1. General introduction

Over the past few decades, the protection of traditional cultural expressions (TCEs) has generated lively debates within the international community and the questions of whether TCEs should be protected by intellectual property rights (IPRs), and if so how, have been of increasing practical concern for TCEs holders and national policy-makers in various countries. To date, however, work on the protection of TCEs has progressed slowly, and little has emerged in the way of concrete, binding law. Moreover, those instruments proposed as solutions appear unable to meet the whole range of concerns raised by TCEs holders and culturally-rich developing countries.

Concerns raised by TCEs holders can be classified into four main categories. First, they stress the difficulties they encounter in preventing and/or controlling the commercial use of their TCEs by third parties and in benefiting from this commercialisation themselves. Secondly, they express concerns about the inappropriate and offensive use of their TCEs. Thirdly, they wish to be attributed for their TCEs, as well as have the possibility to object to any false attribution. Finally, they emphasise the need to ensure the identification and preservation of existing TCEs, as well as their promotion, dissemination and continued evolution.

The protection of TCEs was initially envisaged on a copyright model, because of the similarity of subject matter between copyright law and TCEs. However, although copyright law seems well suited to meet some of the needs and objectives of TCEs holders, it is limited in its potential for protecting TCEs.

This study argues that ‘origin related intellectual property rights’, such as trade marks, certification and collective marks and geographical indications, as well as passing off and laws against misrepresentation, appear to be conceptually best suited for the protection of TCEs, because of their specific nature and characteristics. Such characteristics include the fact that they are usually produced within a community, which is often linked to a specific place, and according to traditional methods and know-how transmitted from generation to generation, often using raw material from sustainable resources. In addition, this method of protection also seems to accommodate the fact that TCEs are usually already in the public domain and to take into consideration some of the aims of TCEs holders, such as the fact that they would like a protection that is unlimited in time.
It will demonstrate that a system of protection based on origin related IPRs could offer practical advantages for TCEs holders since such category of rights used as such or with minor adaptations would enable them to obtain quick, practical and effective protection. In addition, there would be no need for the creation of a new *sui generis* intellectual property (IP) or IP related system, which would take a long time to establish and may not be politically feasible anyway. The proposed approach would admittedly not address all the concerns of TCEs holders, but it would provide a balanced and workable compromise solution that could satisfy most of their concerns and policy objectives.

In order to support this proposition, it is necessary (i) to identify the needs and expectations of TCEs holders; (ii) to examine and compare policy options that have been adopted at the national, regional and international levels for the protection of TCEs; and (iii) based on this information, to identify the policy approach that would satisfy those needs and expectations best.

Due to the multi-faceted nature of TCEs, their broad geographical reach and the wide range of concerns, which can vary from one traditional community to the other, it is not possible to provide an exhaustive study of all policy approaches or legal provisions that have been proposed or adopted, nor probably to find a one-size-fits-all approach to the protection of TCEs. In this view, the study presents a selection of case studies to better illustrate the main policy approaches. The case studies have been selected as test-sites for the proposition because they provide particularly significant illustrations of certain types of TCEs protection and because, together, they represent a wide range of perspectives, interests and concerns of TCEs holders.

Finally, it should be noted that it is not within the scope of this study to discuss whether or not TCEs should be protected but rather to identify what is the best option for their protection within IP or IP related systems.

### 1.1 TERMINOLOGY, DEFINITION AND CHARACTERISTICS OF TCES

Over the years, various terms have been used to describe the subject matter that is the object of this book. These include, but are not limited to, ‘folklore’, ‘traditional cultural expressions’, ‘expressions of folklore’, ‘indigenous cultural and intellectual property’, ‘indigenous heritage’ and ‘traditional knowledge’. The terminology used varies depending on the region and/or the traditional communities using it.

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1 Terminological issues have been discussed by various academics and commentators. See for example Michael Blakeney, *The Protection of Traditional*
While this book uses the words ‘traditional cultural expressions’ as a working term, it should be noted that this is not an internationally agreed term and that the terminology in this area is still under discussion in a number of national, regional and international fora.

Similarly, various definitions have been proposed at the national, regional and international level to describe the subject matter of TCEs. There is not, at the present time, an agreed legal definition of TCEs. Defining TCEs is a complex and subjective task, which varies depending on the region and the traditional community or body from which the definition emanates. Potentially, TCEs encompass a wide variety of customs, traditions, forms of artistic expressions, knowledge, beliefs, products and processes of production that originate from many societies throughout the world.

Over the past few years, the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore has continuously developed and refined a proposed definition of TCEs. Its current version is set out in Article 1 of the Substantive Provisions of the WIPO Revised Provisions for the Protection of Traditional Cultural Expressions/Expressions of Folklore. It provides that:

(a) ‘Traditional cultural expressions’ or ‘expressions of folklore’ are any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested, and comprise the following forms of expressions or combinations thereof:
   (i) verbal expressions, such as stories, epics, legends, poetry, riddles and other narratives; words, signs, names, and symbols;
   (ii) musical expressions, such as songs and instrumental music;
   (iii) expressions by action, such as dances, plays, ceremonies, rituals and other performances;
   whatever or not reduced to a material form; and

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2 At places, different terms may be used when discussing legal provisions using such terms. Similarly, this study uses both the terms ‘TCEs holders’ and ‘indigenous or traditional communities’, to designate the groups seeking TCEs protection.

3 Although the protection of TCEs appears to be an issue that primarily concerns indigenous groups in developing countries, many indigenous communities in developed countries, such as Australia, New Zealand, Canada and the United States, maintain equally strong TCEs.
(iv) tangible expressions, such as productions of art, in particular, drawings, designs, paintings (including body-painting), carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, baskets, needlework, textiles, glassware, carpets, costumes; handicrafts; musical instruments; and architectural forms; which are:

(aa) the product of creative intellectual activity, including individual and communal activity;

(bb) characteristic of a community’s cultural and social identity and cultural heritage; and

(cc) maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of that community.

(b) The specific choice of terms to denote the protected subject matter should be determined at the national and regional levels.

This definition draws upon the 1982 WIPO–UNESCO Model Provisions for National Laws for the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Action, the more recent 2002 Pacific Islands Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture, as well as existing national copyright laws which provide *sui generis* protection for TCEs.

As highlighted in the proposed definition, TCEs refer to products of creative intellectual activity. It is generally accepted that TCEs have been handed down from one generation to another, reflect a community’s history, values and cultural and social identity, and consist of characteristic elements of a community’s heritage. TCEs are often made using raw materials from sustainable resources and are constantly evolving and developing. In many cases, it is difficult or impossible to identify a specific author or authors, especially in relation to the oldest, pre-existing and collective TCEs. However, TCEs also include contemporary expressions of traditional culture, which are constantly recreated, reinterpreted and adapted by traditional communities and artists in response to their environment, and in relation to which it may be possible to identify an author. Often, however, these contemporary creations are regarded by a community as identifying and reflecting its traditions, values and beliefs, and thus as being owned by that community and falling within a shared sense of communal responsibility, identity and custodianship.
1.2 CONCERNS AND POLICY OBJECTIVES OF TCES HOLDERS

Initiatives for the protection of TCEs reflect a wide range of concerns and policy objectives, which may differ across regions and/or traditional communities. The main concerns and policy objectives of TCEs holders may, however, be classified into the following categories.

1.2.1 Economic Interests and Commercial Use

TCEs holders stress the difficulties they encounter in preventing and/or controlling the commercial use of their TCEs by third parties and in benefiting from this commercialisation themselves. Although little statistical and economical data exists on the valuation of TCEs, it is generally accepted that they substantially contribute to the economy in a range of industries, such as arts and crafts, tourism, advertising, music, film, television and the export industry. Many traditional communities rely on TCEs to generate income. They are concerned that allowing imitation products to compete in the marketplace may deprive them of a reliable source of income, and that the commercial use of TCEs on consumer products, when undertaken by others, may deny them that future use.

1.2.2 Inappropriate or Offensive Use

Inappropriate or offensive use may take various forms:

- **Distortion**: distortions of TCEs often occur when TCEs are adapted for marketing purposes without the consent of traditional communities. Such distortions are often considered inappropriate, disrespectful, and at times offensive.

- **Disclosure and sacred nature**: TCEs holders emphasise the often sacred and cultural significance of TCEs and the fact that using TCEs outside their traditional context, and in ways contrary to customary laws, may cause great offence and undermine the social organisation of traditional communities. In traditional communities, TCEs relating to sacred sites, objects, designs, religious ceremonies and initiation rituals

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7 See Palethorpe and Verhulst, *supra* note 1, 14.
are often an important element of the communities’ social dynamic. The public disclosure of such materials, which may reach those not permitted for cultural reasons to know about or view such materials, may undermine the social organisation of such communities.

- **False connection**: in some industries, it has become common practice to promote non-indigenous products and businesses by using indigenous or traditional names or signs as brand names, trade marks and business names. TCEs holders are concerned that this practice misleads consumers by falsely suggesting a connection with the community and leads them to believe that the business is owned and run by indigenous people or that benefits flow back to indigenous or traditional communities. In addition, TCEs as such are often incorporated into souvenirs and other domestic consumer products ranging from items of clothing, wall hangings, etc., regardless of their significance to the beliefs of the originating culture.

- **Derogatory, libellous, defamatory or fallacious uses**: TCEs holders wish to object to any derogatory, libellous, defamatory or fallacious use of their TCEs.

### 1.2.3 Attribution

Traditional communities would like the right to be attributed for their TCEs, as well as the possibility to object to any false attribution. The latter issue arises, for example, where imitation products are presented as genuine TCEs in the marketplace. This phenomenon has increased in recent years as a result of a growing interest in the culture of traditional communities, the demand for their cultural products and the development of international travel and tourism.

The question of attribution also deals with another problem: the difference over property regimes. Most cases dealing with TCEs involve the concept of communal property over TCEs, whereas Western property theories tend to focus on the individual.

### 1.2.4 Identification, Preservation and Promotion

TCEs holders wish to ensure the identification and preservation of existing TCEs, as well as their promotion, dissemination and continued evolution. They fear that the gradual incorporation of TCEs into the cultures of others and their distortion from their original form might have potentially detrimental effects on their culture and may disrupt its continued evolution. Furthermore, they consider that TCEs are a valuable means of promoting a sense of cohesion and identity and should therefore be preserved.
1.3 CURRENT LEGISLATIVE BACKGROUND: THE PROTECTION OF TCES IN THE INTERNATIONAL ARENA

The protection of TCES has generated lively debates within the international community and the questions of whether TCES should be protected by intellectual property rights, and if so how, have been on the international agenda since the 1970s. The World Intellectual Property Organisation (WIPO) began to explore the field of TCES in 1978. It convened three meetings of experts in cooperation with the United Nations Educational, Scientific and Cultural Organisation (UNESCO) that led to the adoption in 1982 of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (‘the Model Provisions’). The Model Provisions were adopted following agreement that: (i) adequate legal protection of folklore was desirable; (ii) such legal protection could be promoted at the national level by model provisions for legislation; (iii) such model provisions should be so elaborated as to be applicable both in countries where no relevant legislation was in force and in countries where existing legislation could be further developed; (iv) the said model provisions should allow for protection by means of copyright and neighbouring rights where such form of protection could apply; and (v) the model provisions for national laws should pave the way for sub-regional and international protection of creations of folklore.

The Model Provisions, which consist of 14 sections, established a sui
generis system of intellectual property-type protection for expressions of folklore. Their aims reflected the necessity to maintain an appropriate balance between protection against abuses of expressions of folklore, on the one hand, and freedom and encouragement of their further development and dissemination on the other. Following their adoption, some countries have used, to some or other degree, the Model Provisions as a basis for national legal regimes for the protection of folklore, however the Model Provisions have not had an extensive impact on national legislation. Reasons for that include the use of the term ‘expressions of folklore’ and the scope of the term as used in the Model Provisions; the nature and scope of the rights granted over expressions of folklore by the Model Provisions, and the possibility that the Model Provisions may be out of date due to technological, legal, social, cultural and commercial developments since 1982.

In April 1997, the UNESCO/WIPO World Forum on the Protection of Folklore was held in Phuket, Thailand. During the meeting, needs and issues related to intellectual property and folklore, as well as views and experiences were identified and discussed by the participants. The meeting adopted a Plan of Action which stated that:

11 The Model Provisions were criticised for addressing only one part of the problem of safeguarding folklore by concentrating on the sole use of IPRs as a tool of protection. See Janet Blake, Preliminary Study into the Advisability of Developing a New Standard-Setting Instrument for the Safeguarding of Intangible Cultural Heritage: Elements for Consideration (Paris, 2002) 19.

12 The Model Provisions were developed in response to concerns that expressions of folklore were susceptible to various forms of illicit exploitation and other prejudicial actions. In particular, it was feared that the dissemination of expressions of folklore might lead to improper exploitation of the cultural heritage of a nation and that any abuse of a commercial or other nature or any distortion of expressions of folklore was prejudicial to the cultural and economic interests of the nation. In addition, it was considered that protection of expressions of folklore had become indispensable as a means of promoting further development, maintenance and dissemination of those expressions. See Preamble to the Model Provisions.

13 These countries include Burkina Faso, Ghana, the Islamic Republic of Iran, Kenya, Mexico, Mozambique, Namibia, Panama, Senegal, Togo, the United Republic of Tanzania. Some other countries including Ghana, the United States and Venezuela, have stated that while their laws were not directly based on the Model Provisions, they coincided with the principles of the Model Provisions. See Detailed Statistics and Summary of Responses Received to the Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Document WIPO/GRTKF/IC/3/10 ANNEX I, 2–3.

The participants were of the view that at present there is no international standard protection for folklore and that the copyright regime is not adequate to ensure such protection. They also confirmed a need to define, identify, conserve, preserve, disseminate, and protect folklore which has been a living cultural heritage of great economic, social, and political significance from time immemorial. They emphasized the importance of striking a good balance of interests between the community owning the folklore and users of expressions of folklore. They were convinced that closer regional and international cooperation would be vital to the successful establishment of a new international standard for the protection of folklore.  

The Plan of Action suggested, *inter alia*, that a committee of experts be set up and that regional consultative fora should take place. Following the Forum, in 1999 WIPO and UNESCO organised four Regional Consultations on the Protection of Folklore. Each of the Regional Consultations adopted resolutions or recommendations which identified intellectual property needs and issues, as well as proposals for future work, related to TCEs.

In 1998, WIPO began a new set of activities designed to explore the intellectual property aspects of the protection of TCEs with the objective ‘to identify and explore the intellectual property needs and expectations of new beneficiaries, including the holders of indigenous knowledge and innovations, in order to promote the contribution of the intellectual property system to their social, cultural and economic development’. To this end, WIPO conducted a series of fact-finding missions between 1998 and 1999 to identify the intellectual property related needs and expectations of traditional knowledge (TK) holders.

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16 Ibid.

17 The regional consultations were held for African countries in Pretoria, South Africa in March 1999; for countries of Asia and the Pacific region in Hanoi, Vietnam in April 1999; for Arab countries in Tunis, Tunisia in May 1999 and for Latin America and the Caribbean in Quito, Ecuador in June 1999.

18 Resolutions and recommendations were addressed to states, and to WIPO and UNESCO. For a detailed account of the resolutions and recommendations, see WIPO-UNESCO African Regional Consultation on the Protection of Expressions of Folklore, Document WIPO-UNESCO/FOLK/AFR/99/1; WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Arab Countries, Document WIPO-UNESCO/FOLK/ARAB/99/1; WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Countries of Asia and the Pacific, Document WIPO-UNESCO/FOLK/ASIA/99/1; and WIPO-UNESCO Regional Consultation on the Protection of Expressions of Folklore for Latin America and the Caribbean, Document WIPO-UNESCO/FOLK/LAC/99/1.

19 See Main Program 11, WIPO Program and Budget 1998–1999.

20 Nine fact-finding missions were conducted in 28 countries and indigenous and local communities, non-governmental organisations, governmental representatives, academics, researchers and private sector representatives were consulted on that occasion. See WIPO Report, *supra* note 6.
In September 2000, WIPO’s Member States established an Inter-governmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (‘the IGC’). The IGC met for the first time from 30 April to 3 May 2001 and held its 13th session from 13 to 17 October 2008. The initial mandate from the WIPO General Assembly required the IGC to meet semi-annually for two years to study and make recommendations for action to the General Assembly. This mandate was subsequently renewed in 2003, 2005 and 2008.

Over the years, the IGC has extensively reviewed legal and policy options for the protection of TCEs. Its work has included a comprehensive analysis of existing national and regional mechanisms for the protection of TCEs and surveys of policy frameworks available for the protection of TCEs, including conventional or general IP regimes, as well as new sui generis systems. In addition, it has carried out and commissioned various case studies and organised panel presentations on diverse national experiences.

The work of the IGC has led to the development of a set of draft provisions, which suggest possible international objectives and principles for the protection of TCEs. The draft provisions draw upon a wide range of community,

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22 At the first session of the IGC, Member States indicated a need for further information on national experience with the protection of TCEs. Accordingly, the Secretariat prepared and issued a Questionnaire on National Experiences with the Legal Protection of Expressions of Folklore, Document WIPO/GRTKF/IC/2/7. The questionnaire was completed by 64 states. See Final Report on National Experiences with the Legal Protection of Expressions of Folklore, Document WIPO/GRTKF/IC/3/10.


24 See for example Terri Janke, Minding Culture: Case Studies on Intellectual Property and Traditional Cultural Expressions (WIPO: Geneva, 2003); Valsala Kutty, National Experience with the Protection of Traditional Cultural Expressions/Expressions of Folklore: India, Indonesia, the Philippines (WIPO: Geneva, 1999).

25 See WIPO, Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions/Folklore, Information Resources (WIPO: Geneva, 2006). The draft provisions are also available as working documents for the IGC. The latest version of the draft provisions has been issued in Document WIPO/GRTKF/IC/11/4(c). A supplementary study describing how these objectives and principles have been adopted and implemented at regional and national levels is available in Document WIPO/GRTKF/IC/9/INF/4. In addition, a table of written comments on the revised draft objectives and principles provided between the ninth and tenth sessions of the IGC is available in Document WIPO/GRTKF/IC/11/4(b).
national and regional experiences, and have been developed over several years by and in consultation with WIPO Member States, indigenous people and other traditional communities, civil society organisations and a range of other interested parties. While the draft objectives and principles have no formal status, they illustrate some of the perspectives and approaches that are guiding work in this area, and could suggest possible frameworks for the protection of TCEs against misappropriation and misuse. To date, the drafts have not been adopted or endorsed by the IGC, but may be developed further in future sessions of the IGC. More importantly, they are being used as points of reference in a range of national, regional and international policy discussions and standard-setting processes.26

26 See www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.html