

We work in a field based in history and preservation, access and control, Commons and Intellectual Property. However, many of these concepts are borne from the Western Enlightenment and for years explorers of the world, as well as researchers and archivists, have taken Indigenous and Aboriginal people's cultural output and misappropriated them. This is not always intentional or malevolent, but in this author's opinion stems from an Imperialistic mind frame that sets these works outside of value (monetary or cultural) of the peoples it comes from and plants them firmly in a cultural Orientalism that creates new value with identifiers such as "Authentic", "Aboriginal", or even "Spiritual" that makes them desirable to collectors or mid American housewives who want a touch of Other in their living room. These appropriated items or ideas are known as Traditional Knowledge and in our field specifically it usually takes the form of Traditional Cultural Expressions. Let us look to the Hopi Cultural Preservation Office's statement on Intellectual Property Rights:

Through the decades the intellectual property rights of Hopi have been violated for the benefit of many other, non-Hopi people that has proven to be detrimental. Expropriation comes in many forms. For example, numerous stories told to strangers have been published in books without the storytellers' permission. After non-Hopis saw ceremonial dances, tape recorded copies of music were sold to outside sources...Although the Hopi believe the ceremonies are intended for the benefit of all people, they also believe benefits only result when ceremonies are properly performed and protected.¹

Worse still are that these images may be seen by people that were not meant to be seen, in this instance non-Hopi, other tribes, or even Hopi youth not meant to know the information shown or given. We are in an age of increasing globalization and

¹ <http://www.nau.edu/~hcopo-p/intellectPropRights.html>

technological progress, and now concepts of intellectual property are fought over and argued about with greater fervor than perhaps any other period in human history. We also have changing concepts of anthropology and with increased interaction between Indigenous peoples and the rest of the world these issues are creating many debates around the legal, economic, social, political and often moral problems of using Traditional Knowledge and most importantly an ever-increasing debate over who owns it. This paper seeks to begin to define traditional knowledge and traditional cultural expression and explore the history of international legislation and the attempt at forming sui generis systems for its protection.

First let us attempt to define our terms in order to find out what is to be protected. Traditional knowledge is an expression of the cultural identity and knowledge traditions of indigenous and local communities. This can be ecological, environmental, agricultural or biological knowledge and is often attached to a spiritual or cultural legal systems as well as forming part of the culture's worldview. "[Traditional knowledge] also has a strong practical component, since it is often developed in part as an intellectual response to the necessities of life."² It is this practicality that often puts it at odds with the world outside of the community who wish to patent and use this knowledge for gain. Let us take yoga as an example a traditional knowledge product of India that has become increasingly popular in the West as a form of exercise. According to an article in The Telegraph in "the United States alone, there have been more than 130 yoga-related patents, 150 copyrights

² WIPO Intellectual Property and Traditional Knowledge, pg. 1.

and 2,300 trademarks.”³ In India however it is considered a collective knowledge and one that is often taught free of charge and the rampant attempt to patent these ancient poses caused India to begin the Traditional Knowledge Digital Library where they have documented various poses and scanned ancient texts in order to register each pose as part of India’s cultural heritage. It also seeks to help foreign patent granting bodies understand Indian systems of medicine and makes this information available in English, French, Spanish, German, and Japanese in patent application format.⁴ This they hope will help to prevent exploitation at the hands of over zealous new age gurus hoping to get rich quickly at the expense of the very thing they claim to espouse.

Traditional knowledge is especially contentious in the biochemical and pharmaceutical industry. In his paper “Who Owns Traditional Knowledge?” Ajeet Mathur attempts to broadly define the nature of traditional knowledge in order to find both its best use and value in the following taxonomy using the criteria of antiquity (contemporary or non-contemporary) or embeddedness (tangible or intangible) in the following table which is used here as an easy to understand example of the complexity involved in traditional knowledge as it relates to patent rights.

Table 1. Taxonomy of Traditional Knowledge⁵

Traditional Knowledge	Contemporary	Non-Contemporary
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³ <http://www.telegraph.co.uk/news/worldnews/asia/india/4783753/India-moves-to-patent-yoga-poses-in-bid-to-protect-traditional-knowledge.html>

⁴ <http://www.tkdil.res.in/tkdil/langdefault/common/Faq.asp?GL=Eng>

⁵ Mathur, pg. 7

Tangible	(1) Neem packaged as tooth paste	(2) Neem twig for dental care
Intangible	(3) Neem for calcium absorption in mammalian bone tissue	(4) Neem as anti-septic

Mathur uses neem as it has been the subject of at least 153 patents and they are all use what he claims as “public domain traditional knowledge as the starting point”⁶ and shows what he separates into four categories of traditional knowledge. In his view category 1 is only patentable if synthesized because the knowledge is not significantly changed and only the process of synthesizing the neem is patentable. Category 2 is placed squarely within the public domain as it is diffused directly from traditional knowledge. Category 3 is patentable (and perhaps even protected under trade secrets) as it has been significantly changed in an inventive way. All three of these can work with international systems of copyright and intellectual property. Category 4 however is difficult as it cannot be patentable unless added to in a significant way and the value would vary: if underused it would be very little but exploitation, even if the value was large, would eventually drive the value to zero if the resource is exhausted. Mathur argues that unless “the value of the information inside the community to the holders and to their competitors, if any”⁷ or “the amount of effort or expenditure in money required by the holders to care for and keep developing such knowledge”⁸ are prohibitively high the knowledge may be

⁶ Ibid. pg. 7.

⁷ Ibid. pg. 9.

⁸ Ibid. pg. 9.

better to be shared in a non-competitive way and remain non-excludable.⁹ Now this is a simplification of a tremendously complicated concept but it suits this paper's goal in helping to define the stakes at hand for traditional knowledge.

As we have seen the concept of traditional knowledge is complex and diverse encompassing many different forms and is the substance of traditional innovations, information, practices, and skills. These elements are often passed down and connected to traditional cultural expressions (also known as expressions of folklore) in forms like songs, chants, narrative tales, and designs. For example a tool may be the embodiment of some form of traditional knowledge but its design and any ornamentation may be seen as a cultural expression. Thus many communities view both traditional knowledge and traditional cultural expressions as parts of a whole.¹⁰ Characteristically these expressions of folklore, the term used most often in international discussions and national laws,¹¹ are part products of inter-generational and fluid social/communal creative processes. They are usually handed down inter-generationally orally or through imitation, they reflect cultural and social identity, they consist of elements of cultural heritage, are made by communities or by individuals recognized as having the right or permission to create them, they are not inherently commercial in nature, and they are constantly evolving, developing and being recreated within the community.¹² In many ways they represent a traditional reflection of what the remix community and creative

⁹ Ibid. pgs. 7-10.

¹⁰ WIPO Intellectual Property and Traditional Knowledge Booklet no 2, pg. 4.

¹¹ WIPO Intellectual Property and Traditional Cultural Expressions/Folklore Booklet no 1, pg. 2.

¹² Ibid. pg. 5.

commons is attempting to achieve. A fluid cultural exchange of ideas and expression that evolves from past work and creates new and more relevant work as time goes on. In this way it is largely a disservice to the community to identify these works as ancient or part of antiquity as they reflect complex social matrices of creation and to view them any other way denigrates the importance and current relevance of the works.

It should also be pointed out that because of this perception of antiquity traditional cultural expressions are often considered public domain under conventional intellectual property law. The problem lies in that there is no agreed upon definition of public domain, although World Intellectual Property Organization (WIPO) defines it as “the scope of those works and objects of related rights that can be used and exploited by everyone without authorization, and without the obligation to pay remuneration to the owners of copyright and related rights concerned- as a rule because of the expiry of their term of protection or due to the absence of an international treaty ensuring protection for them in the given country.”¹³ The concern here is that rights to these materials, including sensitive and spiritual expression not meant for public access, is usually owned by researchers who recorded the material that archives hold. This is not to say they have copyright over the ritual itself, but the reports on the factual information.¹⁴ These records are often seen as important research for anthropologists and ethnographic fields of study, and archives are responsible for providing that access.

¹³ WIPO “Guide to the Copyright and Related Rights Treaties Administered by WIPO and glossary of copyright and related rights terms”, pg. 305.

¹⁴ Skrydstrup, pgs. 18-19.

This is a distinctly Western concept especially in countries that practice more liberal democratic philosophies. "Free access to information, in other words, is seen as a cornerstone of democracy and a key element of open societies."¹⁵ Indigenous peoples however often have a different attitude toward access, and "the social fabric of native nations often consists of reciprocal spheres of knowledge, the boundaries of which are zealously protected."¹⁶ These boundaries can be drawn between generation, caste, or gender. Western archive practice by tradition does not draw itself along these lines, nor does intellectual property law. Derrida's definition (one of many) of an archive as a site of consignation is particularly apt here:

By consignation, we do not only mean, in the ordinary sense of the word, the act of assigning residence or of entrusting so as to put into reserve (to consign, to deposit), in a place and on a substrate, but here the act of *consigning* through *gathering together signs...* *Consignation* aims to coordinate a single corpus, in a system or synchrony in which all the elements articulate the unity of an ideal configuration. In the archive, there should not be any absolute dissociation, any heterogeneity or *secret* which could separate (*secernere*), or partition in an absolute manner.¹⁷

How is traditional knowledge protected though? How can we make sure the peoples that they came from control these elements? This protection is important in all countries and cultures, but it is imperative in developing and least developed countries. These countries stand the most to lose through cultural imperialism and also misappropriation and exploitation at the hands of developed nations attempting to coerce them into accepting trade agreements that puts their cultural wealth in danger in order to receive international aid or even to enter into the

¹⁵ Brown, pg. 1.

¹⁶ Ibid. pg. 1.

¹⁷ Derrida, pg. 3.

modern global environment. In terms of traditional cultural expressions the archival goal of preservation and safeguarding traditional knowledge is not totally antithetical to protection, but care must be taken. Improper handling or ignorance of the source material (or acting without prior informed consent) can place these objects unintentionally within the public domain. Protection however can take several meanings and all need to be worked on carefully with the indigenous community from which the work comes. There can be intellectual property protection which would prevent others from using it to sell t-shirts or knock-off 'authentic native' art. Protection could also be helping people pass on a dying language or legend within the cultural context of transmission. Protection could take the form of traditional conservation and preservation practices, ensuring the object is used in the correct way by future generations. Yet another use of protection could be access to outside groups in order to promote understanding or respect for the community from which it comes.¹⁸ These myriad ways of protection exemplify the complexities involved in the interaction between the archival community and the cultures where the objects that are kept come from. In general it can be seen that preservation and protection of cultural heritage, the promotion of cultural rights and history, cultural exchange and artistic development, and promotion of the needs or interests of indigenous communities (the broader issues at stake in the traditional knowledge argument) all need to be addressed legally to provide a method for the communities to protect and benefit from their cultural knowledge.

¹⁸ WIPO Intellectual Property and Traditional Cultural Expressions/Folklore Booklet no 1, pg. 11.

In doing research two terms consistently came up: Positive Protection and Defensive Protection. Positive Protection is defined as “the creation of positive rights in traditional knowledge that empower traditional knowledge holders to protect and promote their traditional knowledge.”¹⁹ Defensive Protection is “a set of strategies to ensure that third parties do not gain illegitimate or unfounded IP rights over traditional knowledge/traditional cultural expression subject matter and related genetic resources.”²⁰ A good example of Defensive Protection is India’s Traditional Knowledge Digital Library as it embodies the two major aspects of defensive protection of traditional knowledge: the legal and practical. Legal being “how to ensure that the criteria defining relevant prior art apply to the traditional knowledge”²¹ and the practical being “how to ensure that the traditional knowledge is actually available to search authorities and patent examiners, and is readily accessible.”²² The database creates not only multilingual access to traditional language framed in a language that is easily readable for patent researchers but also is a digital repository of ancient texts in an attempt to define relevant prior art, and while not being the prior art itself define the sources of the prior art “which act as the source of information for TKDL.”²³ Another important approach is requiring that patent applicants would have to disclose traditional knowledge sources within the application. While there are existing requirements in patent law for some of this

¹⁹ <http://www.wipo.int/tk/en/tk/>

²⁰ WIPO/GRTKF/IC/17/INF/13, pg 6.

²¹ WIPO Intellectual Property and Traditional Knowledge Booklet no 2, pg 27.

²² Ibid.

²³ <http://www.tkd.l.res.in/tkd.l/langdefault/common/Faq.asp?GL=Eng>

information²⁴, WIPO wants to further focus requirements to add genetic resources utilized in the development of the application, the country of origin of genetic resources, associated traditional knowledge (including innovations and practices utilized), the source of traditional knowledge, and evidence of prior informed consent.²⁵ The Patent Cooperation Treaty is another WIPO project that aims to provide international search and examination and clarify the validity of an application before national processes even begin.²⁶

Positive protection is something that could be seen to have begun internationally at the Diplomatic Conference in Stockholm for the revision of the Berne Convention for the Protection of Literary and Artistic Works in 1967. However the only outcome for traditional cultural expression was article 15(4)(a), (later added to in the Stockholm Act of 1967 and the Paris Act of 1971)²⁷ which allows for the possibility of protection of “unpublished work 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 who shall represent the author and shall be entitled to protect and enforce his rights in the countries of the Union.”²⁸ This is a start but as a whole it is woefully inadequate as it allows the state to claim responsibility for works and the language used is vague and undefined, and could easily be exploited. The door was opened and the option for extended or adapted

²⁴ WIPO Intellectual Property and Traditional Knowledge Booklet no 2, pg 28.

²⁵ WIPO/GRTKF/IC/7/10 para. 3.

²⁶ WIPO Intellectual Property and Traditional Knowledge Booklet no 2, pg 29.

²⁷ Skrydstrup, pg. 20.

²⁸ <http://www.law.cornell.edu/treaties/berne/15.html>

international intellectual property law focused on traditional knowledge (through sui generis aspects of the law) or new stand-alone sui generis systems which give rights to traditional knowledge directly had precedent and could be put into place.

The heart of many of these debates is the attempt at embedding traditional cultural expressions within western intellectual property law, which are concerned with originality, fixation, finite duration and individual creators many of which are elements not found within folklore. Often sui generis systems are the only way to protect these expressions. Let us look to major milestones in sui generis systems and attempt to chart how these address the complexities of traditional cultural expression. In 1976 the Tunis Model Law on Copyright for Developing Countries was adopted and included sui generis protection for folklore.²⁹ When the Berne Convention was revised in 1971 it was “deemed appropriate to provide States with a text of a model law to assist States in conforming to the Convention’s rules in their natural laws.”³⁰ So the Committee of Governmental Experts adopted the Tunis Model Law with the assistance of WIPO and United Nations Educational, Scientific and Cultural Organization (UNESCO), which provides specific protection for folklore.³¹ This protection is set “to prevent any improper exploitation and to permit adequate protection of the cultural heritage known as folklore which constitutes not only a potential for economic expansion, but also a cultural legacy intimately bound up with the individual character of the community.”³² The Tunis Model Law

²⁹ WIPO Intellectual Property and Traditional Knowledge Booklet no 2, pg 23.

³⁰ WIPO/GRTKF/IC/5/3 para. 71.

³¹ Ibid. para 72.

³² WIPO/GRTKF/IC/5/INF/3 annex pg 1.

provides sui generis protection to folklore but allows derivative work to attain copyright. Fixation is not required, nor is originality although criteria for specifying this are not given. A competent authority exercises the holder of rights.³³ Competent authority here is defined as “one or more bodies, each consisting of one or more persons appointed by the Government for the purpose of exercising jurisdiction under the provisions of this Law whenever any matter requires to be determined by such authority.”³⁴ Section 6 gives folklore author rights of economy (reproduction, derivation and translation, and broadcasting)³⁵ as well as the moral right to claim authorship of his work and to seek legal relief should a “derogatory action in relation to, his work, where such action would be or is prejudicial to his honor or reputation.”³⁶

Rights here do not apply when folklore is used by a public entity for non-profit use³⁷ it also (importantly) adds a domain public payant system so users of folklore can pay a percentage of profits to the competent authority for the purposes of promoting institutions for the benefit of authors (including guilds, cooperatives and the like) or to protect and disseminate folklore.³⁸ Most importantly on an international context (and giving communities an avenue of redress) importation of protected works constitutes infringement and can be seized. The infringer is liable for damages and can be fined or imprisoned and any violation of national cultural

³³ Ibid. annex pg 2-5.

³⁴ Tunis Model Law, Section 18.

³⁵ Ibid. Section 4.

³⁶ Ibid. Section 5(1).

³⁷ Ibid. Section 6(1^{bis})

³⁸ Ibid. Section 17.

heritage will be stopped using any available means.³⁹ These rights are granted without temporal limitation.⁴⁰ It is obvious that the Tunis Model Law leaves a much-improved state of affairs for parties interested in protecting their folklore, but it wasn't yet a focused model of sui generis, merely adding sui generis aspects onto an existing model.

In 1982 a group convened by WIPO and UNESCO developed the WIPO-UNESCO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Exploitation and Other Prejudicial Actions (Model Provisions).⁴¹ This group was concerned with folklore, being living cultural heritage of nations, being exploited through dissemination and this exploitation (or distortion) is prejudicial to cultural and economic interests of the nation. Folklore, as a manifestation of intellectual creativity, deserves to be protected in a similar manner that intellectual property. Protection of folklore is also an indispensable tool for developing nations to promote development, maintenance and dissemination of their heritage outside of the country. The Model Provisions are therefore concerned with providing protection for traditional cultural expressions against illicit exploitation and prejudicial actions.⁴² While the Tunis Model Law defined folklore as "all literary, artistic and scientific works created on national territory by authors presumed to be nationals of such countries or by ethnic communities, passed from generation to generation and constituting one of the basic elements of the

³⁹ Ibid. Section 15.

⁴⁰ Ibid. Section 6(2).

⁴¹ WIPO/GRTKF/IC/5/3 para. 73

⁴² Model Provisions, Preamble and Section 1.

traditional cultural heritage”⁴³ the Model Provisions create a much broader and clearly defined definition of expressions of folklore. Here they are productions consisting of traditional artistic heritage developed by a community or individuals reflecting the values of such a community. This includes verbal expressions (folk tales, poetry or riddles), musical expressions (folk songs or instrumental), and actions (folk dances, plays, artistic forms or rituals) either tangible or intangible. It also includes tangible expressions such as folk art (drawings, paintings, carvings, sculptures, pottery, terracotta, mosaic, woodwork, metalware, jewelry, basket weaving, needlework, textiles, carpets and costumes), musical instruments and architecture.⁴⁴ This expansion is important as it shows a much greater understanding on the part of international policy makers the breadth of expression that traditional culture can take.

The holder of rights can be a competent authority or a relevant community⁴⁵ and these rights require that the holder give authorization when it is used in publication, reproduction, distribution, public performance or broadcast with the intent of gain (monetary) or outside the traditional or customary context.⁴⁶ The source of the expression must also be acknowledged properly (including geographic place and community where it was taken) in any print or public performances.⁴⁷ This is hugely important, as it is the beginning of protecting traditional cultural expressions with special spiritual or cultural importance (secret dances for

⁴³ Tunis Model Law, Section 18.

⁴⁴ Model Provisions, Section 2.

⁴⁵ Ibid. Section 9.

⁴⁶ Ibid. Section 3.

⁴⁷ Ibid. Section 5.

instance) from being disseminated out of context. However, this is undermined because no authorization is required for education, utilization by way of illustration in an original work, incidental usage, or where expressions of folklore are borrowed for creation of an original work.⁴⁸ While these are noble reasons, they are still problematic as open access, as we have seen, allows people access to knowledge that they should not have access to under traditional cultural norms. The court is also given jurisdiction to hear appeals against decisions of authorization by the competent authority.⁴⁹ The country enacting the Model Provisions will determine offenses and the courts will have jurisdiction over these offenses as well⁵⁰, and any objects violating the law can be seized.⁵¹ The Model Provisions also seek to make sure there is no limit or prejudice to protection available under existing laws.⁵²

The Tunis Model Law prohibits importation and distribution of folklore made abroad without authorization⁵³ and applies to works “which, by virtue of treaties entered into by the country”⁵⁴ as well as national folklore (including countries promulgated).⁵⁵ The Model Provisions however defines regional and international protection as subject to reciprocity and on the basis of international treaties or agreements.⁵⁶ The sui generis aspect of the Model Provisions has allowed several countries to use them as a basis for national legal frameworks in the protection of

⁴⁸ Ibid. Section 4.

⁴⁹ Ibid. Section 11.

⁵⁰ Ibid. Section 6.

⁵¹ Ibid. Section 7.

⁵² Ibid. Section 12.

⁵³ Tunis Model Law Section 6(3)

⁵⁴ Ibid. Section 16(2) Alternative X

⁵⁵ Ibid. Section 16(2) Alternative Y

⁵⁶ Model Provisions Section 14.

folklore or even within current frameworks.⁵⁷ The Model Provisions also spurred the desire to draft an international treaty and WIPO and UNESCO convened a group to attempt to do just this but most participants thought it was premature to take such actions as “there was not sufficient experience available as regards the protection of expressions of folklore at the national level, in particular, concerning the implementation of the Model Provisions.”⁵⁸

The next major event in the positive protection of traditional cultural expressions happened in December of 1996. WIPO member states adapted the WIPO Performances and Phonograms Treaty, which gave protection to the performer of an expression of folklore including actors, singers, musicians, dancers and other persons who take part in the performance or interpretation of traditional expressions of culture. The Treaty came into force on May 20, 2002, and by April 15, 2003 41 WIPO states had ratified it.⁵⁹ This is significant as previously the International Convention for the Protection of Performers, the Producers of Phonograms and Broadcasting Organizations, 1961 (the Rome Convention) had defined performers to mean “actors, singers, musicians, dancers, and other persons who act, sing, deliver, declaim, play in or otherwise perform literary or artistic works.”⁶⁰ This excludes folklore performers, as expressions of folklore do not fall under traditional concepts of literary or artistic works. This distinction is further evidence of defining folklore as primitive and beneath protection, and it should be

⁵⁷ WIPO/GRTKF/IC/5/3 para. 76.

⁵⁸ Ibid. Para 78.

⁵⁹ Ibid. Para 80.

⁶⁰ Rome Convention, Article 3(a)

clear the large steps it took to ratify this treaty. Seeking to further understand the needs of communities and traditional knowledge holders, WIPO conducted fact-finding missions from 1998 to 1999. They visited 28 countries and consulted more than 3000 people including indigenous communities, governmental representatives, academics, researchers, and the private sector to identify intellectual property concerns and expectations regarding traditional knowledge (including traditional cultural expression).⁶¹

Following this in late 2000 the member states of WIPO established an Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC). IGC attempts to make progress in addressing policy and linkages between intellectual property systems and the needs of traditional knowledge holders. They undertake analytical studies of international policies and case studies to form basis for international policy debate. They also attempt to create tools to help knowledge holders protect their rights.⁶² They are currently holding their 17th meeting (December 6-10, 2010) and continue to work on their draft proposals on Traditional Cultural Expressions/Expressions of Folklore (WIPO/GRTKF/IC/17/4), Traditional Knowledge (WIPO/GRTKF/IC/17/5), and Genetic Resources (WIPO/GRTKF/IC/17/6). These draft provisions have no formal status, but they help to define the perspectives and policies involved as well as helping to suggest frameworks for protection of traditional knowledge and traditional cultural expressions from misappropriation or misuse. They are to be

⁶¹ WIPO Intellectual Property and Traditional Cultural Expressions/Folklore Booklet no 1, pg. 3.

⁶² WIPO/GRTKF/IC/5/3 para 88.

used as reference points for international treaties and policies.⁶³ In attempting to define the needs and expressions at stake they are looking to the Model Provisions as well as the Pacific Regional Framework for the Protection of Traditional Knowledge and Expressions of Culture (Pacific Model Law), a sui generis system created in 2002.⁶⁴

The Pacific Model Law's objective is to protect the rights of traditional owners in both traditional knowledge and traditional cultural expression, and permit tradition-based creativity and innovation including commercialization. This commercialization is subject to prior informed consent, where traditional knowledge holders are fully consulted before their knowledge is used or accessed and the intended use and its consequences are understood, as well as equitable benefit-sharing, where traditional knowledge holders would receive benefits that arise from the use of their knowledge either through monetary or non-monetary means, are taken into account within any system.⁶⁵⁶⁶ Here cultural expressions are the main focus, and are defined as any way that traditional knowledge appears or is manifested. This includes names, stories, chants, riddles, histories, songs in oral narratives, art and craft, musical instruments, sculpture, painting carving, pottery, terracotta mosaic, woodwork, metalware, jewelry, weaving, needlework, shell work, rugs, costumes, textiles, music, dances, theatre, literature, ceremonies, ritual

⁶³http://www.wipo.int/tk/en/consultations/draft_provisions/draft_provisions.htm
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⁶⁴ WIPO/GRTKF/IC/17/4 pg 16

⁶⁵ Pacific Model Law, Explanatory Memorandum pg 1.

⁶⁶ Definitions from WIPO Intellectual Property and Traditional Knowledge Booklet no 2, pg 23.

performances, cultural practices, delineated forms parts and details of designs and visual compositions, and architectural forms.⁶⁷ This is a much broader and well thought out definition of traditional cultural expressions that previous model laws, and the inclusion of names and details of designs and visual compositions allow for greater protection than before.

The definition of traditional subject matter here is also defined as anything “ (i) created, acquired or inspired for traditional economic, spiritual, ritual, narrative, decorative or recreational purposes; (ii) transmitted from generation to generation; (iii) regarded as pertaining to a particular traditional group, clan, or community of people; and (iv) is collectively originated and held.”⁶⁸ This allows for a wider definition of claims, and the collective aspect allows the traditional knowledge to have no author or date of origin and sets it firmly in a heritage based definition regardless of the actual time it was created or tangibility of the object. Another hugely important aspect of this sui generis system is defining the owners of traditional knowledge and traditional expressions of culture to be the group, clan, or community (or an individual recognized as part of the group) in which the knowledge are entrusted “in accordance with customary law and practices.”⁶⁹ As stated previously, the Model Provisions and the Tunis Model Law place the ownership merely onto a competent authority. This could allow people to claim ownership regardless of their place or status within the community. The Pacific

⁶⁷ Pacific Model Law, pgs. 3-4

⁶⁸ Ibid. Section 4.

⁶⁹ Ibid. Section 4.

Model Law places ownership directly to the community and most importantly within said community's traditional law and practice.

The Pacific Model Law also modernizes the traditional cultural rights (held by the community) to allow authorization or prohibition on the rights to reproduce, publish, perform or display in public, to broadcast (by radio, television, satellite, cable or any other means) to the public, to translate or adapt, to transform or modify, to fixate the knowledge (through film, sound recording or photography), to make derivative works, to make available online, to make or sell (import or export) products derived from traditional knowledge, and finally to make use of traditional knowledge in other material form.⁷⁰ The fixation aspect and the electronic aspect here are especially important to archives, as well as display in public, as most expressions of traditional culture in archives are fixed objects that under traditional intellectual property law are copyrighted by the researcher. This takes great steps to counter act this. Interestingly there is also a Fair Use section, which includes face-to-face teaching, criticism or review, reporting news or current events, judicial proceedings, and incidental use, although acknowledgement is needed in these cases.⁷¹ There is also a detailed process of application for usage and description of the duties of the Cultural Authority that must approve the applications,⁷² as well as setting out clear terms and conditions that should be part of the authorized user agreement. This includes equitable benefits sharing, respect for moral rights of the traditional owners, and interestingly education and training requirements for the

⁷⁰ Ibid. Section 7.

⁷¹ Ibid. Section 7 (4) (5)

⁷² Ibid. Section 25.

applicant.⁷³ That the user agreement allows the Cultural Authority to set education conditions on the user is a brilliant move to make sure that the knowledge is not used in a derogatory way even accidentally. It also creates a cultural exchange situation whenever a request for traditional cultural expressions is put forth. It allows them to protect their moral rights and traditional cultural rights which are guaranteed to continue in force in perpetuity, are inalienable, and cannot be waived or transferred.⁷⁴

As these sui generis systems are clarified “their adoption nationally and/or internationally, mutatis mutandis, would reduce transactions costs of patent protection and also mitigate some degree of uncertainty and risks...”⁷⁵ While Mathur here is talking specifically about genetic resources and biotechnology, the same philosophy can be applied to archives as well. With a clearly ratified and defined set of precedent to work with, cultural institutions would be freer to make policy changes and repatriation attempts without fear of recrimination. WIPO-IGC provides a wealth of information, which is needed due to the complexity of this matter. This paper has only given a brief outline of sui generis systems and attempted to define traditional knowledge and traditional cultural expression for use as a stepping-stone to further research. It has not covered other sui generis systems (such as the Bangui Agreement and Panama Law No. 20 and Executive Decree No. 12), nor has it covered international trade agreements (such as TRIPS). It is important for any institution to be aware of these issues, as well as the national

⁷³ Ibid. Section 22.

⁷⁴ Ibid. Section 9 and 13(4)

⁷⁵ Mathur, pg 5.

laws guiding them. Concerns over intellectual property as well as traditional cultural and moral rights have become as much of a part of the archive landscape as knowledge of film gauges, paper preservation, and access policies.

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