Traditional Knowledge and Traditional Cultural Expressions

Professor Uma Suthersanen
Queen Mary, University of London
PART ONE: DEFINITIONS AND ISSUES
Definitions

Knowledge is the basis of all economies including those of traditional societies

Traditional knowledge and traditional cultural expressions are not old, obsolete and maladaptive - they can be highly evolutionary, adaptive, creative, original and novel

Traditional property rights are not always collective or communal in nature, just as Western notions of property are not always inherently individualist
What Types of Knowledge?

- Specialised knowledge may be held exclusively by males, females, certain lineage groups, or ritual or society specialists (such as shamans) to which they have rights of varying levels of exclusivity. This does not necessarily give that group the right to privatise what may be more widely considered to be the communal heritage.

- A body of knowledge built by a group of people through generations living in close contact with nature. It includes a system of classification, a set of empirical observations about the local environment, and a system of self-management that governs resource use (Martha Johnson)
“What is ‘traditional’ about traditional knowledge is not its antiquity, but the way it is acquired and used. In other words, the social process of learning and sharing knowledge, which is unique to each indigenous culture, lies at the very heart of its ‘traditionality.’ Much of this knowledge is actually quite new, but it has a social meaning, and legal character, entirely unlike the knowledge indigenous peoples acquire from settlers and industrialized societies”

Russel Barsh
TRADITIONAL CULTURAL EXPRESSIONS (TCEs): What does this mean?

- **verbal expressions**, such as folk tales, folk poetry and riddles
- **musical expressions**, such as folk songs and instrumental music
- **expressions by action**, such as folk dances, plays and artistic forms or rituals: whether or not reduced to a material form
- **tangible expressions**, such as: productions of folk art; musical instruments; architectural forms

UNESCO-WIPO Model Provisions for National Law on the Protection of Expressions of Folklore against Illicit Exploitation & other Prejudicial Actions
Intangible cultural heritage – is this the same?

“The ‘intangible cultural heritage’ means the practices, representations, expressions, knowledge, skills – as well as the instruments, objects, artefacts and cultural spaces associated therewith – that communities, groups and, in some cases, individuals recognize as part of their cultural heritage. This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.”

Intangible cultural heritage

The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:

(a) oral traditions and expressions, including language as a vehicle of the intangible cultural heritage;

(b) performing arts;

(c) social practices, rituals and festive events;

(d) knowledge and practices concerning nature and the universe;

(e) traditional craftsmanship.
Artisanal products or handicrafts are those produced by artisans, completely by hand or with the help of hand-tools and even mechanical means, as long as the direct manual contribution of the artisan remains the most substantial component of the finished product. Their special nature derives from their distinctive features, which can be utilitarian, aesthetic, artistic, creative, culturally attached, decorative, functional, traditional, and religiously and socially symbolic and significant. They are made of sustainably produced raw materials and there is no particular restriction in terms of production quantity. Even when artisans make quantities of the same design, no two pieces are ever exactly alike.
Authorship and ownership in TK

Individual or collective?

Rights, duties, responsibilities

Property and “the public domain”
TK AND TCEs

- Why is it an Issue?
- Who are the stakeholders? Who benefits and who loses?
- Do we need protection for these creations?
- What sort of protection? Patents? IPRs?
- Guarding against misappropriation or cultural control/censorship?
- Property rights? Tort/Liability Rules?
- Cultural branding? GI scheme? Certification of origin scheme?
- Human rights (e.g. property rights, national sovereignty, dignity or cultural access or cultural protection)?
TK plays an important role in the global economy. Traditional peoples and communities responsible for discovery, development, preservation of medicinal plants, herbal formulations, agricultural and forest products traded internationally.

TK also used as input into modern industries: pharmaceuticals, botanical medicines, cosmetics and toiletries, agriculture, biological pesticides.
Trade in handicrafts is substantial. Artisan handicrafts represent an estimated US$30 billion world market. In addition, handicraft production and sales represent a substantial percentage of gross domestic product (GDP) for some countries.

Cultural (Mis)Appropriation

“Cultural appropriation is held to be wrong for two main reasons. First, it is disrespectful of the cultural values of the source community, which rarely has sanctioned the imitation of its creations by outsiders. Second, it subjects that community to material harm, either by denying it legitimate economic benefits or by undermining shared understandings essential to its social health.”

Threats to Communities

1. *Loss of income*: copying and mass production by outsiders deprive artisans of a source of income, and represents a loss of export revenue for the country hosting the indigenous group.

2. *Disappearance of culture*: continued production and development of traditional handicrafts and artworks are threatened by the disappearance of traditional skills.

3. *Misappropriation and misuse*: Where sacred images or music are recorded or taken, and disseminated either in original form or in a different context which is felt to be disparaging, etc.
Why protect traditional knowledge?

◆ Recognise local value – economic, cultural, spiritual, survival

◆ Exploit national and international market value

◆ Conserve the environment

◆ Preventing biopiracy
Legal and Management Options

• Defensive Mechanism

Measures which ensure that IP rights over TK and TCE are not given to parties other than the source holders. Some countries and communities are also developing databases that may be used as evidence of prior art to defeat a claim to a patent on such TK, or evidence of prior authorship.

• Positive Mechanism

Creation of positive rights in TK and TCE that empower source holders to protect and promote their culture and identity as “property”. In some countries, *sui generis* legislation has been developed specifically to address the positive protection of TK for example - in NZ, use of certification trade marks to protect rights of Maori tribes and use of Maori symbols. Providers and users may also enter into contractual agreements and/or use existing IP systems of protection.
National Examples

• *Chinese* Copyright Law - protects “quyi” i.e. traditional art forms as ballad singing (唱曲), *story telling* (说书), comic dialogues (小品), clapper talks (快板) and *cross talks* (相声)

• *Brazilian* Decree No 3551, 4th August 2000 - Establishes a Register of Intangible Cultural Heritage

• *Brazilian* Decree No. 5753, 12th April 2006 - acceding to UNESCO Convention on the Safeguarding of the Intangible Cultural Heritage

• *Colombian* Copyright Act: on public domain: Article 189. Indigenous art in all its manifestations, including dances, songs, crafts, drawings and sculptures, shall belong to the cultural heritage.
PART TWO: TRADITIONAL CULTURAL EXPRESSIONS AND COPYRIGHT
Problems with Copyright Law

- **Subject matter** - Are there limits? Stories, epics, legends, poetry, riddles?

- **Fixation** - What of oral culture?

- **Authorship** - who is the author and beneficiary? Individual, community, tribe, country?

- **Authentication/right of attribution** - when falsely attributed as being traditional or indigenous art or music

- **Term of protection** - No protection for very old Aboriginal art such as rock engravings and paintings; intangible property is also distinct from land ownership
**Terry Yumbululul v Reserve Bank of Australia et anor**

- Morning Star Pole - Sculpture?

Morning Star poles are used in ceremonies commemorating the deaths of particular individuals, and link the spirits of the dead to their ancestral home. Poles are painted with sacred designs - which artists are allowed to paint after a secret initiation ceremony.

- Artist given permission to create and display poles for cultural and educational purposes, and to receive any associated income.
Terry Yumbulul v Reserve Bank of Australia

• pole was commissioned by an art dealer and sold to the Australian Museum.

• Commemorative Banknote to recognise 1988 bicentenary of English occupation

• Yumbulul signed licence agreement allowing reproduction of work “by mechanical reproduction throughout the world and to licence others to do so” for 85% royalties

• dispute as to Y’s understanding of contract

• banknote was printed
Reserve Bank of Australia’s commemorative $10 note
Terry Yumbulul v Reserve Bank of Australia - Judgement

- Yumbulul regarded as sole owner of copyright in the work
- Assumed to have signed contract willingly and with knowledge of consequences, as was advised by Aboriginal Artists Agency
- Community criticised his exploitation, whilst court criticised the agency’s failure to protect community
Court’s holding

• “There was evidence that Mr. Yumbulul came under considerable criticism from within the Aboriginal community for permitting the reproduction of the pole by the bank. [...] It may well be that when he executed the agreement he did not fully appreciate the implications of what he was doing in terms of his own cultural obligations ...[...]

• And it may also be that Australia’s copyright law does not provide adequate recognition of Aboriginal community claims to regulate the reproduction and use of works which are essentially communal in origin.”

per Mr. Justice French
Bulun Bulun v R&T Textiles

- John Bulun Bulun - well known artist from Arnhemland - author of *Magpie Geese and Water Lilies at Waterhole*

- Bark painting depicting ancient and cultural aboriginal site

- Bulun Bulun was artist

- Work created in accordance with Aboriginal laws and customs of Ganalbingu People

- Original painting eventually sold to Northern Territory Museum of Arts and Sciences

- Unauthorised reproduction and alterations by defendant as textile pattern
Influence of the *Mabo* decision on *Bulun Bulun*

- Seminal Australian High Court decision - *Mabo v Queensland (No 2) (1992) 175 CLR 1*
- Recognition of “native title”
- Extended further to argue that since indigenous connection to land and indigenous cultural property are deeply integrated issues which cannot be separated;
- “Native title” should also include the protection of indigenous art.

Do you agree?
Claims to Communal Property and Native Title

Applicant’s case: that the Ganalbingu people

1. “are the traditional owners of the body of ritual knowledge from which the artistic work is derived, including the subject matter of the artistic work and the artistic work itself.”

2. have a native title which arises from their connection to and interest in law. Such title extends to all artworks and creations emanating from the land.

3. artist holds the work in trust for the tribe or artist owes a fiduciary duty to the people in respect of his role as author and owner of artistic work
Mr. Justice Von Doussa considered that there was no evidence to suggest that any person other than Mr. Bulun Bulun was the creative author of the artistic work. He noted:

“A person who supplies an artistic idea to an artist who then executes the work is not, on that ground alone, a joint author with the artist. Joint authorship envisages the contribution of skill and labour to the production of the work itself.”

and further on noted that

“to conclude that the Ganalbingu people were communal owners of the copyright in the existing work would ignore the provisions of section 8 of the Copyright Act, and involve the creation of rights in indigenous peoples which are not otherwise recognised by the legal system of Australia.”
Judgement: Common Law Rights v. Communal Title

“Whilst it is superficially attractive to postulate that the common law should recognise communal title, it would be contrary to established legal principle for the common law to do so. There seems no reason to doubt that customary Aboriginal laws relating to the ownership of artistic works survived the introduction of the common law of England in 1788.

The Aboriginal peoples did not cease to observe their sui generis system of rights and obligations upon the acquisition of sovereignty of Australia by the Crown.

The question however is whether those Aboriginal laws can create binding obligations on persons outside the relevant Aboriginal community, either through recognition of those laws by the common law, or by their capacity to found equitable rights in rem.”, per Mr. Von Doussa
Judgement: Fiduciary Relationship and Equitable Title

Although no ownership of copyright vested in tribe, the Court found that a fiduciary relationship existed: equity imposed the following fiduciary obligations on the artist:

1. not to exploit the artistic work in a way that is contrary to the laws and customs of the Ganalbingu people;

2. in the event of infringement by a third party, to take reasonable and appropriate action to restrain and remedy the infringement of the copyright in the artistic work.

3. The equity recognized falls short of an equitable interest in copyright. The right of the Ganalbingu clan, in the event of a breach of obligation by the fiduciary, is a right in personam to bring an action against the fiduciary to enforce the obligation.
PART THREE: PATENTS AND BIOPROSPECTING
What is biopiracy?

(a) The misappropriation of biological resources or traditional knowledge through the patent system; and/or

(b) The unauthorised collection for commercial ends of genetic resources or traditional knowledge

A legal issue or a moral one?
Biopiracy and patents –
a polarised debate …

Turmeric, neem, basmati rice, maca, quinoa, endod, enola bean, ayahuasca, hoodia …

New & inventive?

… or old & blindingly obvious?
Who “invented” hoodia?
Why is TK more important than some people think?

As new chemical entities continue to be hard to find, scientists often go back to earlier substances to identify novel properties. Reflected in increased patenting of second/further uses.

The “learning trails” from initial find (or set of initial finds) to a product or class of products are hard to trace. The natural/TK origins of “new” drugs may become forgotten.

The modern use may be completely different, leading us to forget where the initial lead(s) came from.

Sometimes it’s just too early to tell – cf. “the linear-discovery-to-product-in-10/12-years” view of pharmaceutical R&D.
**Some Examples: Aspirin**

- Found in willow bark and other plants inc. Spiraea (meadowsweet)
- Known for 7,000 years. Used as analgesic & anti-inflammatory agent in Ancient Greece and Rome.
- 1757 - Rediscovered by Rev Edward Stone, lead to it by traditional “doctrine of signatures”, & example of quinine
- 1828 - Isolated by Buchner
- 1853 – chemically modified by Gerhardt. Then by Kraut (1869), Hoffman, Eichengrūn & Dreser (1897) - patents filed in US & UK naming Hoffman as inventor. Highly successful product for Bayer
- Inspired development of whole class of drugs: the NSAIDs – eg paracetamol, ibuprofen
- Mode of action discovered by John Vane, 1971 – COX inhibitors
- Continuing discoveries relating to aspirin, some useful and patented ....
- ... and some not all good (linkage by Starko (2009) to increased death rate of post-WWI influenza epidemic sufferers)
“The Amazonian Indians have known for centuries that cinchona bark can be used to treat malarial and other fevers. They used it in the form of powdered bark. In 1820, French scientists discovered that the active ingredient, an alkaloid called quinine, could be extracted and used more effectively in the form of sulphate of quinine. In 1944, the structure of the alkaloid molecule ($C_{20}H_{24}N_2O_2$) was discovered. This meant that the substance could be synthesised.

“Does the Indian know about quinine? My Lords, under the description of a quality of the bark which makes it useful for treating fevers, he obviously does. I do not think it matters that he chooses to label it in animistic rather than chemical terms. He knows that the bark has a quality which makes it good for fever & that is one description of quinine.”
PART FOUR: BRANDING
Authenticity/Certification?

+ But are moral rights sufficient?

+ How can we tell the painting opposite is a genuine Aboriginal painting? What if the painting is labeled as one from the Ganalbingu Tribe – what can they do?
Mis-Use of Symbols, Names and Images

- **Canada**: names of First Nations, such as Algonquin, Mohawk, Haida and Cherokee, as well as symbols such as Indian heads, tepees or tomahawks, are used as trade marks by many non-Aboriginal companies to market products ranging from firearms and axes to tobacco, gasoline and cars.

- **United States**: estimated that more than 2,600 high school, college or professional teams have used Native American names and images as mascots, logos and team names.

- **New Zealand**: use of Maori and Polynesian names for a range of toys by Lego; the use of Māori imagery by Sony Playstation in a game called the Mark of Kri; the reproduction of various New Zealand icons, such as a hei tiki (greenstone pendant personifying a human ancestor); the use of tāmoko (Māori facial tattoo) on the boot of a Ford truck; the use of the words ‘MAORI MIX’, together with a quasi-Māori design and a map of New Zealand, by tobacco company Philip Morris to market cigarettes in Israel; the use of Māori imagery in the fashion industry: Paco Rabanne’s Spring 1998 collection featuring two models wearing metal outfits reproducing a stylised moko, to name only a few.
Traditionally performed by the All Blacks, New Zealand's international rugby union team, as well as the Kiwis, New Zealand's international rugby league team

Ngati Toa attempted to trademark Ka Mate to prevent its use by commercial organisations without their permission; the IP office of NZ refused as Ka Mate had achieved wide recognition in New Zealand and abroad as representing New Zealand as a whole and not a particular trader/tribe.

For a history of the authorship of the haka, see J Archer, *Ka Mate: Its origins, development and significance*, 2009 (available on internet).
Branding

• Trade Marks/Certification Marks: Eg: The Cowichan Band Council of British Columbia is famous for its Cowichan sweaters which are hand-knit from ancient designs. The yarn is hand dyed, using traditional colours. The band registered a certification mark that is used on all Cowichan sweaters and clothing products. This mark helps consumers identify an authentic Cowichan product and protects the Cowichan products against imitation.

Do we Need An International Instrument?
Traditional Knowledge

World Intellectual Property Organization

Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)
Recognise that indigenous peoples and communities consider their cultural heritage to have intrinsic value, including social, cultural, spiritual, economic, scientific, intellectual, commercial and educational values, and acknowledge that traditional cultures and folklore constitute frameworks of innovation and creativity that benefit indigenous peoples and traditional and other cultural communities, as well as all humanity.
Prevent the *misappropriation* and *misuse* of traditional cultural expressions

provide the legal and practical means, including effective enforcement measures, to prevent the *misappropriation* of their cultural expressions and derivatives/adaptations

to control ways in which they are used beyond the customary and traditional context

promote the *equitable sharing of benefits* arising from their use
Traditional Knowledge: WIPO
IGC Draft Definition

• WHAT ARE TRADITIONAL CULTURAL EXPRESSIONS?

• Traditional knowledge means knowledge including know-how, skills, innovations, practices, and learning which is collectively generated, preserved and transmitted in a [traditional] and intergenerational [context] within an indigenous or local community.
Traditional Knowledge: WIPO IGC
Draft Definition I

- WIPO SAYS: the products of creative intellectual activity, including individual and communal creativity

- DOES THIS MEAN THEY ARE COPYRIGHT WORKS?

- IF COMMUNAL, IS IT JOINT AUTHORSHIP? COLLECTIVE WORKS?

- WHO OWNS IT?

- THE INDIVIDUAL?

- THE TRIBE?

- THE NATION?
WIPO DEFINES BENEFICIARY

- holders of traditional knowledge [who generate, promote, protect, preserve and transmit knowledge in a traditional and [or] intergenerational context INCL:

- Indigenous peoples, local communities [and nations] [family or individuals.] and other particular names contained in the domestic legislation of the parties

- where the traditional knowledge holders are unknown, State as their legal representative

(SERIOUSLY – the State??)
Traditional Cultural Expressions: WIPO IGC Draft Definition II

+ WIPO SAYS: indicative of *authenticity of the cultural and social identity* and cultural heritage of indigenous peoples and communities and traditional and other cultural communities

+ THIS SOUNDS LIKE TRADE MARKS: IDENTITY AND ORIGIN

+ SHOULD THEY BE REGULATED WITH CERTIFICATION MARKS – EG MAORI ART WORKS IN NEW ZEALAND
Traditional Knowledge: WIPO IGC
Draft Definition III

+ WIPO SAYS: “maintained, used or developed by indigenous peoples and communities and traditional and other cultural communities, or by individuals having the right or responsibility to do so in accordance with the customary land tenure system/law or normative systems or traditional/ancestral practices of those indigenous peoples and communities and traditional and other cultural communities, or has an affiliation with an indigenous/traditional community”

+ DOESN’T THIS SOUND LIKE LAND LAW? CUSTOMARY LAW? WHY IS THIS PART OF INTELLECTUAL PROPERTY LAW?
any distortion, mutilation or other modification of, or other derogatory action in relation to, the traditional cultural expressions, done in order to cause harm thereto or any action that may be prejudicial to the expressions, that would offend against or would damage the reputation, customary values or cultural identity or integrity of the community, to the reputation or image of the community, indigenous peoples and communities or region or nation to which they belong or any action that may be prejudicial to the expressions that would offend against or would damage the reputation, customary values or cultural identity or integrity of the community.
WIPO IGC Draft Rights

- The reproduction, publication, adaptation, broadcasting, public performance, communication to the public and fixation of TCEs or adaptations thereof

- Any use of the traditional cultural expressions or adaptation thereof which does not acknowledge in an appropriate way the indigenous peoples and communities and traditional and other cultural communities or the nation as the source or owner of the traditional cultural expressions, except where omission is dictated by the manner of the use
“...endure for as long as the traditional cultural expressions continue to meet the criteria for protection”

“...in so far as secret TCEs/ are concerned, their protection as such shall endure for so long as they remain secret”

“the protection granted to TCEs against any distortion, mutilation or other modification or infringement thereof, done with the aim of causing harm thereto or to the reputation or image of the community, indigenous peoples and communities or region to which they belong, shall last indefinitely.”
Criticisms of WIPO Efforts

- After twenty two sessions of the IGC, no agreement is in view even with regard to the key objectives and principles of the new TCE (and TK) instrument.

- Views diverge between indigenous and non-indigenous stakeholders and often even between indigenous communities.

- For indigenous peoples, one central question is whether the new instruments should also extend to TCEs and TK of a non-indigenous origin.

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The “intangible cultural heritage”, as defined in paragraph 1 above, is manifested inter alia in the following domains:

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(b) *performing arts*;

(c) *social practices*, rituals and festive events;

+ *knowledge and practices* concerning nature and the universe;

(d) *traditional craftsmanship*. 