INTELLECTUAL PROPERTY AND TRADITIONAL CULTURAL EXPRESSIONS: A SYNOPSIS OF CURRENT ISSUES

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Literature on the topic of the intellectual property (IP) / traditional cultural expressions (TCE) nexus almost invariably highlights the poor fit that Western IP law provides for the proper protection and promotion of TCEs.[1] The most prominent platform for the international discussion of this issue is taking place in the World Intellectual Property Organization's (WIPO's) Intergovernmental Committee (IGC),[2] where the most recent meeting in the summer of 2007[3] resulted in a shortlist of hoped-for future outcomes, not excluding a binding international legal instrument.

In the context of copyright law, this article will lay out the

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[1] *See, e.g.*, Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Are U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1 (2004). *See also* Enyinna S. Nwauche, *The Protection of Expressions of Folklore through the Bill of Rights in South Africa,* SCRIPT-ed, Vol. 2, No. 2, 125-162 (2005) and Silke von Lewinski, *Traditional Knowledge, Intellectual Property, and Indigenous Culture: The Protection of Folklore*, 11 CARDOZO J. INT'L & COMP. L. 747 (2003).

[2] WIPO IGC Review of Policy Issues, http://www.wipo.int/tk/en/igc/issues.html (last visited on April 18, 2008).

[3] WIPO IGC: Conferences, Meetings and Seminars, http://www.wipo.int/meetings/en/details.jsp?_meeting_id=12522 (last visited on April 18, 2008). The Eleventh Session of the IGC took place at WIPO headquarters in Geneva from July 3 – 12, 2007.

differences between Berne Convention tenets and the ideals of a prospective TCE-based legal instrument. It will then go on to outline and comment on current *sui generis* laws and other approaches that incorporate various aspects of existing Western laws.[4] The TCE topic is highly sensitive and does not cover a homogeneous set of interests. As such, a one-size-fits-all instrument may be very difficult, if not impossible, to distill. The international discussion, at the very least, brings these issues under scrutiny and encourages debate as to a wide range of possibilities. Integral to this discussion, however, is a unified vocabulary. The definition of TCE "protection," for example, has yet to be agreed upon.

In the context of UNESCO's Convention on the Protection and Promotion of the Diversity of Cultural Expressions (hereinafter Cultural Diversity Convention), "protection" means the "adoption of measures aimed at the preservation, safeguarding and enhancement of the diversity of cultural expressions."[5] In WIPO's Draft Provisions on Traditional Cultural Expressions/Expressions of Folklore, however, Article 10 puts forth that:

> Protection for traditional cultural expressions/expressions of folklore in accordance with these provisions does not replace and is complementary to protection applicable to traditional cultural expressions/expressions of folklore and derivatives thereof under other intellectual property laws, laws and programs for the safeguarding, preservation and promotion of cultural heritage, and other legal and non-legal measures available for the protection and preservation of traditional cultural expressions/expressions of folklore.[6]

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[4] Please note that a full discussion and examination of these issues is beyond the scope of this article, which will focus on Western copyright laws.

[5] Convention on the Protection and Promotion of the Diversity of Cultural Expressions, Oct. 20, 2005, art. 4(7), CLT-2005/CONVENTION DIVERSITE-CULT REV., http://unesdoc. unesco.org/images/0014/001429/142919e.pdf.

[6] WIPO, April 26, 2007, *The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objective and Principles*, WIPO/GRTKF/IC/9/4, http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=77573.

In the context of the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions (The WIPO-UNESCO Model Provisions), "protection" is meant to be "against any improper utilization of expressions of folklore, including the general practice of making profit by commercially exploiting such expressions outside their originating communities without any recompense to such communities."[7] To some extent, the very goal of any eventual instrument is not entirely clear and delegations at the most recent IGC noted that the problem lies in the "lack of formation of common understandings or common perception as to what . . .words should mean."[8] The IGC, amongst other venues,[9] is providing opportunities to wrestle with these and other issues.

I. The Berne Convention and TCEs

The Berne Convention addresses copyright subject matter of literary and artistic works, including a range of things that would seem to include TCE-like expressions:

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[7] Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, *Commentary prepared by the Secretaries of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO), Observation 4* (1985).

[8] Intergovernmental Committee On Intellectual Property And Genetic Resources, Traditional Knowledge And Folklore, *Collation of Written Comments On The List of Issues,* WIPO/GRTKF/IC/11/4(A) (April, 30, 2007), *available at* http://www.wipo.int/edocs/mdocs/tk/en/wipo_grtkf_ic_11/wipo_grtkf_ic_11_4_a.pdf.

[9] The World Trade Organization (WTO) and World Bank, for example, are also addressing the TK/TCE issues and are engaging in the debate. *See, e.g.*, WTO's Background Information on TRIPs Article 27.3b, *available at* http://www.wto.org/english/tratop_e/trips_e/art27_3b_e.htm (last visited April 19, 2008); and the World Bank, *Traditional Knowledge and Empowerment*, *available at* http://web.worldbank.org/WBSITE/WBI/EXTCEEDRD/0,,contentMDK:20275212~menuPK:548817~pagePK64168445~piPK:64168309~theSite:542906,00.html (last visited April 19, 2008).

> The expression 'literary and artistic works' shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression, such as books, pamphlets and other writings; lectures, addresses, sermons and other works of the same nature; dramatic or dramatico-musical works; choreographic works and entertainments in dumb show; musical compositions with or without words; cinematographic works to which are assimilated works expressed by a process analogous to cinematography; works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science.[10]

The manner in which it protects these works, and the fact that most TCEs would be considered public domain material for purposes of copyright law, leaves TCEs outside the Berne Convention umbrella. Although there was an attempt to address TCEs in the 1967 Stockholm Revision Conference of the Berne Convention, delegations ascertained that there were enough differences between TCEs and traditionally-copyrighted works that precluded TCEs' direct inclusion in Berne.[11] Specifically, copyright law's originality requirement, fixation requirement, the term of copyright, the concept of the public domain, the focus on sole authors, the types of things allowed by fair use, and its domestic applicability all inhibit Western copyright laws—as are represented by the Berne Convention—from applying to TCEs.

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[10] Berne Convention for the Protection of Literary & Artistic Works, art. 2(1), Sept. 9, 1886, revised at Paris, July 24, 1971, amended Sept. 28, 1979, 17 U.S.C.A. 104, 828 U.N.T.S. 221 [hereinafter *Berne Convention]*.

[11] *See, e.g.*, Vol. II, *Records of the Intellectual Property Conference of Stockholm 1967* (Geneva 1971).

A. Originality

The Berne Convention does not provide a uniform minimum standard for originality but rather defers to domestic law.[12] The European Community's Software Copyright Directive makes mention of originality insofar as it requires that a computer "program . . . [be] the author's own intellectual creation."[13] The United States' originality requirement is more explicit; the 1976 Copyright Act provides that copyright protection subsists in "original works of authorship fixed in any tangible medium of expression . . ."[14] The Supreme Court case *Feist Publications, Inc. v. Rural Telephone Service, Co.*, emphasized the requirement and in fact stipulated that originality is the "sine qua non" of copyright.[15] Japan's Copyright Law defines a copyrightable "work" as a "production in which thoughts or sentiments are expressed in a creative way and which falls within the literary, scientific, artistic or musical domain."[16]

Originality in the context of TCEs is not appropriate. Indeed, the generational nature of most TCEs encourages that new generations copy and/or make new iterations of prior creative works. While the degree to which new versions of prior works are original for purposes of copyright law will be different depending on the Indigenous culture and the TCE in question, the salient point is that the integrity of the TCE is usually meant to be kept intact and, to that end, TCEs are replicated (copied) by new generations for the sake of cultural continuity.

For Indigenous communities that wish to commercialize some of their TCEs, copyright can be an option, if tribal custodians, for example, grant permission to individual artists within the tribe to make new, original art based on TCEs. A stone napkin holder in the shape of an elephant is just one example. These napkin holders are being sold at the World Bank's Pangea Artisan Market in

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[12] Berne Convention, *supra* note 10, art. 2(7).

[13] Council Directive 91/250, 1991 O.J. (L 122) 42 (E.C.).

[14] 17 U.S.C. § 102(a) (1976).

[15] 499 U.S. 340, 343 (1991).

[16] Japanese Copyright Act, art. 2(1)(i).

Washington, DC. The artisans who fashioned the napkin holder are from Kenya and the object is described as follows: "Not only does this napkin holder feature traditional Kenya art through its carved lines, but it also incorporates a contemporary use of warm color."[17] The artisan might therefore be able to acquire a copyright for this object, since it was (perhaps) legitimately based on a TCE, but differently colored and re-worked as a household item.[18]

B. Fixation

The Berne Convention does not require fixation for a creative work to receive copyright protection, "[i]t shall, however, be a matter for legislation in the countries of the Union to prescribe that works in general or any specified categories of works shall not be protected unless they have been fixed in some material form."[19] Jurisdictions deal with this quite differently. The United States requires not only originality but also fixation in a "tangible medium of expression."[20] In the United Kingdom, the Copyright Designs and Patents Act stipulates that copyright "does not subsist in a literary, dramatic or musical work unless and until it is recorded, in writing or otherwise; and references in this Part to the time at which such a work is made are to the time at which it is so recorded."[21] Swiss copyright law, on the other hand, does not require that a work be fixed (written, recorded or otherwise made physically permanent) for copyright protection to subsist.[22]

For a wide range of TCEs, fixing a single iteration in a physical format would be antithetical to the very nature of TCEs,

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[17] Pangea, Stone Napkin Holder, http://www.pangeamarket.com/servlet/Detail?no=272 (last visited Apr. 16, 2008).

[18] This example is offered as a hypothetical example only. It is possible the traditional aspect of the object is not so central or important to any Kenyan tribe to constitute a TCE.

[19] Berne Convention, *supra* note 10, art. 2(2).

[20] *Id.* art. (2)(7).

[21] Copyright, Designs and Patents Act, 1988, Ch. 48, § 3(2) (Eng.).

[22] RS 231.1, Federal Law on Copyright and Neighboring Rights of Oct. 9, 1992, as amended Dec. 16, 1994.

which tend to have many similar but not identical manifestations. The New Zealand Maori *moko* provides a helpful example here. The *moko* is, traditionally, body and face markings carved with chisels (now needles) into the skin. Many important rites and rituals are associated with the bestowing of *moko* as the markings indicate status and rank. Notwithstanding the fact that the markings are applied to human skin, a non-permanent canvas: If *moko* were protected under Western copyright law, a single copyrighted iteration of the *moko* designs would necessitate that any subsequent user of those designs would need a license from the copyright holder. This kind of arrangement, antithetical to the communal arrangement currently in place, is an imperfect fit for this kind of TCE.

C. Term

The Berne Convention requires a copyright term of a minimum of fifty years after the death of the author. It specifically states that, "[t]he term of protection granted by this Convention shall be the life of the author and fifty years after his death."[23] Individual jurisdictions implement either the "life + 50" minimum or go beyond. The United States currently protects works for "life + 70" as a general rule and applies a slightly different formula for anonymous or pseudonymous works or works made for hire.[24] For example, in Australia copyright lasted "life + 50" until 2005, at which time Australia signed a free trade agreement with the United States and agreed to extend its copyright term to "life + 70."[25]

Once again, given the intergenerational nature of TCEs, no finite term would be adequate for their protection. While some organizations have expressly sought copyright protection for certain

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[23] Berne Convention, *supra* note 10, art. 7(1).

[24] For a full understanding of copyright term in the United States, *see* U.S. Copyright Office Circular 15a, Duration of Copyright: Provisions of the Law Dealing with the Length of Copyright Protection, *available at* http://www.copyright.gov/circs/circ15a.html.

[25] *See* U.S.-Australia Free Trade Agreement 213 (2004), *available at* http://www.ustr.gov/assets/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/asset_upload_file148_5168.pdf.

symbols and other forms of TCEs, the fact that copyright will expire will not provide the kind of protection that would be beneficial to most TCEs. An organization in Alaska, for example, included an image of Lam Sua, the "person of the universe," in an elegant coffee table book on Alutiiq history. Along with publication, Lam Sua could be considered copyrighted by the person who photographed the Lam Sua image (although this is less certain after the *Bridgeman*[26] case, especially if Lam Sua was a two-dimensional image before it was photographed) or to whom copyright was assigned upon its publication. In 70 years, however, Lam Sua would fall into the public domain, which would be less-than an ideal situation.

D. Public Domain

The public domain (or "copyright-free") is not a concept for which most Indigenous cultures have an analogous mechanism. Generally, a work that is in the public domain in the Western sense is a work that is not endowed with any layer of copyright protection. This means that any entity can use the work in any way it chooses, including for commercial purposes, without permission of the author. For TCEs, while copyright protection could be construed as too confining for their communal nature, the public domain is too "free" because the types of uses for which TCEs are not offensive is prescribed, depending on the Indigenous culture and the TCE involved.

One example of where this has come up in case law is Australia's *Yumbulul v. Reserve Bank of Australia.*[27] The Aboriginal artist in this case, Terry Yumbulul, had given permission to the Aboriginal Artist Agency to license uses of his painting of his clan's morning star pole, which has several sacred connotations within the clan. Due to a misunderstanding on the artist's part between access and use, the Agency granted permission to the Reserve Bank to use Mr. Yumbulul's artwork in a commemorative banknote. The case was ultimately dismissed since both the Agency and the Reserve

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[26] *Bridgeman Art Library, Ltd. v. Corel Corp*, 36 F. Supp. 2d 191 (S.D.N.Y. 1999).

[27] *Yumbulul v. Reserve Bank of Australia*, 21 I.P.R. 481 (1991).

Bank acted with proper legal authority, and the Aboriginal design in question was in the public domain. The judge noted, however, that the sacred character of the work and the criticism the artist received in his community were indicative of the poor fit that Australia's copyright law provided for TCEs.

E. Sole Authors

Western copyright law assigns its bundle of rights to individual people or individual legal entities. Joint authorship for purposes of copyright has a narrow interpretation and would probably not allow for the kind of communal ownership that a clan or tribe would find useful. In the United States, for example, the benefits of authorship can be divvied amongst joint authors but, for an entire culture or clan, that kind of rights management would be extremely difficult if not impossible, due to the fact that entire tribes and clans consider themselves, as a whole, stewards and caretakers of their culture. "Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are co-owners of copyright in the work."[28] Communal rights are gaining some attention but Western copyright regimes remain focused on single, identifiable authors.

F. Copyright Exceptions (Fair Use)

The subject of much conversation and consternation amongst copyright academics is fair use (also called fair dealing and copyright exceptions). Fair use is another area of copyright law that does not provide the proper type of protection for TCEs. Copyright exceptions are jurisdiction-dependent and tend to be vague. Specifically, the Berne Convention states:

> (1) It shall be permissible to make quotations from a work which has already been lawfully made available to the public, provided that their making is compatible with fair practice, and their extent does not exceed that justified by

[28] 17 U.S.C. § 201(a) (1978).

> the purpose, including quotations from newspaper articles and periodicals in the form of press summaries.
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> (2) It shall be a matter for legislation in the countries of the Union, and for special agreements existing or to be concluded between them, to permit the utilization, to the extent justified by the purpose, of literary or artistic works by way of illustration in publications, broadcasts or sound or visual recordings for teaching, provided such utilization is compatible with fair practice.[29]

Individual jurisdictions tend to allow certain uses of copyrighted works, including those for educational and research purposes and for quotation, criticism, comment and news reporting. For the sacred or spiritual nature of many TCEs, however, even use as a teaching tool comprises improper treatment. For certain Indigenous people, any revelation of specific TCEs to outsiders is punishable conduct. A college professor in New Mexico, for example, has been banished from Taos Pueblo by his own Native American community for writing about a spiritual tribal dance. His order of banishment states that he "caused irreparable harm to the sensible nature of the religious activity through exploitation."[30] Under fair use guidelines, the professor's actions are perfectly acceptable but, to the tribe whose dance was publicized without authorization, fair use tenets fall short of fulfilling its needs.

G. Domestic Nature

Intellectual property laws, while somewhat stitched together by international agreements like the Berne Convention and the Agreement on the Trade Related Aspects of Intellectual Property Rights (TRIPS Agreement), remain domestic in nature. Swiss copyright law applies to creative works in Switzerland; Greek copyright law applies to creative works in Greece and so on.

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[29] Berne Convention, *supra* note 33, art. 10(1)-(2).

[30] Associated Press, *Sacred Dance Essay Prompts Tribal Banishment*, CNN.com, Feb. 6, 2004, http://www.cnn.com/2004/US/Southwest/02/06/tribal.banishment.ap/.

International agreements like Berne and TRIPS require countries to provide "national treatment" to foreign works when the relevant foreign country is also a signatory to the agreement. Switzerland and Greece, both signatories to the Berne Convention, would therefore have to treat each other's copyrighted works the same as they treat the nationals of their own country. But, given the generally domestic nature of IP laws, any law that incorporates protection for TCEs is only effective in the jurisdiction in which that law was passed. This is often not helpful for Indigenous groups that span more than one country.

The Ashanti people in Africa provide a relevant example. The Ashanti developed a tradition of weaving that manifests itself in the beautiful *Kente* cloth, which is considered a royal garment and is traditionally reserved for special occasions. Various colors of yarns have different symbolic significance and reflect different levels of status. Silk yarns, for example, are usually considered the most prestigious. Each cloth has a name and a meaning, as do the numerous patterns and motifs that are used in the cloths; each finished *Kente* cloth is rich with color, symbolism and tradition. While the Ashanti people mostly live in modern-day Ghana, many also live in other neighboring West African countries. To the extent that Ghana provides protection for the *Kente* cloth, it is not applicable in neighboring countries, unless a regional or international instrument is drawn up and signed.[31]

II. Sui Generis *TCE Laws*

Some jurisdictions have bypassed the wait for an international instrument to be accepted and have instead drawn up domestic legislation addressing TCEs. The Law of the Republic of

[31] Ghana passed a new law in 2005, The Copyright Law, May 17, 2005, PNDCL No. 690, which includes a folklore provision: "'Folklore' means the literary, artistic and scientific expressions belonging to the cultural heritage of Ghana which are created, preserved and developed by ethnic communities of Ghana or by an unidentified Ghanaian author, and includes kente and adinkra designs, where the author of the designs are not known, and any similar work designated under this Act to be works of folklore…" *Id.* § 76.

Azerbaijan on Legal Protection of Azerbaijani Expressions of Folklore is the most recent example; Panama's Law on the Special Intellectual Property Regime Governing the Collective Rights of Indigenous Peoples for the Protection and Defense of their Cultural Identity and their Traditional Knowledge of 2000 is another example with an interesting history.[32]

The extent to which these laws are accomplishing their goals is debatable, and, as aforementioned, the domestic nature of these *sui generis* laws prevents them from providing a robust or powerful protection. Furthermore, there may be a problem of purpose that needs to be addressed. If Panama's Law is meant to protect Indigenous art and knowledge, its focus on economic compensation for the commercialization of their cultural goods could undermine that goal.[33] Arguably, none of the domestic *sui generis* laws has been in effect long enough to cull any reliable analysis of how well the laws work. Their existence, however, is at least an indication that TCEs' lack of protection requires international attention.

III. TCEs within the Law "As Is"

Although a thorough examination and analysis of other avenues of TCE protection and promotion is beyond the scope of this paper, it is worthwhile noting that there are indeed some mechanisms in place (both legal and non-legal) that can offer relevant help. This section will look briefly at the deference Western courts pay to Indigenous or Native laws, as well as the types of marks that are currently being used to both protect and market TCEs in commerce.

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[32] For an excellent description and analysis of the Panamanian law, see Irma de Obaldia, *Western Intellectual Property and Indigenous Cultures: The Case of the Panamanian Indigenous Intellectual Property Law*, 23 B.U. INT'L L.J. 337 (2005).

[33] *Id.* at 379.

A. Indigenous Laws

While Western copyright laws provide a less-than perfect fit for TCEs, individual Indigenous cultures often have their own customary laws for dealing with the misuse of their traditional culture. The extent to which Western courts defer to these laws or policies is currently varied across jurisdictions. Africa has been noted as a region that is more likely than not to refer to tribal laws when adjudicating a TCE claim, while the United States, New Zealand and Australia do so in a very piecemeal manner.[34] One of the most prominent Australian cases in which a judge consulted Aboriginal law was *John Bulun Bulun & George Milpurrurru v. R & T Textiles Pty Ltd.* (1998).[35]

In this case, one of the artist's paintings, based on the heritage of his people, the Ganalbingu, had been produced with proper permission in a book. Without permission, however, this image was replicated on rolls of fabric made overseas and re-imported into Australia. The action was brought by the artist based on the section of the Australian Copyright Act that deals with infringement by importation. The judge used a remedy based on principles of equity by finding a fiduciary relationship between the artist and his clan such that, if the artist himself had not brought suit, the clan may have been able to do so. The judge referenced the customary law of the Indigenous community in question:

> The law and customs of the Ganalbingu people require that the use of the ritual knowledge and the artistic work be in accordance with the requirements of law and custom, and that the author of the artistic work do whatever is necessary to prevent any misuse. The artist is required to act in relation to the artwork in the interests of the Ganalbingu people to preserve the integrity of their culture, and ritual knowledge.[36]

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[34] Paul Kuruk, *The Role of Customary Law Under* sui generis *Frameworks of Intellectual Property Rights in Traditional and Indigenous Knowledge*, 17 IND. INT'L & COMP. L. REV. 67, 90-95 (2007).

[35] [1998] AILR 39; (1998) 3 AILR 547.

[36] *Id.*

B. Authentication and Certification Marks

Other uses are made of the current system and sometimes they are appropriate. For example, for a TCE whose guardians are willing to commercialize it, authentication or certification marks can play a useful role. In New Zealand, the *toi iho* Maori-made mark[37] is attached to goods that are made by Maori people. The mark acts as a stamp of approval for eventual consumers who are interested in purchasing genuine Maori articles. A similar mark, the Silver Hand,[38] is used in Alaska to identify goods made by Native Alaskans and the *Igloo* tag is used in Canada to identify goods made members of its Native population.[39] These mechanisms are not fool-proof; however, the Alaska State employee who heads the Silver Hand program indicated that the Silver Hand tags have been reported counterfeited and sold to non-Natives for profit.[40]

C. Geographic Indications

Other avenues are also used. In India, a geographic indications law was recently passed and it covers a range of subject matter, including works that could be construed as TCEs.[41] One such creative work is the *Kullu* shawl, a wool shawl with unique geometric patterns. With the recognition of the shawl as a geographic indication, there is now a cause of action against "*Kullu*-like" shawls that are passed off as authentic *Kullu* shawls within India's borders.

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[37] Toi Iho, http://www.toiiho.com/ (last visited Apr. 17, 2008).

[38] Alaska State Council on the Arts, http://www.eed.state.ak.us/aksca/native.htm.

[39] For an example of a gallery using the mark, *see* Gallery Canada, Central Arctic Inuit Art, http://www.gallerycanada.com/about_us.asp.

[40] Correspondence between the author and L. Saunders McNeill, February, 2007.

[41] Government of India, Department of Commerce, *28 Products Registered as Geographical Indications*, (Press Release, Nov. 9, 2006).

IV. The Current International Debate

Within WIPO's IGC, the most recent conversation[42] encouraged continued and accelerated work on the IP/TCE nexus, with a specific mention of its international dimension. The IGC's mandate was extended for two years.[43] With specific regard to future work, the IGC noted that having more participation from representatives of Indigenous communities, made possible by the launch of the Voluntary Fund,[44] greatly benefits the IGC's work. The IGC further agreed that, while continuing work on its previous mandate, it will focus on international issues and that "no outcome of its work is excluded, including the possible development of an international instrument or instruments." In September 2008, the IGC will present a progress report to WIPO's General Assembly.

V. The Creative Heritage Project and a Way Forward

Aside from the IGC, WIPO is undertaking a project concerning IP guidelines for documenting, recording and digitizing intangible cultural heritage. While this project deals with much of the same subject matter as is addressed by the IGC, the Creative Heritage Project is not currently aimed at norm-setting or introducing an international legal instrument. Rather, it is surveying current practices of cultural institutions across the globe and distilling a set of observations and best practices for managing IP issues in the recordation, digitization and dissemination of intangible cultural heritage.[45]

The rich set of resources upon which the Creative Heritage Project is pulling includes a database of IP codes, policies and

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[42] The Eleventh Session of the IGC took place in Geneva from July 3 to July 12, 2007; *available at* http://www.wipo.int/tk/en/igc/igc11-docsummary.html.

[43] *Id. See* Meeting Code WIPO/GRTKF/IC/11, *available at* http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=81852.

[44] In October 2005, WIPO set up a voluntary fund to facilitate the participation of Indigenous communities in the IGC's work; *available at* http://www.wipo.int/tk/en/ngoparticipation/voluntary_fund/index.html.

[45] *See* The Creative Heritage Project, *available at* http://www.wipo.int/tk/en/folklore/culturalheritage/index.html.

protocols; a range of laws and commentary on those laws; a set of commissioned surveys that focus on geographic regions that are facing these issues; and a series of brief case-studies that put the issues into focus. With this holistic approach, taking into account a broad range of practices and protocols and analyzing them in their respective contexts, the Creative Heritage Project is creating an opportunity for dialogue amongst institutions and individuals and a platform for discussion amongst the world's different Indigenous cultures that are being faced with these issues as technology creates an opportunity for dissemination, but also an unprecedented avenue for misappropriation and misuse. The range of complex and sensitive issues associated with the stewardship of TCEs poses a challenge to the international community and requires communication between disciplines that have not historically worked closely together. This also presents a rare occasion, of course, to learn more about the nexus of these issues and to develop genuinely helpful guidelines.