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Protecting Cultural Expressions: The Perspective of Law*

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I. Introduction

In the last few years, intellectual property lawyers have become quite intensively involved in the discussion of the possible protection of genetic resources, traditional knowledge and the cultural expressions of indigenous peoples.[1] The new wave of initiatives in this area has a number of causes. In essence, a conflict of interests has emerged between (mainly) Western users of indigenous knowledge and expressions on the one hand, and indigenous peoples who feel that such knowledge and expressions belong uniquely to them. Although Western researchers and creative artists such as musicians and painters have long had recourse to indigenous cultures as a basis for new creations, major problems have arisen only today, and this is mainly due to the fact that today's exploitation takes place on a considerably larger scale.[2] Today's markets are mostly global, and are characterised by growing competition and an ever-increasing need for new products to be offered to consumers at ever-shorter intervals. The highly dynamic nature of these modern markets entails the constant need for new "raw" materials such as melodies, rhythms, designs, even genetic materials and medical remedies. Traditional cultural expressions are a major source of such new materials. The "New Age" movement, the new search by Westerners for spirituality in indigenous cultures, has also increased the importance of indigenous knowledge and expressions in recent years.[3]

Such exploitation regularly occurs without the consent of indigenous peoples and without them sharing the benefits of exploitation. This state of affairs generally complies with existing intellectual property law, under which most indigenous knowledge and expressions are considered to be in the public domain. However, indigenous peoples usually apply to cultural expressions their own system of property, one that is often related to the existence of super-natural beings.[4] Customary law often designates specific persons or groups of persons within indigenous communities as the only custodians (or otherwise responsible persons) for a particular design, song, etc. Moreover, the economic exploitation of what indigenous peoples see as belonging to them, namely the knowledge and expressions of culture that have been passed down from generation to generation, is considered to be unfair if done without consent and/or without the sharing of benefits.

Additional factors that have led to open-ended and heated debate on these issues are the increased awareness of such issues by indigenous peo-

ples, the great extent to which they have organized themselves, and the effective activism of their representatives, all of which have brought worldwide attention to indigenous concerns.[5] Whereas these issues have been discussed in a broad range of different international fora, the World Intellectual Property Organisation (WIPO) has played a leading role concerning intellectual property. The WIPO began to deal with cultural expressions quite some time ago.[6] Only since 1998, however, has it addressed issues of genetic resources and traditional knowledge, beginning with a joint study with the United Nations Environment Program concerning the role of intellectual property rights in the sharing of benefits arising from the use of biological resources and associated traditional knowledge. Additional activities in various committees and working groups ultimately led to the establishment of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore. This has met regularly since Spring 2001, mainly to discuss possible measures to protect indigenous resources, knowledge and cultural expressions.

II. Cultural indigenous expressions and existing legal protection

1. Expressions covered by the study

The following will be limited to expressions in the field of culture, such as music, art, stories, and similar expressions that could be covered by copyright if the conditions were fulfilled. Accordingly, secret sites, landscapes, natural objects, burial sites and the like which are not covered by intellectual property protection will not be dealt with in this article. It is clear to me that analyzing individual elements outside their broader context, such as the spiritual context or landscape, contradicts the holistic approach of indigenous peoples and therefore may be considered inappropriate. However, such analysis has been deliberately restricted to the ways in which existing intellectual property laws apply to indigenous cultural expressions, not least in order to remain within our area of expertise, rather than pretending to suggest an overall solution.

2. The notion of "cultural property" in copyright

Before analyzing the applicability of copyright protection to the cultural expressions of indigenous peoples, it may be useful to describe briefly the rationale and mechanism of copyright protection. First of all, since we are dealing with "cultural property," it must be emphasized that this notion does not exist in the realm of copyright. Although copyright is (at least in

part) a property right and, as such, protected in fact by the fundamental right of property (for example according to Art. 14 of the *Grundgesetz*, that is, the German Constitution, and Art. 27 (2) of the Universal Declaration on Human Rights), the word "cultural" is not used explicitly within those contexts. Rather, copyright rules designate the object of protection, i. e., the author's work, by means of definitions such as "personal intellectual creation" (§ 2 (1) German Copyright Act); in most laws, this is then illustrated by a list of examples, such as musical works, literary works, art works, choreography, architecture etc.

3. Main features of copyright and neighboring rights protection

Copyright protection in a work comes into being by the mere creation thereof. This is a consequence of the natural law philosophy inherent in Continental law and, under the influence of international law, increasingly in Anglo-American law as well.[7] Under the Anglo-American system (also called the "copyright system" as opposed to the "author's rights"- or "droit d'auteur"-system), in those countries that are not bound by the main international treaties, the fulfilment of formalities such as copyright registration or notice is a requirement for the *genesis* of copyright protection. Only in most countries adhering to the copyright system is a physical example of the work required before it is protected.

The beneficiary of protection is the author of the work. Under the author's rights system, this is always the particular human being who created the work. Under the copyright system, however, the author may also be a company or an employer for whom an employee created the work. Accordingly, musical recording companies are often recognized as authors of works in the copyright system, whereas a special neighboring right, which is usually more limited than an author's right, has been established for the record producer in countries that follow the author's right system. Performing artists such as musicians and actors have long been recognized as neighboring right holders in author's rights countries, while not enjoying equivalent protection in copyright countries. In any case, copyright is based on an individualistic concept as opposed to a collective one. Accordingly, only an individual author, or a group of individual authors who have created a particular work, may enjoy copyright protection for that intellectual creation.

In principle, the protection of authors' rights consists of exclusive rights, i.e. the right to prohibit or authorize all significant kinds of exploitation. (For neighboring rights, a limited list of explicitly determined kinds of exploitation is usually provided.) In respect of certain uses, the law (in par-

ticular in author's rights systems) may substitute for the exclusive right a statutory remuneration right, such as the levy on blank tapes that covers the private copying of music and other works on those tapes. In addition, under the author's rights system, so-called moral rights are part of copyright protection. They protect the personal link between the author and his work, in particular by the right of paternity, i.e. the right to be named as the author thereof, to remain anonymous or to choose a pseudonym. They also protect such personal link by the right of integrity, i.e. the right to object to any mutilation, distortion or other derogatory treatment in respect of the work. The exclusive rights of exploitation are limited by law in respect of specific purposes such as education, teaching, research, quotation, private use, juridical use, governmental use, information on current events of the day, and the like. The duration of copyright is also limited, usually to at least 50 years after the author's death, and within the European Community and a number of additional countries to 70 years after the author's death. The duration of neighboring rights is limited in most cases to 50 years after the fixation, the first publication or other relevant date.

4. Protection of traditional cultural expressions per se

a) Direct protection

Given this background, let me now deal with the question of whether or not indigenous cultural expressions are covered by copyright protection. This requires making a distinction between traditional cultural expressions *per se* on the one hand, and on the other hand contemporary works created by individual authors or groups thereof on the basis of, or inspired by, such traditional expressions. First, with regard to traditional cultural expressions *per se*, it is widely recognized that they cannot be protected by copyright, and for a number of reasons. For example, usually no individual author or group of authors can be ascertained, and even if this were possible, or if one were to consider applying the rules for anonymous authors, in most cases the duration of protection would have expired a long time ago. Copyright is meant to recognize the ownership of individual authors in their individual works, not least in order to provide an incentive for further creation. Traditional expressions cannot be attributed to an individual author or a group, because they usually have originated in an indigenous community and existed for an undetermined period of time, during which they have been further developed while being transmitted from generation to generation.

Because such transmission takes place orally, the requirement of material fixation in countries following the copyright system would be an additional obstacle to copyright protection. Furthermore, the dynamic character of "living heritage" makes such expressions unsuitable for copyright protection.

b) Indirect protection

aa) Copyright and Neighboring Rights

However, traditional cultural expressions may be indirectly protected by copyright and neighboring rights in certain cases. First, copyright protects databases and other collections if either the arrangement or the selection of the material constitutes an intellectual creation. This is a change from the past, when many laws restricted such protection to collections of "works" (within the meaning of copyright law) and therefore would not have covered the collection of traditional cultural expressions. Today, however, most laws have extended such protection to collections of non-works and even data. At the same time, the scope of such protection is limited to the arrangement or selection of material and does not extend to the collected material itself. It should be noted, moreover, that, in fact, such collections will be made most often by people from outside the indigenous communities, such as ethnographers, musicologists etc. Accordingly, it is these persons, rather than members of indigenous communities themselves, who would enjoy a right to prohibit or authorize the use of the arrangement or selection of material. This protection would, therefore, not be of any direct benefit to the community. Rather, it is the collectors who would benefit on the basis of their copyright in the collections of traditional cultural expressions.

A similar situation exists in respect of recordings. For example, a person who makes a photograph of a traditional design acquires a copyright in the photograph (rather than in the design itself) and can prohibit or authorize the use thereof. A person, such as a record producer or musicologist, who makes a sound recording of a traditional song acquires a neighboring right or, in countries of the Anglo-American system, a copyright, in the recording itself (rather than in the song). The same is true for the person who produces a documentary film of a traditional dance. In each case, these are usually persons from outside the indigenous communities; they acquire rights in a production, such as the recording, that incorporates cultural expressions and, consequently, can indirectly benefit from the exploitation of those expressions.

Finally, under many laws, including recent international law (specifically Art. 2 (a) of the WIPO Performances and Phonograms Treaty (WPPT), which came into force on May 20, 2002), even performers of "expressions of folklore" enjoy protection. Accordingly, in particular, actors (except under the WPPT), singers, other musicians, and dancers of expressions of folklore are granted the same protection of their performances as performers of works. This protection will be beneficial to the indigenous communities more frequently than the above-mentioned indirect protection, since community members are more likely to perform their own cultural expressions than to record them or collect them in databases. Here, again, it would not be the cultural expressions themselves that are protected, but only the concrete performances thereof. Accordingly, the performers could not prohibit anyone else from singing a traditional song, but they could prohibit the recording of their own performance and the further use of such a recording.

bb) Other intellectual property rights

Other existing forms of intellectual property protection that are relevant to traditional cultural expressions include protection by trademarks, geographical indications and protection from unfair competition. Trademarks may be particularly useful in the form of so-called collective marks and (as a special form of a collective mark) certification marks, because collective marks correspond to the collective nature of traditional cultural expressions. More specifically, the owner of the right can be an association rather than an individual person, and the association does not need to be an industrial or commercial establishment. Accordingly, indigenous communities can readily establish such associations in order to register collective marks.

Collective marks (like trademarks in general) do not provide for the direct protection of cultural expressions. However, their purpose is to indicate the identity and the commercial origin thereof. Accordingly, rights owners such as indigenous communities cannot prevent the reproduction and distribution of goods incorporating their cultural expressions; however, the marketing of their own goods with a collective mark may provide an advantage on the market, since the consumer will know that only those goods bearing the collective mark are authentic. The owners of the collective marks have the exclusive rights to prohibit and authorize the use of the mark for such goods by third persons. In other words, the collective mark serves the authenticity interest and allows the consumer to distinguish authentic products from similar ones that are mere imitations or oth-

erwise made by persons from outside the indigenous communities. Collective marks are recognized world wide as a form of trademark protection to be provided, as required by Art. 7[bis] of the Paris Convention for the Protection of Industrial Property.

An extra advantage of certification marks or guarantee marks for indigenous communities is that they assure the consuming public that the respective goods have certain guaranteed characteristics, such as that they fulfil certain standards of quality or have been manufactured in a specific way, for example according to the traditions of a community. The quality standards are specified and controlled by the association for which the certification mark has been registered. In practice, many indigenous peoples have started to use collective marks with a view to undermining the market for imitations made by outsiders.[8]

Geographical indications are similar in that they do not protect the cultural expressions themselves, but may be used to identify them as originating in a particular geographical region or other part of a specific territory. Accordingly, they authenticate the geographical origin of the cultural expressions. Geographical indications are being considered as possible tools of protection for indigenous communities in many areas of the world.[9]

There are also cases in which rules of unfair competition may provide some protection, especially where commercial transactions take place in respect of goods incorporating traditional cultural expressions, and where a competitive relationship exists between the indigenous community and a person who commercializes such expressions. In particular, the prohibition against disclosure of confidential information (in civil law countries) and breach of confidence (in common law countries) – now covered by Art. 39 of the TRIPS Agreement[10] under the rubric of the protection of undisclosed information – may be helpful in protecting against disclosure those traditional cultural expressions that are as yet undisclosed. Under these terms, it is possible to prevent secret expressions from being made available to the public, or, if so wished, to commercialize them on the basis of know how-licenses.

Other than laws specifically related to intellectual property, there are no other provisions (such as relating to human rights and cultural heritage) that currently provide any concrete, substantial protection.[11] Because, in particular, existing intellectual property law offers only limited and indirect protection for traditional cultural expressions, indigenous peoples have pointed to the need for new forms of legal protection. Before discussing such possible new forms, however, let me analyze the status of copyright protection for contemporary individual works based on traditional cultural expressions.

5. Protection of works based on traditional cultural expressions

Where individual authors create specific paintings, songs or other works on the basis of traditional cultural expressions, such works will usually fulfil the general requirements for copyright protection. The situation is more complicated, however, by the fact that the integration of elements of traditional expressions into the newly created works may occur to differing degrees and in different ways. Elements such as the style of painting, or the particular motifs, symbols or stories that are referred to in a painting, may be rather obscure, and may have served only as a source of inspiration for the work. Alternatively, they may be easily recognizable, and may have been incorporated into the new work with relatively little change. The closer the new work refers to or integrates the traditional expressions, the more restricted is the scope of protection for the new work itself. All pre-existing elements that have been adopted from traditional expressions remain in the public domain (from an intellectual property point of view) and will therefore not be protected; only the new, personal elements of creation contributed by the author of the new work are protected by copyright. In other words, it would not constitute an infringement of copyright if someone made a copy of an element of the new work that consisted exclusively of a traditional cultural expression.

Hence, as a rule, copyright exists in contemporary works that are based on traditional cultural expressions. The authors of such works enjoy an exclusive right of exploitation that allows them to prohibit other persons from using it in particular ways or to authorize such use gratuitously, in exchange for payment or under any other conditions. This right may conflict, however, with customary law that usually provides for a different kind of "property." One example would be the case of exclusive entitlement by individual members or groups of members of indigenous communities who are the established and recognized custodians of particular traditional cultural expressions. Those persons are not usually the same as the authors of the works. It follows, then, that indigenous communities may have an interest in being protected against such copyright protection in order to be able to give effect to their customary rules.[12]

III. Options for the protection of traditional cultural expressions *per se*

1. First attempts to establish international protection

It has been more than 30 years since the first attempts to provide for a copyright-like protection of traditional cultural expressions *per se*. At the international level, this issue was first discussed at the 1967 Stockholm

Revision Conference of the Berne Convention for the Protection of Literary and Artistic Works. Among other reasons, this initiative came about in part because so many former colonies had become independent, developing nations since the preceding revision conference and had begun to represent their own interests. Although the protection of traditional cultural expressions is not strictly speaking a North-South issue (given its importance in industrialized countries such as Australia, New Zealand, Canada and the United States as well as in developing countries), the issue was raised and strongly supported by the developing countries.

The advantage of including such traditional expressions in the framework of the Berne Convention would have been immediate coverage in the many countries that were already Members of the Convention. At first, the Indian delegation proposed to include "works of folklore" in the non-exclusive list of works that are protected by the Convention (Art. 2 (1) of the Convention).[13] However, the Australian delegation in particular noted that folklore was different from authors' works in that there was no individual author or group of authors. Thus there would be problems in applying the provisions of the Berne Convention, which were designed to protect the rights of individual authors. Consequently, a Working Group was established. Responding to the Australian argument, it proposed a new paragraph to be inserted into Art. 15 of the Berne Convention (which was then adopted as a new Art. 15 (4) thereof).[14] This paragraph reads as follows:

> "(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 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."

Although this text did not explicitly refer to "folklore" or similar notions, it implied that traditional cultural expressions were "works" protected by copyright, though usually unpublished. Furthermore, it implied that it may be impossible to identify any individual author or groups of authors, but that it may at least be possible to relate a particular expression of folk-

lore to a specific geographical area. This wording had the advantage of avoiding perceived difficulties in defining "folklore," while at the same time it was clear from the Report of Main Committee I that the main field of application of the paragraph would be to expressions of "folklore."[15] In principle, Art. 15 (4) of the Berne Convention adheres to the concept of individual authorship. This may have been one of the main reasons why this model was not successful: only India made the necessary designation of a competent authority under this provision.[16]

Given this lack of success, other initiatives were taken to address the protection of traditional cultural expressions. In particular, a Committee of Governmental Experts of UNESCO and WIPO adopted, in its session of February 23-March 2, 1976, the Tunis Model Law, which included the protection of "folklore." It was aimed at assisting developing countries in drafting their own copyright legislation in general.[17] The Tunis Model Law proposed, for inclusion in national copyright laws, specific rules relating to "folklore," including a definition thereof, the provision that material fixation would not be required for protection (unlike under Anglo-American copyright laws), and the unlimited duration of protection.[18] Thus, a number of particular characteristics of traditional cultural expressions were taken into account, while their collective nature was not.[19]

A further improvement of models for the protection of traditional cultural expressions resulted from the adoption of the "Model Provisions for National Laws on the Protection of Expressions of Folklore against Illicit Exploitation and Other Prejudicial Actions"[20] by a WIPO/UNESCO Committee of Governmental Experts in 1982. The provisions served as a guideline for countries interested in introducing special protection for "folklore." The Model Provisions included a definition of the subject matter to be protected, the acts that would be subject to authorization by a competent authority or community, the exceptions thereto, and the obligation to indicate the source of any identifiable expression. There were other rules as well, for example regarding the enforcement, the protection of foreign folklore and the relationship with other forms of protection.

Following the 1982 Model Provisions, WIPO and UNESCO submitted a draft treaty to a Meeting of the Group of Experts on the International Protection of Expressions of Folklore by Intellectual Property in Paris, in December 1984.[21] While the general need to establish an international legal framework for the protection of folklore was recognized, the Group of Experts expressed a number of concerns, such as the lack of identification of the expressions of folklore subject to protection in other Member Countries, and the resulting legal uncertainty as to the scope of international obligations under the treaty. Another problem concerned cases

where expressions of folklore were spread out over two or more countries. This made it seem preferable to reach solutions at the regional level before an international treaty was concluded. The number of unresolved problems, along with the lack of sufficient experience regarding the protection of traditional cultural expressions at the national level, led the group of experts to conclude that the adoption of any international treaty would be premature.[22] This result may have discouraged further efforts toward international protection for a long time.

2. Recent activities of WIPO

It is only in the context of the preparation of the 1996 WIPO Treaties, the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), that a new initiative was taken in respect of the possible protection of traditional cultural expressions. The preparations included also a third treaty (which was not even open for negotiations at the Diplomatic Conference) on the *sui generis*-protection of databases.[23] Developing countries may have felt that the planned new treaties, and in particular the Database Treaty, would primarily benefit industrialized countries. They tried to establish a link between the adoption of a database treaty and a possible international instrument for the protection of traditional cultural expressions.

The first outcome of such demands was (in February 1996) a recommendation of the WIPO Committee of Experts preparing the 1996 WIPO Treaties to the Governing Bodies of WIPO, according to which an international forum for the exploration of issues concerning the preservation and protection of expressions of folklore, the intellectual property aspects thereof and the harmonization of different regional interests should be organized.[24] This forum was held in Phuket, Thailand, in April 1997 under the auspices of WIPO and UNESCO. It adopted an "action plan," according to which some rather ambitious suggestions were made. Not only was a "Committee of Experts" to be established in co-operation with UNESCO, and regional consultations were to take place, but the Committee of Experts was also supposed to "complete the drafting of a new international agreement on the *sui generis*-protection of folklore by the second quarter of 1998, in view of the possible convocation of a Diplomatic Conference, preferably in the second half of 1998."[25]

While this plan was obviously too ambitious, intensive work has since followed within WIPO. First, the fact-finding missions of WIPO regarding the needs and expectations of indigenous peoples in respect of genetic resources, traditional knowledge, traditional names and folklore have been

the basis for subsequent work by the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.[26] Since its first session in Spring 2001, the Intergovernmental Committee has discussed a number of tasks. These include the updating of the 1982 Model Provisions, work on the preparation of an international treaty on *sui generis*-protection for expressions of folklore, and a number of rather short term-tasks such as the study of current forms of available protection, customary laws, terminological issues, case studies, and the collection and review of information on national experiences with existing protection.[27]

Many countries, in particular industrialized countries, tend to consider the work on a future international treaty on the protection of expressions of folklore to be premature, not least given the diversity of situations in various parts of the world. Despite this, some useful and intensive work has been carried out, in particular the assessment of responses to a questionnaire sent by WIPO to its Member States on national experiences with the legal protection of expressions of folklore.[28] The responses to this questionnaire constitute a rich basis for further considerations. For example, it appears from the responses that relatively few of those countries that provide for a specific legal protection of traditional cultural expressions by copyright or similar provisions are actively applying these rules in practice; they have indicated a number of different reasons for this.[29]

3. Discussed models of sui generis-protection

A number of countries have already introduced *sui generis*-protection.[30] Let us look at the various possible contents of such protection. First, it is important to look at the needs expressed by indigenous peoples themselves. Especially relevant in this regard are the results of WIPO's fact-finding missions.[31] From these, it is clear that such needs may vary from community to community. For example, some indigenous peoples continue to live, at least in part, according to their traditions, while others have adopted Western concepts.[32] For many, the need to be protected for spiritual and similar reasons against non-customary uses of traditional cultural expressions by outsiders represents the prime concern. For example, secret objects should not be used in a profane context. Another concern is related to authenticity: indigenous peoples have an interest in preventing others from making available to the public any traditional cultural expressions that are not authentic but are presented as such. Finally, indigenous peoples want at least to share in the benefits that accrue to others who exploit goods incorporating traditional cultural expressions or achievements, or that are based thereon.

These interests have been taken into account by *sui generis*-laws in different ways; most solutions are based on concepts of authors' rights protection while taking into account the particular nature of traditional cultural expressions.[33] Non-economic needs regarding the spiritual link between indigenous communities and their traditional cultural expressions may be taken care of by rights similar to moral rights under authors' rights regimes, in particular by the right of integrity of expression and the right of paternity. For example, Art. 13 of the "Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture," adopted by the Secretariat of the Pacific Community,[34] states that traditional owners of traditional expressions of culture have the right of attribution of ownership in relation thereto, the right not to have such ownership falsely attributed to them, and the right not to have their expressions of culture subjected to derogatory treatment. The need for authenticity may already be covered by the registration and use of collective marks as described above.[35]

Finally, economic concerns may be recognized through either the introduction of an exclusive right to prohibit or authorize certain uses of traditional cultural expressions, or of a simple statutory right to remuneration for their exploitation. Exclusive rights have been introduced for example in Panama's law[36] "on the special intellectual property regime upon collective rights of indigenous communities, for the protection of their cultural identities and traditional knowledge"[37] and in Art. 7 of the Regional Framework of the Pacific Community.[38] The latter provision does not use the terminology of authors' rights ("exclusive rights/rights to authorize or prohibit certain uses") but states that a number of uses "require the prior and informed consent of the traditional owners." Nevertheless, the effective protection corresponds to that of exclusive rights under authors' rights regimes. Also, the individual uses covered by the need of prior and informed consent are comparable to those usually covered by authors' rights, such as, for example, reproduction, publication, performance, broadcast, adaptation, etc.

In a number of countries, the law provides that a remuneration has to be paid for particular uses of traditional cultural expressions. Such a concept is comparable to statutory remuneration rights under authors' rights regimes and to so-called *"domaine public payant"*-systems. The collective nature of traditional cultural expressions may be taken into account by the establishment of such rights as collective rights to be administered by public authorities; however, this solution may not be ideal in countries where conflicts of interests exist between national governments and indigenous communities.

One of the probably most promising ways of integrating the needs of indigenous communities into *sui generis*-protection regimes may be found in the above-mentioned Regional Framework of the Secretariat of the Pacific Community.[39] In this Framework, existing customary law is referred to in several respects. For example, notions such as "traditional owners" of traditional expressions of culture have been defined by reference to the relevant customary law. Art. 4 of the Regional Framework defines "traditional owners" as "(a) the group, clan or community of people; or (b) the individual who is recognized by a group, clan or community of people as the individual in whom the custody or protection of the traditional knowledge or expressions of culture are entrusted in accordance with the customary law and practices of that group, clan or community." The protection of this Regional Framework is granted to such traditional owners. Also, in order to enable continuing customary uses of traditional cultural expressions without the need for prior and informed consent, customary uses are exempted from any criminal or civil liability. "Customary uses" have been defined as those "in accordance with the customary laws and practices of the traditional owners" (Art. 4 of the Regional Framework). Other deviations from authors' rights principles include the perpetual duration of the protection, due to the "living heritage" nature of traditional cultural expressions.

IV. Outlook

In conclusion, different *sui generis*-protection models have already been tested for some time; the most recent ones, such as the Regional Framework of the Pacific Community, which integrate the relevant customary laws and practices, may be the most promising protection models. At the same time, we should acknowledge that most countries that have already had *sui generis*- or even copyright-based legislation regarding the protection of traditional cultural expressions, have not realized such protection in practice. It may be a task for the immediate future to find out the reasons and take appropriate measures to improve this situation. Only once protection will be working well at the national level will it make sense to conclude regional and international agreements. International agreements are certainly needed, given the frequent exploitation of traditional cultural expressions beyond national borders; however, they may not be the most appropriate approach, given the widespread conflicts between national governments (representing the countries in negotiations in the framework of international organisations such as WIPO) and their own indigenous communities.

Instead of international or regional treaties, other, non-binding instruments may be useful in promoting the protection of traditional cultural expressions: They may be agreed upon more easily, since they are not binding, and yet may provide much of the same protection as do binding laws. They may comprise ethical codes, guidelines, and the like, which can be established upon agreement by the interested user groups and indigenous peoples, or simply by one or the other. In addition, practical measures, such as raising the awareness of indigenous peoples concerning their current legal options, may be a useful tool to promote respect for their traditional cultural expressions. Similar measures might include the provision of assistance in the negotiation of contracts, the publication of guidelines on recommended legal and cultural practices, and the establishment of an institution to act as an agent or otherwise assist indigenous communities. Meanwhile, Western users of traditional culture must become more aware of the particularities of indigenous issues and show more respect for world views that are not their own. Long-term success may be reached only if both sides show mutual interest and understanding as a basis for common solutions.

Notes

* A version of this article exists in *Focaal* 2004 (44), "owning culture," edited by Deema Kaneff.

1 The term "cultural expressions" is used in this paper as a synonym for the more often used "folklore" in order to take account of indigenous claims according to which "folklore" would have negative connotations.

2 For example, it has been claimed that Indian arts and crafts are "an $ 800 Mio. annual industry" in New Mexico, see S. L. Pinel and M. J. Evans 1994, 47.

3 F. Sandler 2001, 81 ff.

4 See, for example E. Kasten 2002, 4; also this volume.

5 On the progress made in this respect within the UN context, see M. Battiste and J. Y. Henderson 2000, 5 ff.

6 See for more details section III.1, below.

7 Two fundamentally different systems of copyright protection exist worldwide. One is the European Continental system, which spread from the Continent to former European colonies, especially to Latin-America and former French colonies in Africa, and is also followed in the former Soviet Union. The other is the Anglo-American system, which prevails in the United Kingdom, Ireland, the USA, Australia, New Zealand, Canada, in former English Colonies in Africa and in other former Commonwealth Countries. Although international law has reduced the differences between the two systems, they persist in principle. See A. Strowel 1993.

8 See in particular for the Maori Made Mark (Toi Iho) for Maori cultural expressions, WIPO doc. GRTKF/IC/4INF/2 of 25 November 2002, no. 79 ff. For examples relating to Australian aborigines and the Iroquois, see WIPO (ed., 2001); see also http://www.wipo.int/traditionalknowledge/report, 73 ff, 123.

9 See WIPO doc. GRTKF/IC/4INF/2 of 25 November 2002, 139, 153 and 196.
10 Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods.
11 On *sui generis*-protection regimes for traditional cultural expressions see below, section III.3.
12 On the complicated issue of conflicts of law and jurisdiction in North America, see R. Cooter and W. Fikentscher 1998, 287, 305 ff and 558 ff.
13 See Records of the Intellectual Property Conference of Stockholm (1967), Vol. II, Geneva 1971, 1152/paras. 126, 127.
14 See Records of the Intellectual Property Conference of Stockholm (1967), Vol. II, Geneva 1971, 917–8.
15 See Records of the Intellectual Property Conference of Stockholm (1967), Vol. II, Geneva 1971, 1173/para. 252; see also p. 918/para. 1509.2.
16 For more details, see M. Nordmann 2001, 25 ff.
17 Tunis Model Law on Copyright with a commentary drafted by the Secretary of UNESCO and the International Bureau of WIPO, *Copyright* 1976, 165 ff.
18 See in particular Sec. 1 (3) in connection with Sec. 6, Sec. 18 (iv), Sec [5bis] and Sec. 6 (2) of the Tunis Model Law (note 17).
19 M. Nordmann 2001, 28 with references.
20 See *Copyright* 1982, 278 ff.
21 Draft Treaty for the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions (1984), reprinted in *Copyright Bulletin* 1985, 9.19 no. 2: 34 ff, and *Copyright* 1985, 47 ff (with comments).
22 Report on the Meeting, *Copyright* 1985, 40 ff, in particular para. 14.
23 On this project see J. Reinbothe and S. v. Lewinski 2002, Chapter 3 note 57.
24 See the Report on the Meeting, WIPO doc. BCP/CE/VI/16 – INR/CE/V/14, para. 269.
25 UNESCO/WIPO (ed.), World Forum on the Protection of Folklore, Paris/Geneva 1998, 235.
26 See the fact-finding mission report (note 8), and the working documents of the Intergovernmental Committee at http://www.wipo.int/globalissues/igc/documents/index.html. On the fact-finding missions see also, in particular, W. Wendland 2002b, 485 ff and 606 ff.
27 See in detail W. Wendland 2002a, 101, 112 ff.
28 See the questionnaire, WIPO doc. GRTKF/IC/2/7.C.
29 For a detailed summary of responses to the WIPO questionnaire see W. Wendland 2002a, 115 ff.
30 See a description of two recent examples, the laws of Panama and the Philippines, in W. Wendland 2002a, 115 ff.
31 See the report, op. cit. (note 8).
32 See for example the distinction between traditional aborigines and urban aborigines, D. Ellinson 1994, 327, 340 ff.
33 See for a detailed analysis A. Lucas-Schlötter 2004.
34 This Regional Framework was adopted in fall 2002 (ISBN 982-203-933-6).
35 See II.4.b)bb).
36 Art. 15 of the Panama Law no. 20 of June 26, 2000.
37 Gaceta Oficial (Panama) no. 24, 083 of 27 June 2000.
38 op. cit., note 34.
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