Preface

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Traditional cultural expressions (TCE; also referred to as “expressions of folklore”) form an essential part of indigenous communities’ identity and heritage, and their protection and promotion are closely linked to sustaining and furthering cultural diversity. The discussions regarding the protection of knowledge and creativity of indigenous communities have gained particular prominence during the last couple of decades, both in academic and policy-making circles. This enhanced interest is partly a response to diverse negative effects of economic globalisation upon indigenous communities, and more importantly to the potential dangers of illicit appropriation and commercialisation of TCE by globally acting corporate powers. In addition, new technologies, as the epitome of globalisation forces, have often been singled out as a specific peril for TCE and as an inhibitor of their protection.

Despite the wide acknowledgement of the value of TCE and the need to safeguard their creative continuity, modern law has not been able to address the pertinent issues in a comprehensive manner, and the attempts to create solutions, be they legal or political, have suffered from the fragmentation of international law in intellectual property, cultural, economic and human rights regimes. The reasons for this fragmentation and the failure of the international community to put in place appropriate instruments for protection of TCE are due not only to collisions between competing regulatory regimes, but also to collisions between global communication systems (such as the law or the economy) and local traditions inherent to the TCE issues. Indigenous communities have criticised attempts to regulate TCE at the global, regional or national levels as being unable to reconcile the interests of a modern society with their traditional customs and laws. Their counter-suggestion, however, which is to rely upon customary law as a basis for indigenous self-determination, appears to be in conflict with the primacy and universality of internationally recognised human rights standards.

The collisions between competing regulatory regimes and between global law and local traditions have been particularly intensified by the ever-expanding digital environment, characterised by a plethora of content distribution platforms and networks. Indeed, the ability of the digital mode to express any type of information in a line of zeroes and ones and to transport this information

instantaneously puts the TCE debates into a new perspective, creating additional challenges, but perhaps also new opportunities.

Against the above backdrop, the objective of the present book is twofold. First, it seeks to examine the collisions between the global and the local within a truly transdisciplinary selection of topics. To this end, it offers a unique combination of approaches of history, philosophy, anthropology, social theory and law. This allows for a comprehensive analysis of the entangled TCE issues from a polycontextural perspective and paves the way for a discussion of the policy proposals recently put forward at the international level. Only a methodology such as this could also secure the conditions for achieving more coherence among the evolving regulatory frameworks and for eventually pinpointing models of effective and efficient protection of TCE. In this spirit, the first part of the book outlines the divergent perspectives of global law and local traditions, and the collisions thereof, from the viewpoint of the historian Monika Dommann and subsequently and thought-provokingly through an application of the instruments of legal sociology, presented by Gunther Teubner and Andreas Fischer-Lescano. The second part follows with discussions of human rights and intellectual property, which are core issues in any analysis of TCE. While Elizabeth Burns Coleman questions the nature of cultural rights as human rights from the standpoint of anthropology and political philosophy, Fiona Macmillan deals with the same topic as a legal scholar, both analysing and challenging conventional positions. Christoph Beat Graber then suggests a novel approach based on the institutional dimension of human rights to tackle the double fragmentation of TCE, and puts forward a procedural solution for reconciling collisions between IP law and indigenous customs. In order to reveal the collisions between competing regulatory regimes, the third part of the volume offers a detailed analysis of the intellectual property law and policy and the current state of play in the different fora creating rules relevant to TCE. Martin Girsberger shows the incredible divergence of these rules and the difficulty of identifying common concepts. Wend Wendland of the World Intellectual Property Organization (WIPO) analyses the work done within the most important forum elaborating TCE rules, namely WIPO's Intergovernmental Committee on Intellectual Property, Genetic Resources, Traditional Knowledge and Folklore, and outlines the chances of establishing an international legal instrument for the protection of TCE. Finally, against the background of the WIPO Secretariat's recently proposed draft provisions, Johanna Gibson offers a fresh and stimulating view of the relationship between land, tradition and intellectual property rights from the perspective of the theory of intellectual property law.

The second, distinct objective of this publication is to extend the scope of reflection of conventional TCE enquiries to a consideration of the specific features of the new digital environment – an environment that profoundly

changes the way we distribute information and communicate, and ultimately affects the relationships between the centre and the periphery in the global society. Although admittedly this new digital environment raises the risks of misappropriation of traditional knowledge and creativity, it may equally offer new opportunities for traditional communities to communicate and to actively participate in trade in cultural expressions of various forms thus revitalising indigenous peoples' values and providing for sustainability of TCE. In this sense, Mira Burri-Nenova explores the intrinsic features and new dynamics of the digital networked environment and outlines some possibilities for protecting and above all promoting TCE through an application of a multi-faceted toolbox mobilising the potential of digital technologies. Herbert Burkert follows with his intriguing analyses of how international lawmaking has reacted to and employed information and communication technologies, and looks into the relation of this policy and of law-making processes to the protection of TCE. Miriam Sahlfeld's contribution tackles the relationship between TCE and development, which is another important and often politicised theme in the TCE context. She investigates the latter not in the sense of development of TCE but rather of development by means of TCE and looks into their impact on economic, social and human development. Christoph Antons deepens the analysis of the development aspect of TCE with a comparative perspective inspired by concrete examples from Australia and Southeast Asia.

The present book is the outcome of an international symposium organised in June 2007 by the research centre i-call (International Communications and Art Law Lucerne) of the University of Lucerne within the framework of the eDiversity project. This project, focusing on the legal protection of cultural diversity in a digital networked environment, is a part of the Swiss National Centre of Competence in Research (NCCR): Trade Regulation, funded by the Swiss National Science Foundation.

It is our hope, as editors, that the unique combination of viewpoints and methods presented here will stimulate a more comprehensive debate on the protection and promotion of TCE and reveal novel ways of approaching these complex issues in practice.*

* By way of guidance to the readers, it should be noted that all websites, except otherwise specified, were last accessed on 1 January 2008. For readers' convenience, the most pertinent and often referred to excerpts of WIPO documents have been reproduced at the end of the volume. The editors thank Susan Kaplan, Jane Müller and Thomas Steiner for their valuable assistance.