely provenance or geographical source.

There are conflicts which may arise between trademark owners and owners of geographical indicators. In the United States, the trademark "Hawaiian Punch" is valid even though the punch is not from Hawaii because consumers would not be deceived into thinking that it was. By contrast, the registration of "Bahia" for cigars from the Dominican Republic where "Bahia" is famed for tobacco from Brazil was refused, because the consumer might be induced to purchase the cigars thinking they were from Brazil.[36] Under recent revisions of U.S. trademark law, trademarks which are not deceptive, but are "primarily geographically deceptively misdescriptive" may no longer be registered in the United States. Nevertheless, such marks, even if unregistered, may be used in commerce as long as there is no likelihood of consumer confusion.

The European system of geographical indications established pursuant to the 1992 EC regulation is a complex legislative scheme. (There are 1200 pages of regulations for the term "cognac" alone.) Rights in geographical indications are not enforced by the state directly but by the members of the wine industry, which have established an inspection authority which has a permanent staff and resources . The Eruopean national, collective, or organization must apply to register the geographical indication with its

[36] In Re House of Windsor, Inc. 221 USPQ 53 (TTAB 1983)

government. Only European owners may apply. The national government must then agree to submit the name for registration in the European registry. Holders of regionally distinctive products may want to ponder the wisdom of establishing a system of protection for geographical indications which requires large expenses for inspection and administration before adopting such a regime.

In their very nature geographical indications are a "badge of origin". Until recently, however, they were not considered "property." The original purpose was similar to the purposes of trademark law – to prevent free riders from "passing off" their goods as the goods of the holder. Where there is value, there are bound to be thieves. Under French aw and the new European system, an appellation of origin or geographical indication cannot legally become "generic" in the same sense as a trademark may become generic and lose its legal significance. But widespread unchecked abuse can turn a geographical indication "semi-generic." In countries which do not have a system of geographical indications, the likelihood of confusion among consumers is the measure of the scope of a trademark. Many fine "types" of wines originating in distinctive regions of European countries followed their nationals as they spread to create vineyards in the so-called "new world."

The copying of the original wines and foodstuffs by these vagrant "sons of the soil" was absolutely deliberate but not in any sense done in bad faith. And the traditional consumers of "Australian Beaujolais" in Australia or "California Chablis" in California were not confused, because even if they could have afforded the true French versions of such wines, they did not have access to them, and the labels of the local product were usually clearly marked as such. Yet trade creates competition and confusion. And even

without confusion as to source, there may be some deception in representations that the "copy" has the same qualities as the original. Extending the discussion to the subject at hand, to what extent must the rights of the modernized (or "westernized") grandsons and granddaughters of holders of TKF, living in urban areas far from their native soils, perhaps working in offices as government officials or even for multinational corporations, to continue to practice (and have access to) their cultural heritage, sing their grandfathers' songs, wear their grandmothers' ceremonial dress, and practice their ancestors' traditional rituals must not be overlooked in the search for new rights. Should they, too, be required to seek permission from the TKF rightsholder to set up shop?

III.C. Patent and Trade Secret Protection for Ideas Incorporating Traditional Knowledge

Holders of TKF regularly complain that genetic resources, such as plants, long known to the holders for their medicinal properties, had been taken from the region and patented in other countries, without compensation. If a researcher investigates a piece of published traditional knowledge and then improves upon it in a practical way, the result may well become a patentable 'invention'. But if the traditional knowledge is unimproved, it may either be in the public domain or protectible by the holder as a trade secret, and outsiders should not be able to acquire patent protection for it.

The problem is illustrated by a controversy over attempts by an American bioprospector to acquire a U.S. patent on a species of the plant banasteriopsis caapi which has attracted the interest of ethnobotanists because it is used by a number of South American tribes as an ingredient in a hallucinogenic concoction.[37] The plant is used in

[37] U.S. Patent No. Plant 5,751 (Patentee: Loren S. Miller) Issued: June 17, 1986 Several other examples of so-called "bio-piracy" involving chickpeas from Iran and India, Enola beans from Mexico, and Nuna

sacred shamanic rituals among Amazon peoples. The Coordinating Body for the Indigenous Organizations of the Amazon Basin [COICA] issued a letter of protest to the U.S. Congress.[38] Questions arose as to whether the claimed plant was patentably distinct from known indigenous varieties.

Also, recently the plant has been found to contains B-carbolines (harmine, harmaline, or tetrahydroharmine) and tryptamine (Dimethyltryptamine-DMT). which have psycho-active effects. A market for the plant among eco-tourists is growing in the region of Puerto Maldonado city in the southern Peruvian rain forest at Madre de Dios.[39] Should the traditional holders have the IP rights in the plant or the compound themselves, or at least to prevent the outsider from acquiring such protection? Obviously, the cost of filing a patent in the United States is not trivial. But traditional holders and the NGOs which support them may, through persistence, develop the necessary expertise to play the patent game on its own terms. Honey Bee network, run by the Society for Research and Initiatives for Sustainable Technologies and Institutions (SRISTI) in India, is an example,

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beans from Peru and Bolivia are discussed in Michael Blakeney, Protection of Plant Varieties and Farmers' rights 24 EIPR 9, 10 (2002)

[38] "[I]n its Fifth Congress realized in May of the past year, [COICA] decided to declare a citizen of the United States, Loren Miller, an "enemy of indigenous people". At this time COICA prohibited his entrance into any indigenous territory. Mr. Miller has patented in the United States, a variety of Ayahuasca or Yage (Banisteriopsis caapi), which is a plant of hallucinogenic properties that is considered sacred for the majority of the 400 indigenous groups in the nine countries which constitute COICA.

We know well the campaign to discredit our organization orchestrated by Miller. For him, it was not enough to patent our sacred plant taken from the garden of an indigenous family in Ecuador, and he is now proposing to install a laboratory to process the plant in the same country. COICA is an organization with positive earned prestige at the international level, not only for the defense of indigenous rights, but also for the proposals and work to amelliorate the life conditions of our peoples.…COICA , once again ratifies all the points of the resolution adopted in the Fifth Congress about the patenting of ayahuasca, and insists in stressing that under no circumstances and despite any pressure of national and international organizations, COICA will not renounce its legitimate right to defend and preserve the knowledge, practices, innovations and natural resources of the peoples whom we represent. This right has been explicitly recognized in the Treaty of Biological Diversity that was ratified by more than 170 countries.… Antonio Jacanimijoy, General Coordinator of COICA Open Letter To The Congress Of The United States *received from* coica@uio.satnet.net (COICA)

[39] *see* e.g.,<http://www.ayahuasca-wasi.com/index.htm>

collecting ideas and "traditional" inventions, refining them, and seeking patent protection. A recent report in the Economist states that SRISTI has developed a database with over 10,000 holdings and has filed at least 8 patent applications.[40]

TKF Collection activities which may provide insight into existing TKF which could block outsiders from acquiring IP protection are an important resource for original holders of TKF. The IGC Second Session included a Progress Report on the Status of Traditional Knowledge as Prior Art regarding possible new criteria which would allow the more effective integration of traditional knowledge documentation into searchable prior art, assuming that knowledge is already publicly available in some form.[41] Characteristics of an international database of traditional knowledge is set forth in that document.[42] If patent examiners (who are imperfect humans like the rest of us) cannot discover relevant traditional knowledge as prior art when they examine patent applications, patents may issue claiming subject matter which is unpatentable. Nullifying or invalidating such patents may be an expensive proposition given that the burden of proving that an issued patent is invalid falls on the party challenging the patent.

A further issue is that knowledge which is part of an oral tradition in a foreign country may not be citeable as prior art in certain jurisdictions such as the United States (unlike the countries of the European Patent Convention, which has an "absolute novelty" requirement which includes oral disclosures.) The Centre for International Research and Advisory Networks [CIRAN] of the Netherlands Organization for International Cooperation in Education (NUFFIC) has as its objective to encourage research that has relevance for developing countries, and to foster international cooperation and capacity-

[40] see http://www.sristi.org/economistprint.html
[41] Progress Report on the Status of Traditional Knowledge as Prior Art AIPO/GRTKF/IC/2/6
[42] id. ¶ 94

building in this area. CIRAN's website includes " the IK-pages", which it characterizes as gateway to indigenous knowledge. This is an integrated, online information system that offers annotated links to websites -publications, organisations and networks, databases- managed all over the world. Furthermore it features news and announcements, and also some search facilities.[43] Links to centers for the collection of IK around the world include the Center for Indigenous Knowledge for Agriculture and Rural Development [CIKARD] at Iowa State University (United States), LEAD (bibliography), CARIKS (South India), GERCIK (Georgia), GHARCIK (Ghana), RIDSCA (Mexico), RURCIK (Russian Federation), SLARCIK (Sri Lanka), and URURCIK (Israel.) The World Bank has established its Indigenous Knowledge Network with references to bibliographies and resource centers in Africa.[44] Such centers for collection of traditional knowledge will be important sources of information both for establishment of searchable collections of prior art and for preservation of traditional knowledge for posterity. Traditional knowledge published on the internet has been deemed citable as prior art in most jurisdictions where it meets the general requirements of prior art.[45] Establishment of Traditional Knowledge Digital libraries, as recently proposed by the IGC, if it is to be successful, should link up all such databases.[46] Holders of traditional knowledge will need practical advice and assistance during the process of documentation to assure that they do not forfeit important intellectual property rights. As holders become more sophisticated about such issues, they may want to file patent applications themselves

[43] http://www.nuffic.nl/ciran/
[44] http://www.worldbank.org/afr/ik/datab.htm
[45] Progress Report On The Status Of Traditional Knowledge As Prior Art WIPO/GRTKF/IC/2/6 (3 July 2001) ¶ 18
[46] id. ¶ 92

(seeking "positive patent rights") rather than merely creating databases to prevent others from obtaining patents ("defensive patent rights.")

There is no reason why holders of traditional knowledge cannot locate patentable inventions which meet the requirements of novelty, inventive step, and practical utility and seek patent protection. Particularly, given that the requirements for novelty in the United States allow for the patenting of inventions which would be considered unpatentable over the prior art in absolute novelty jurisdictions and thus be barred from patent protection, holders might want to consider the United States as a lucrative potential exclusive market for inventions based upon traditional knowledge. Holders of traditional knowledge may themselves become U.S. patent owners. It is granted that patent holders must be legal persons. There is no reason a collective with legal personality cannot file a patent application. A patent holder has the right to exclude others from making, using, selling, or importing products based upon their inventions which fall within the scope of the claims of a patent.

The inventor must be named in the patent application in the United States and in Paris Convention countries under Article 4ter. The right of the inventor to be named in the invention is an important human right, notwithstanding the fact that a corporation may be the owner of the invention by a mandatory assignment from the inventor. In the US, an employee inventor generally has no right to compensation from the employer for economic benefits issuing from the commercialization of a patented invention. But many corporations which rely heavily on the inventive activity of their employees utilize an award or recognition system, which may or may not include payment of money. The policy rationale for granting economic rights not to the inventor but to the employer is

that the employer provides both a stable work environment and the necessary physical and psychological support, such as well-equipped research facilities. Only inventions that can be dated and attributed to an individual or small group of people can be patented. Conceivably, the holder of traditional knowledge could be the assigned owner of a patent and the individual of the collective who brought forward the knowledge and cooperated in the articulation of the invention could be the named inventor, with community recognition for the individual, and economic rights in the collective "holder" which has provided the means of subsistence for its members.[47] Traditional communities may not, at least initially, be either sophisticated enough or willing to engage in the tussle of competition in a market economy. But the NGOs which service them may be, assuming that they have the capacity to become receptive to the proposition that intellectual property protection can benefit societies in developing countries and is not just a tool of multinational corporations. And, given the fact that much of the "value added" which leads to economic benefits from commercialization derives from the transformation of a traditional product to a market item, the share of the benefits which would accrue to the holder instead of to a company in the developed world would skyrocket. Holders of TKF have the right to seek assistance to learn the complexities of the existing IP regimes so as

[47] A problem with the patent claims of Indigenous Peoples in relation to traditional medical remedies, is that it has been the practice of ethnobotanists and ethnopharmacologists to publish accounts of the uses of plants by indigenous peoples. Another obstacle to the recognition of the contribution of Aboriginal Peoples to the development of new drugs, are the fairly strict rules that apply to the concept of joint invention. Joint inventorship typically requires that each of the joint inventors must have contributed to the inventive conception, "working toward the same end and producing an invention by their aggregate efforts." It is not necessary that they did not work physically together at the same time and that each did not make the same type or amount of contribution. However, both must work on the same subject matter and make some contribution to the inventive thought and to the final result. Michael Blakeney, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain, WIPO Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3 (November 1999), p.9, citing sources

to allow themselves to become the primary beneficiaries of economic gains from the exploitation of IP rights in TKF instead of remaining marginalized.

III.D Copyright Protection for Folklore

The possibility of porotection of folklore at the international level was introduced at the 1967 Stockholm Converence of the Berne Convention for the Protection of Literary and Artistic Works was intended The 1967 Stockholm Diplomatic Conference for Revision of the Berne Convention for the Protection of Literary and Artistic Works (the "Berne Convention") through the introduction of Article 15(4) which reads:

> "(4)(a) In the case of unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union, it shall be a matter for legislation in that country to designate the competent authority which shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union."
> "(b) Countries of the Union which make such designation under the terms of this provision shall notify the Director General [of WIPO] by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union."

But according to the recent work of the IGC, Preliminary Report On National Experiences With The Legal Protection Of Expressions Of Folklore, only one country (India) has designated a competent authority in accordance with Article 15(4). According to the recorded intentions of the 1967 revision Conference, this Article of the Berne Convention furnishes the possibility of granting protection for expressions of folklore. Its inclusion in the Berne Convention responds to calls made at that time for specific international protection of expressions of folklore.[48] The Preliminary

[48] Preliminary Report On National Experiences With The Legal Protection Of Expressions Of Folklore (WIPO/GRTKF/IC/2/8) 28 October 2001, ¶12 fn 8.

Report notes a "slight problem" with the protection of expressions of folklore under the Rome Convention in that only performers of literary and artistic works proper derive protection of their performances. This was ameliorated in the 1996 WIPO Performances and Phonograms Treaty, which includes among the definitions under Article 2:

> (a) "performers are actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in, interpret, or otherwise perform literary or artistic works *or expressions of folklore…[*emphasis added]

The report notes that Article 15 of the WPPT provides for performers and producers of phonograms to have the right to a single equitable remuneration for use of phonograms published for commercial purposes." Furthermore, the agreed statements concerning Article 15 says:

" It is understood that Article 15 does not prevent the granting of the right conferred by this Article to performers of folklore and producers of phonograms recording folklore where such phonograms have not been published for commercial gain. agreed statements concerning the WPPT adopted by the Diplomatic Conference on December 20, 1996.[49]

As of 15 January 2002, the WPPT has been ratified by 28 states. Upon ratification by only two more states, this treaty will enter into force after three months.

IV Protection under *Sui generis* legislation

Efforts to develop *sui generis* legislation for the protection of TKF are growing apace. In the United States, the Indian Arts and Crafts Act of 1990 provides for special trademark protection to Indian art. Civil sanctions are imposed for misrepresentations that arts and crafts are of "Indian." origin include triple and punitive damages, attorney';s fees, and a penalty of $1,000 per day for each day that the goods are offered for sale or

[49] http://www.wipo.int/treaties/ip/performances/statements.html

sold.[50] Criminal penalties for counterfeit use of marks registered with the Indian Arts and Crafts Board in the U.S. Department of the Interior may be punished by sentences and fines of up to 5 years and $1,000,000 for first offenders and 15 years and $5,000,000 for subsequent offenders.[51] There is no federal law in the United States to protect ceremonies, songs and symbols, however. According to Professor Barsh:

> The Indian Arts and Crafts Act gives the federal Indian Arts and Crafts Board authority to create [sic] distinctive trademarks for Indian tribes and individual Indian artists, and prohibits the misrepresentation of tangibles as Indian-made.This Act does not prevent the performance, display, or sale of artworks that abuse or misappropriate traditional songs, symbols, dances, or other elements of Indians' cultural heritage. Hence, if a catalogue- order company advertises a kachina for sale without claiming that it is Indian- made, or a recording studio distributes an initiation song surreptitiously taped at a ceremony, there is no recourse under the Act.[52]

Such laws can be problematic when there are conflicts among different "holders" in the same region. For illustration, the Senate of the State of Arizona, United States refused to pass stiffer laws against Indian arts "fraud" which would have made it illegal for one tribe to claim a product which was made by another tribe, a practice the Hopis of northern Arizona say happens frequently with their jewelry and kachina dolls. According to the news report:

> "Ferrell Secakuku, Chairman of the Hopi tribe, said members of the Navajo Nation in Arizona and New Mexico have been selling kachinas they claim to be Hopi. He called this "morally not right and unjust" and said it is a misrepresentation of the Hopi tribe origin. Kachinas are seen as a spiritual force by the Hopis. Hopis pray to the kachinas for a variety of reasons, such as for rain and medicine, Secakuku said. The word kachina is unique to the Hopi tribe and Hopis object to its use by other tribes. But Democratic Rep. Benjamin Hanley, a Navajo from Window Rock, Ariz. said an "Indian is an Indian as I see it" and the

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[50] Indian Arts and Crafts Act of 1990 (Pub.L. 101-644, Title I, Nov. 29, 1990, 104 Stat. 4662) codified at 25 U.S.C. §305 (1990)

[51] 18 U.S.C. 1158.

[52] Russel L. Barsh, Grounded Visions: Native American Conceptions Of Landscapes And Ceremony, 13 St. Thomas L. Rev. 127, 141 (2000)

> kachina is a commercialized product now that it is no longer solely a religious symbol. Hanley voted against the bill. Franklin J. Hoover, assistant general counsel for the Hopi tribe, said the selling of fake Hopi and Zuni products takes place at arts and crafts shows throughout the Southwest because of their unique and well-known style. Hoover said that in addition to the kachina, the Hopi tribe believes a form of jewelry manufacturing called inlay, a process of layering silver that results in a smooth surface, has also been pilfered by the Navajos.
>
> "Although Sen. James Henderson Jr.,, voted for the bill, he said in a later interview that he thought it was unnecessary and the feuding tribes should take care of their own business. But, he said, once lawyers get involved it becomes a "big deal." Many members of the House, including Henderson, who is a Navajo, said they felt the state should stay out of tribal business, over which it has little control. Republican Rep. John Verkamp of Flagstaff said the bill spiraled to defeat after Rep. Jack Jackson made a speech on the floor that Verkamp said added confusion to the issue. Jackson, also a Navajo, said the bill's passage would create problems for Native Americans and their children who intermarry among tribes. This bill would deny these children the chance to practice whichever tribal customs they choose. …George Allen, vice-president of the Arizona Retailers Association, said he agreed to support the bill after it was rewritten to move responsibility of proving tribal authenticity from the retailer to the supplier. New language in the bill would have made it a violation of the consumer fraud act to sell falsely identified Native American products. Hoover said this would have allowed retailers or customers to sue for damages instead of having to go through the Attorney General's Office. As the law currently reads, violators of the imitation Indian arts and crafts act receive a civil penalty of no more than $5,000. It is legal to sell imitation Native American products as long as the dealer or retailer does not claim they are authentic." [53]

A potentially serious variation on this problem encountered in the United States may arise in situations where children of holders who marry outside the community may continue to practice their culture if TKF is protected by a *sui generis* law.

> [M]ost Indian tribes retain "blood quantum" criteria for membership. Minimum blood quantum criteria were originally inserted in tribal constitutions by federal officials in the 1930s, as a way of limiting federal expenditures on newly "reorganized" Indian communities. Imagine the case of a young woman who lives on an Indian reservation, practices traditional herbal medicine learned from her grandmother, and participates actively in her people's annual ceremonial cycle. She is an enrolled tribal member, but her children by a non-member may not be eligible for protection under … the Indian Arts and Craft Act, although the children were raised by her in the same traditions. Some may even be subject to

[53] see http://wildcat.arizona.edu//papers/89/131/09_3_m.html

> penalties for claiming to be "Indian," if they become commercial artists or sell handicrafts. Indian tribes have the authority to eliminate blood-quantum criteria, but very few tribes have done so. Blood quantum is widely supported by federally-recognized tribes today as a legitimate test of eligibility to share in tribal assets and services. However, blood quantum is arguably unjust as a limitation on individuals' rights to practice their religion and draw upon their own cultural traditions as artists. [54]

Agricultural communities are also paying attention to *sui generis* rights. India reportedly has a new *sui generis* law on the Protection of Plant Varieties and Farmers' Rights.[55] The countries of the Andean Community have issued guidelines on access to genetic resources in its Decision 391. Reconciling Articles 6 and 7 of that document will be challenging.[56] At the Second Session of the Intergovernmental committee on IP and Genetic Resources, Traditional Knowledge and Folklore in December 2001, the Representative of the Secretariat of the Pacific Community said that her organization, jointly with the Pacific Islands Forum Secretariat and UNESCO had developed a Pacific Regional Model Framework on the Protection of Traditional Knowledge and Expressions of Culture.[57]

> "The framework comprises regional guidelines and a *sui generis* Model Law. The local community members are the major stakeholders and, therefore, the Pacific Regional Model Law prioritizes local communities and provided for the development of an infrastructure in each enacting Pacific Island country, with a national body to negotiate on behalf of the indigenous community. The Delegation said that the Pacific Islands communities were capable of administering a scheme to control unauthorized exploitation within the framework of their own traditional and cultural authorities. In this vein, the Pacific Regional Model Law provided for an Administrative Structure to be established at the national level under the Minister responsible for culture. The Structure comprised the following bodies and competences: the Traditional Knowledge and Expressions of Culture Board; and the Cultural and Intellectual Property Organization which comprised three

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[54] Russel L. Barsh Grounded Visions: Native American Conceptions Of Landscapes And Ceremony, 13 St. Thomas L. Rev. 127, 139 (2000)

[55] see, Draft Report (WIPO/GRTKF/IC/2/16 Prov. ¶ 60

[56] see http://www.sice.oas.org/trade/JUNAC/decisiones/DEC391e.asp

[57] see, Draft Report (WIPO/GRTKF/IC/2/16) Prov. ¶ 41

> divisions, namely the Resource Center, the Clearing House and the Dispute Resolution Tribunal. Her organization had begun assisting Pacific Island countries who had expressed interest in enacting appropriate legislation and it was currently looking at how to develop a harmonized infrastructure while maintaining and further developing the existing institutions in the region., as well as treaties and processes such as the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property and the International Labor Organization.

It is interesting that the Pacific Community intervention referred to "traditional knowledge and expressions of *culture* – not folklore. Referring specifically to *sui generis* protection for expressions of folklore at the international level, attempts to establish an international treaty in the mid-1980's were unsuccessful. Some theoretical problems are described in the Preliminary Report, which stopped movements toward an international treaty.

> Two main problems were identified by the Group of Experts: the lack of appropriate sources for the identification of the expressions of folklore to be protected and the lack of workable mechanisms for settling the questions of expressions of folklore that can be found not only in one country, but in several countries of a region. The Executive Committee of the Berne Convention and the Intergovernmental Committee of the Universal Copyright Convention, at their joint sessions in Paris in June 1985, considered the report of the Group of Experts and, in general, agreed with its findings. The overwhelming majority of the participants was of the opinion that a treaty for the protection of expressions of folklore was premature. If the elaboration of an international instrument was to be realistic at all, it could not be more than a sort of recommendation for the time being.[58]

With regard to *sui generis* protection specifically focused on expressions of folklore at the national level, the Preliminary Report draws attention to Sections 1(5bis) and 6 of the 1976 Tunis Model law on Copyright for Developing Countries, and the Model Provisions adopted by the Committee of Governmental Experts Convened by

[58] Preliminary Report On National Experiences With The Legal Protection Of Expressions Of Folklore (WIPO/GRTKF/IC/2/8) 28 October 2001, ¶23

WIPO and UNESCO in 1982. Approximately half the states responding to the WIPO fact-finding missions which stated that they have relevant laws and regulations stated that these were based at least to some degree upon the Model Provisions.[59]

V. Protection Under Customary Law and Alternatives

Customary law sometimes protects symbols, but protects them because they derive from vision, and therefore possess inherent power.[60] There are some salient differences in the form and the role of customary law from other law. A description of the customary law of the Kiowa Native American tribe states:

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[59] "Where folklore was used in a traditional context, an authorisation was needed for the publication, recitation, performance or distribution. Use of folklore outside its traditional context would have to seek the prior consent of the community or an authorised person. Authorisation was not required for uses of expressions of folklore if the purposes relates to research, conservation and archiving. Furthermore, there is no need for authorisation, outside of the traditional or customary context, when an expression of folklore was used: for educational purposes; by way of illustration; for creating an original new work; for reporting of a current event; and where folklore is permanently situated in a public place.
"The Model Law prohibited unauthorised commercial use of expressions of folklore. It provided that where the competent authority granted authorisation, it could set the level of remuneration and collect fees. The fees would be used for the purpose of promoting or safeguarding national culture or folklore. The commentary on the Model Law suggested that it would be advisable to share this fee with the community from which the folklore originated. The Model Law provided for offences relating to distortions of expressions of folklore. The offence provisions required the element of "wilful intent," with fines and imprisonment imposed as punishment. There were also civil sanctions and seizure provisions.
"The *Model Law*, was anticipated in Australia, by the 1981 *Report of the Working Party on the Protection of Aboriginal Folklore,* which envisaged the appointment of a Commissioner of Aboriginal Folklore to exercise a protective jurisdiction. The Commissioner, rather than Indigenous peoples would initiate litigation against infringing activities. This Report was commended in the 1982 WIPO/UNESCO meeting of experts on folklore, but it was not implemented. The notion of a protective jurisdiction would certainly not find favour today. Certainly in Australia, the notion of a government-administered, protective, jursidiction has been thoroughly discredited, particularly because of the disastrous consequences of other paternalistic policies of protectivism.
"However, in countries which have not endured this sort of colonial experience, the protective model is considered unobjectionable. For example, the folklore provisions of the Nigerian Copyright Act 1988 are based extensively on the WIPO/UNESCO Model Law and the supervision of the exploitation of cultural works is conferred upon the Nigerian Copyright Commission." Michael Blakeney, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain, WIPO Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3 (November 1999), p.12, citing sources

[60] Candace S. Greene and Thomas D. Drescher, The TIPI with Battle Pictures: The Kiowa Tradition of Intangible Property Rights, 84 Trademark Reporter, 418, 431 (1994) the authors of this article suggest that customary law functions as a protector of powers which could be analogized to the "commercial magnetism" possessed by a famous trademark (and protected from dilution) or the "right of publicity" possessed by a famous celebrity and protected by the law of misappropriation.

> An immediate apparent difference is that [customary law] was codified in oral tradition rather than in written statute or common law form. This distinction is not, however, as significant as might appear from a Western perspective, for oral tradition was a respected source of authority and did not hold the second-rate status that it is often accorded in literate societies. Also [because the population was small], it was not difficult to maintain a shared knowledge of the basic precepts of the system. The major difference between Western law and that of the Kiowa…is that Kiowa law developed and functioned within a small scale society in which individuals were in intense interaction and often dependent upon each other for successful exploitation of the environment. This social situation shaped goth the goals of the legal system and its mechanisms of social control. The goal of the system was to maintain peace in the community and heal breaches in the social fabric, rather than to right wrongs.[61]

There are several formal conceptual obstacles to the use of customary law to protect TKF. In some jurisdictions, customary law only protects rights in tangible personal property for the traditional communities who occupy it. The principle of protective jurisdiction and of the subsistence of a fiduciary relationship creating obligations in equity have been difficult to establish, for example, in Australia.[62]

It is evident that whatever the definition of "holders" of TKF is adopted, "they" are not in agreement as to what rights they want recognized. The observations of Sir Michael Somare and Christine Morris point to the difficulty of reconciling different interests. Some of the interventions at the IGC December 2001 meeting reflect a similar sentiment. An example is the report of the Saami Council representing the indigenous people of northern Scandinavia.

> "The Representative of the Saami Council, an organization of the indigenous Saami people in Finland, Norway, Russia and Sweden, stated that the Committee should recognize the differences between intellectual property rights, on the one hand, and genetic resources, traditional knowledge and folklore, on the other. The Saami indigenous peoples generally regarded their knowledge and natural

[61] Candace S;. Greene and Thomas D. Drescher, The TIPI with Battle Pictures: The Kiowa Tradition of Intangible Property Rights, 84 Trademark Reporter, 418, 427 (1994)

[62] Michael Blakeney, What Is Traditional Knowledge? Why Should It Be Protected? Who Should Protect It? For Whom?: Understanding The Value Chain, WIPO Roundtable on Intellectual Property and Traditional Knowledge, WIPO/IPTK/RT/99/3 (November 1999), pp. 6-7, 13.

> resources not as a commodity, but as common good that vested in the people collectively. In contrast, intellectual property rights were private rights intended to be sold on the market. For that reason alone, intellectual property rights would not be appropriate for protecting indigenous knowledge and resources. In this context, it should be pointed out that international law already recognized the collective rights of indigenous peoples, such as Article 13.1 of the ILO Convention No. 169. Given that indigenous peoples regarded their knowledge and natural resources as springing out from a spiritual, cultural and sometimes religious connection between the people and its land, and whereas this spiritual link was unique to indigenous peoples, the Committee should give indigenous peoples an effective opportunity to participate in its work. To deprive indigenous peoples of their genetic resources, traditional knowledge and folklore constituted a violation of those peoples' fundamental rights to self-determination, which was acknowledged by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The same emphasis on indigenous peoples' rights to self-determination had been emphasized by the United Nations Human Rights Committee. He reiterated that it was of paramount importance that the Intergovernmental Committee address the rights to genetic resources, traditional knowledge and folklore, not solely from an intellectual property rights perspective, but also in a manner so as to allow human rights and environmental aspects to influence its work. [63]

The sentiments in a statement by a federation of indigenous peoples' groups to the World Trade Organization during the Review of provisions of TRIPS Article 27.3(B) are quite similar:

> The statement drew the distinction between private proprietorial rights and 'indigenous knowledge and cultural heritage [which] are collectively and accretionally evolved through generations… the inherent conflict between these two knowledge systems and the manner in which they are protected and used will cause further disintegration of our communal values and practices."
> The statement pleaded for a legislative structure which "builds on the indigenous methods and customary laws protecting knowledge and heritage and biological resources…"[64]

Morris, Somare, the Saami Council and such others remind us of the challenge we face: to balance the wishes of communities which are holders traditional knowledge and folklore to protect them *from* economic exploitation against the wishes of those same

[63] Draft Report (WIPO/GRTKF/IC/2/16 Prov. ¶ 47

[64] Michael Blakeney, Protection of Plant Varieties and Farmers' rights 24 EIPR 9, 17 (2002)

communities (or others) wishing to protect it *through* such exploitation. This delicate balance may vary from society more urban to society more rural, from community more distinctive to community more assimilated, from economy more affluent to economy less self-sufficient, and from context more timeless to context more historical. Holders of traditional knowledge and folklore in the "information society" are becoming more aware of their identities and how legal regimes, both existing and yet to be developed, may be used to their advantage. Non-holders should be wary of imposing alien principles on holder communities as they search for answers. Much of where the discussion should lead depends therefore on the holder communities themselves. The factors to be weighed and where the balance is to be struck in a particular community may be critical to answering the ultimate question: Can we as a species preserve the rich diversity of human culture, harmonize ourselves with the limits of the natural world, achieve fair and sustainable development not just for ourselves but for those who will follow us in the centuries to come.