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## Copyright Harmonisation in the Asian Pacific Region: Weaving the Peoples Together?

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### 1 Introduction

In 2015, Professor Adrian Sterling proposed an ‘Asian Pacific Copyright Code’ that would harmonise the copyright laws of Asian Pacific countries that adopt the code.<sup>2</sup> The Code was proposed within the framework of the Asian Pacific Copyright Association (APCA) established in 2011 with members throughout the region.<sup>3</sup> This chapter argues that the proposed draft Code, as it stands, does not adequately take the interests of indigenous peoples and the impact of regional copyright harmonisation on those interests into account.

Regional, as well as international, copyright harmonisation has proven to be a complex issue. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) 1994 was arguably the most

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2 See Adrian Sterling ‘Asian Pacific Copyright Code’ in this volume.

3 Asian Pacific Copyright Association [www.apcacopyright.org](http://www.apcacopyright.org) [APCA].

significant step in harmonising intellectual property (IP) law, including copyright, on a global scale.<sup>4</sup> Much has been written about copyright harmonisation in Europe, and the extent of its success or failure remains subject to vigorous debate.<sup>5</sup>

While diverse and different from one another, many Asian Pacific countries have indigenous communities with rich cultural heritage and knowledge systems. However, as Kathy Bowrey explains, ‘it has become conventional wisdom to assert that intellectual property provides inadequate protection to Indigenous peoples’.<sup>6</sup> The relationship between indigenous knowledge and culture and copyright has been a major component of the IP and human rights literature.<sup>7</sup> There are issues that arise at the intersection of IP and indigenous rights, both in terms of protection and exploitation (what should not be exploited and how to best use and protect the knowledge and cultural expressions that are available). The incompatibility of copyright and traditional cultural expressions (TCEs, or folklore as it was previously known) is mainly due to the fundamental differences between the values underpinning the western IP system and the worldviews of indigenous peoples.

In the face of an initiative to harmonise copyright law in the Asian Pacific region, this chapter explores the potential impact of harmonisation on the rights of the region’s indigenous peoples to their TCEs. In doing so, the chapter focuses on what needs to be considered when developing a harmonised copyright *de lege ferenda* in the region.<sup>8</sup>

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4 Agreement on Trade-Related Aspects of Intellectual Property Rights 1869 UNTS 299 (adopted 15 April 1994, entered into force 1 January 1995) [TRIPS].

5 See Agnès Lucas-Schloetter ‘Is There a Concept of European Copyright Law? History, Evolution, Policies and Politics and the *Acquis Communautaire*’ in Irini Stamatoudi and Paul Torremans (eds) *EU Copyright Law: A Commentary* (Edward Elgar, Cheltenham, 2014); P Bernt Hugenholtz, ‘Harmonisation or Unification of European Union Copyright Law’ (2012) 38(1) *Monash University Law Review* 4; Christina Angelopoulos ‘The Myth of European Term Harmonisation: 27 Public Domains for the 27 Member States’ (2012) 43(50) *IIC* 567; Maria Lilla Montagnani and Maurizio Borghi ‘Promises and Pitfalls of the European Copyright Law Harmonisation Process’ in David Ward (ed) *The European Union and the Culture Industries: Regulation and the Public Interest* (Ashgate, Farnham (UK), 2017).

6 Kathy Bowrey ‘Indigenous Culture, Knowledge and Intellectual Property: The Need for a New Category of Rights’ in Kathy Bowrey, Michael Handler and Dianne Nicole (eds) *Emerging Challenges in Intellectual Property* (Oxford University Press, Oxford, 2011) 46 at 46.

7 See generally on intellectual property harmonisation in Asia Pacific Christoph Antons, Michael Blakeney and Christopher Heath (eds) *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International, The Hague, 2004).

8 ‘Of the law [that is] to be proposed’.

The chapter is divided into three main sections. Following this introduction is a brief overview of the treatment of TCEs or indigenous culture more generally during the course of copyright law harmonisation internationally. Part 3 outlines the relationship between copyright harmonisation and the protection of TCEs and the significance of that relationship. Finally, Part 4 identifies some possibilities for addressing the challenges regarding protection of TCEs from misappropriation that arise because of regional copyright harmonisation.

## 2 Copyright Harmonisation and Protection of TCEs: An Overview

Some of the factors that make copyright incompatible with TCEs are its focus on the individual author, the type of subject matter that attracts protection, the fixation requirement, the scope of moral and material rights of the author and copyright owner and copyright flexibilities, including the term of protection and limitations and exceptions to copyright. Many scholars have written extensively on indigenous peoples' claims to legal rights in their cultural expressions and their relationship to IP.<sup>9</sup> Therefore, this chapter will not repeat those claims. The chapter instead focuses on the treatment of TCEs in the context of copyright law harmonisation regionally and globally.

The lack of consideration for the value of indigenous TCEs and their treatment by copyright law is not surprising considering that a change in the international community's attitude towards indigenous rights in

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9 See Matthew Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, Cheltenham, 2015) at Part Two and chs 11 and 21; Peter Drahos and Susy Frankel (eds) *Indigenous People's Innovation: Intellectual Property Pathways to Development* (ANU E Press, Canberra, 2012) at chs 1, 5 and 7; Christoph Antons 'Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies' in Christoph Graber, Karolina Kuprecht and Jessica Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012) 144; Christoph Antons 'At the Crossroads: The Relationship Between Heritage and Intellectual Property in Traditional Knowledge Protection in Southeast Asia' (2013) 29 *Law Context A Socio-Legal J* 74; Christoph Antons (ed) *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Wolters Kluwer, Alphen aan den Rijn, 2009) at chs 5, 7, 11, 12 and 15.

general did not happen until the 1960s and 1970s,<sup>10</sup> and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted only 10 years ago.<sup>11</sup>

Bowrey argues that:<sup>12</sup>

since the late twentieth century the major obstacle to better protection of Indigenous intellectual property has not been a lack of legal interest, or disagreement about the need for reform, but the considerable uncertainty about *how* to achieve this objective.

This lack of certainty has resulted in ‘forum shopping’ for the recognition of rights of indigenous people to their culture and knowledge and has led to international law on indigenous IP rights (IPRs) being ‘fragmented and fractured’.<sup>13</sup> Meaningful regulation of indigenous traditional knowledge (TK) and TCEs has largely happened either outside of the main international IP fora,<sup>14</sup> or outside the traditional framework of IP law.<sup>15</sup> This is partly because TK and TCEs do not form part of the traditional western IP laws.

Early attempts to provide protection for the then termed works of ‘folklore’ within the framework of copyright led to the adoption of art 15(4) of the Berne Convention for the Protection of Literary and Artistic Works 1886 (Berne Convention) as part of its 1967 Stockholm revisions.<sup>16</sup> The article leaves it to Member States to designate a competent authority

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10 See Convention (No. 107) Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries 328 UNTS 247 (opened for signature 26 June 1957, entered into force 2 June 1959); Convention for the Safeguarding of the Intangible Cultural Heritage 2368 UNTS 3 (adopted on 17 October 2003, entered into force 20 April 2006); Convention on the Protection and Promotion of the Diversity of Cultural Expression 2440 UNTS 311 (adopted on 20 October 2005, entered into force 18 March 2007).

11 United Nations Declaration on the Rights of Indigenous Peoples GA Res 61/295 A/Res/61/295 (2007) [UNDRIP].

12 Bowrey, above n 6, at 66.

13 Matthew Rimmer ‘Introduction: Mapping Indigenous Intellectual Property’ in Matthew Rimmer (ed), *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, Cheltenham, 2015) at 32.

14 See Convention on Biological Diversity 1760 UNTS 79 (opened for signature 5 June 1992, entered into force 29 December 1993) [CBD]; Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (adopted 29 October 2010, entered into force 12 October 2014).

15 The latest example of this is the negotiations at the World Intellectual Property Organization (WIPO) see WIPO Draft Articles for Protection of Traditional Cultural Expressions WIPO/GRTKF/IC/28/6 (2014).

16 Berne Convention for the Protection of Literary and Artistic Works 1161 UNTS 31 (opened for signature 9 September 1886, entered into force 5 December 1887), art 15(4) [Berne Convention].

that represents unknown authors of ‘unpublished works’ where ‘there is every ground to presume’ that the author is a national of the country.<sup>17</sup> By leaving the regulation of folklore to Member States, the article does not provide the same level of protection for, or clarity regarding, what we today know as TCEs as other copyright subject matters. So far, only India has announced the designation of such authority to the Berne Union Director General, as required by art 15(4)(b).<sup>18</sup> However, other countries such as the United Kingdom<sup>19</sup> and Canada<sup>20</sup> have implemented laws that assign a designated authority to deal with works with an untraceable author.

The two decades following the adoption of art 15(4) of the Berne Convention saw further national and international initiatives that aimed for the provision of better protection for TCEs. In 1976, with the assistance of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and the World Intellectual Property Organization (WIPO), Tunis adopted the Tunis Model Law on Copyright for Developing Countries, which focused on folklore.<sup>21</sup> Nearly a decade later in 1985, a joint expert committee of UNESCO and WIPO stated that ‘legal protection of folklore by copyright laws and treaties does not appear to have been particularly effective or expedient’. The joint Working Group then developed the Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Prejudicial Actions.<sup>22</sup>

17 Article 15(4).

18 Article 15(4)(b) provides that ‘countries of the Union which makes such designation under the terms of this provision shall notify the Director General by means of a written declaration giving full information concerning the authority thus designated. The Director General shall at once communicate this declaration to all other countries of the Union’. On 1 February 1984, India declared that it has designated ‘the Registrar of the Copyrights of India as a competent authority in terms of Article 15, paragraph 4(a) of the Convention’. WTO Council for TRIPS ‘Notification Provisions of Intellectual Property Conventions Incorporated by Referencing into the TRIPS Agreement but not Explicitly Referred to in It’ IP/C/W/15 (20 November 1995) at 7.

19 The Copyright (Recording of Folksongs for Archives) (Designated Bodies) Order 1989 (UK) designates the bodies who maintain the archives of sound recordings of performances of folksongs as prescribed by s 61 of the Copyright, Designs and Patents Act 1988 (UK) where the words of the folksong are ‘unpublished and of unknown authorship at the time the recording is made’.

20 Section 77(1) of the Canadian Copyright Act RSC1985 c C-42 allows the Copyright Board (established as per s 66(1)) to grant licences for use of published works where the copyright owner cannot be located. See for an analysis of the implications of s 77(1) Jeremy de Beer and Mario Bouchard *Canada’s ‘Orphan Works’ Regime: Unlocatable Copyright Owners and the Copyright Board* (Copyright Board of Canada, December 2009).

21 WIPO *Tunis Model Law on Copyright for Developing Countries* (UNESCO, 1976). This model law remains soft law.

22 UNESCO/WIPO *Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and other Forms of Prejudicial Actions* (Paris and Geneva, 1985) at [10].

When trade-related aspects of IP were being ‘cooked up’ in 1994 as part of the TRIPS negotiations, trade in TCEs was not properly considered, if at all. Approximately a year before the adoption of the TRIPS Agreement, the Bellagio Declaration highlighted that:<sup>23</sup>

Intellectual property laws have profound effects on issues as disparate as scientific and artistic progress, biodiversity, access to information, and the cultures of indigenous and tribal peoples. Yet all too often those laws are constructed without taking such effects into account, constructed around a paradigm that is selectively blind to the scientific and artistic contributions of many of the world’s cultures and constructed in fora where those who will be most directly affected have no representation.

Subsequent IP treaties follow the same wording and approach of the Berne Convention.<sup>24</sup> The TRIPS Agreements and the WIPO Copyright Treaty 1996 (WCT) require their Contracting Parties to comply with arts 1 to 21 of the Berne Convention.<sup>25</sup> The Beijing Treaty on Audiovisual Performances 2012 (not yet in force)<sup>26</sup> and the WIPO Performances and Phonograms Treaty 1996 (WPPT) both extend their afforded protections to performers of expressions of folklore.<sup>27</sup>

In addition to international attempts, there have been national initiatives that deal with the recognition, protection and management of indigenous TCEs and potentially enforcement of the rights associated with those TCEs by indigenous communities or custodians of the cultural expressions. Throughout the Asian Pacific region, a number of countries have adopted different initiatives to protect the rights of indigenous communities in their TCEs.<sup>28</sup>

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23 ‘The Bellagio Declaration’ in James Boyle *Shamans, Software, and Spleens: The Construction of the Information Society* (Harvard University Press, Cambridge, 1996) 193.

24 Berne Convention, above n 16.

25 TRIPS, above n 4, art 9(1) (excluding art 6*bis*); WIPO Copyright Treaty 2186 UNTS 121 (opened for signature 20 December 1996, entered into force 6 March 2002), art 1(4) [WCT]; Berne Convention, above n 16, arts 1–21.

26 Beijing Treaty on Audiovisual Works (adopted 24 June 2012, not yet in force) [Beijing Treaty]. In the Asia Pacific, Indonesia has signed while China, Japan, and the Russian Federation have ratified the Beijing Treaty.

27 WIPO Performances and Phonograms Treaty 2186 UNTS 203 (adopted 20 December 1996, entered into force 20 May 2002) [WPPT]. In addition to international treaties, regional instruments such as the Swakopmund Protocol within the Framework of the African Regional Intellectual Property Organization (ARIPO) also recognise the expressions of folklore as a matter for protection. Swakopmund Protocol on the Protection of Traditional Knowledge and Expressions of Folklore (adopted by the Diplomatic Conference of ARIPO at Swakopmund (Namibia) August 9, 2010) art 1.

28 For a list of national legislation see WIPO Traditional Knowledge, Traditional Cultural Expressions & Genetic Resources Laws, available at [www.wipo.int](http://www.wipo.int).

Aware of the exclusion or lack of effective protection for TCEs in international copyright instruments, in 2008, the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) commissioned a gap analysis on *The Protection of Traditional Cultural Expressions*.<sup>29</sup> The focus of the gap analysis was on describing the existing international possibilities for the protection of TCEs, identifying the gaps that existed for protection internationally and, finally, outlining the options available for addressing those gaps.

Since 2011, the IGC has been working on a new international instrument for the protection of TCEs.<sup>30</sup> At the time of writing this chapter, the IGC planned to continue its text-based negotiations on TCEs in its upcoming sessions as part of its 2018/2019 Mandate. Many Asian Pacific countries have been closely involved with the negotiations at the IGC. For instance, Indonesia currently coordinates the ‘group of Like-Minded Countries’ consisting of countries from the Asian Pacific, as well as the Latin American and Caribbean groups. Australia and New Zealand have been particularly engaged in securing financial support for enabling the participation of indigenous and local communities at the negotiations.<sup>31</sup>

## 3 Why Copyright Harmonisation Matters

### 3.1 Countries’ Obligations under Human Rights Law

One cannot resist drawing parallels between the protection of TCEs and copyright and the interface of human rights and IP law.<sup>32</sup> Similar reasons can be identified for the current state of the interface in both areas. Generally, human rights and IP law (and its connection to trade) have developed separately. Furthermore, there is still a lack of clarity regarding

29 WIPO *The Protection of Traditional Cultural Expressions: Draft Gap Analysis* WIPO/GRTKF/IC/13/4(b) (11 October 2008).

30 WIPO *The Protection of Traditional Cultural Expressions: Draft Articles* WIPO/GRTKF/IC/33 (March 2017) [WIPO Draft Articles].

31 WIPO IGC *Participation of Indigenous and Local Communities: Proposal for Subsidiary Contributions to the Voluntary Fund* WIPO/GRTKF/IC/28/10 (19 May 2014); See also WIPO ‘Australian Donation Means New Life for Fund that Involves Indigenous Peoples in International Negotiations’ (press release, 1 March 2017).

32 See for an overview Laurence Helfer and Graeme Austin *Human Rights and Intellectual Property: Mapping the Global Interface* (Cambridge University Press, Cambridge, 2011).

the definition and scope of human rights and TCEs. Consequently, the international community has not sufficiently explored or recognised the human rights implications of trade in TCEs.

Concepts such as public interest and flexibility have been an integral part of international IP treaties. However, it was not until 2013, when WIPO adopted the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, that human rights and their importance were expressly mentioned in an IP instrument.<sup>33</sup>

UNDRIP is generally viewed as the most prominent authority on the rights of indigenous people, complementing and emphasising the human rights previously recognised in key international human rights agreements.<sup>34</sup> With the exception of a few countries in the region, most Asian Pacific countries initially voted in favour of the Declaration.<sup>35</sup>

The legal status of UNDRIP is the subject of debate. Since it was drafted in the form of a declaration, as opposed to a convention or treaty, UNDRIP arguably has a non-binding status. However, some commentators argue that because of the universal acceptance of the Declaration and the subsequent endorsement of the opposing countries, including Australia and New Zealand, the Declaration has become part of customary international law.<sup>36</sup>

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33 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (opened for signature 27 June 2013, entered into force 30 September 2016) [Marrakesh Treaty].

34 UNDRIP, above n 11.

35 Australia and New Zealand initially voted against UNDRIP. Cambodia, China, India, Indonesia, Japan, Malaysia, Maldives, Micronesia, Nepal, Philippines, Singapore, Sri Lanka, Thailand, Timor-Leste and Vietnam voted in favour of the Declaration. Bangladesh, Russian Federation and Samoa abstained from voting. UNDRIP Voting Record, United Nations Bibliographic Information System [unbisnet.un.org](http://unbisnet.un.org).

36 See Mauro Barelli 'The United Nations Declaration on the Rights of Indigenous Peoples: a human rights framework for intellectual property rights' in Matthew Rimmer (ed) *Indigenous Intellectual Property: A Handbook of Contemporary Research* (Edward Elgar, Cheltenham, 2015) at 47; S James Anaya and Siegfried Wiessner 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment' in S James Anaya (ed) *International Human Rights and Indigenous Peoples* (Wolters Kluwer, Austin, 2009) at 99–102; Stephan Allen 'The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order on Indigenous Rights?' in Andrew Halpin and Volker Roeben (eds) *Theorising the Global Legal Order* (Hart Publishing, Oxford, 2009) 187; and Emmanuel Voyiakis 'Voting in General Assembly as Evidence of Customary International Law?' in Stephen Allen and Alexandra Xanthaki (eds) *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart Publishing, Oxford, 2011) 209.

Of relevance to the discussion of this chapter is art 11(2) of UNDRIP, which states:<sup>37</sup>

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Furthermore, arts 12 and 13 recognise rights of indigenous people towards their ‘spiritual and religious traditions, customs and ceremonies’ and their ‘histories, languages, oral traditions, philosophies, writing systems and literatures’.<sup>38</sup> On the issue of participation of indigenous communities, art 18 of UNDRIP provides that:<sup>39</sup>

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Finally, art 31 of UNDRIP stipulates that:<sup>40</sup>

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including ... oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>41</sup>

Viewing rights of indigenous people to their TCEs through the lens of human rights necessitates two sets of actions by governments. First, by protecting TCEs from misappropriation, countries ensure that human

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37 UNDRIP, above n 11, art 11(2).

38 Articles 12 and 13.

39 Article 18.

40 Article 31.

41 See for an analysis of the scope and meaning of an indigenous right to intellectual property in the context of New Zealand Valmaine Toki ‘An Indigenous Rights to Intellectual Property’ (2015) *Intellectual Property Quarterly* 370; and Jessica C Lai ‘What is an “Indigenous Right to Intellectual Property?”’ (2017) 1 *Intellectual Property Quarterly* 78.

rights associated with TCEs are respected, protected and fulfilled.<sup>42</sup> Second, similar to other human rights, rights of indigenous communities should be balanced against the human rights of others. This includes balancing both IPRs of indigenous peoples (as creators) as well as non-IP related human rights of indigenous peoples (as custodians of TCEs) against others' human rights (such as the right to freedom of expression or culture). Therefore, countries would engage in a balancing act that defines the scope of permissible uses of TCEs by artists, creators or the general public.<sup>43</sup> For instance, the Waitangi Tribunal in New Zealand has provided extensive guidelines on how a balance should be struck between the protection of Māori interests in their TCEs and the interests of others.<sup>44</sup>

This may appear the same as the balancing of different rights under art 15 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) regarding the interests of authors and those of the public.<sup>45</sup> However, the unique relationship between indigenous peoples and their cultural expressions requires a different balancing strategy. Harmonising copyright law across the Asian Pacific region, with diverse indigenous communities, without taking local customs and social values into account as part of a balancing act, undermines the human rights obligations of the countries in the region.

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42 See, for example, *Universal Declaration of Human Rights* GA Res 217/A (1948), art 27 [UNDHR] recognising everyone's right to participation in the cultural life of the community and protection of the moral and material interests resulting from any scientific, literary or artistic works they create; International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 27 [ICCPR]; International Covenant on Economic, Social and Cultural Rights 999 UNTC 3 (opened for signature 16 December 1966, entered into force 3 January 1976), art 15 [ICESCR]; Convention on the Elimination of All Forms of Discrimination against Women 1249 UNTS 13 (opened for signature 18 December 1979, entered into force 3 September 1981), art 13(c) [CEDAW]; Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990), art 31 [CRC]; UNDRIP, above n 11, arts 8 (recognising the rights for indigenous peoples not to be subjected to 'destruction of their culture') 11, 31 (recognising the right to maintain, control, protect and develop indigenous culture and traditional cultural expressions) and 13 (specifically recognising the indigenous peoples right to 'maintain, control, protect and develop their intellectual property over such cultural heritage ... and traditional cultural expressions').

43 See for a discussion of balancing of indigenous-derived art and freedom of expression in New Zealand Jessica C Lai 'Bicultural Art: Offensive to the Māori or Acceptable Freedom of Expression?' Wai 262, the CCPR and NZBORA' (2013) 19(2) AJHR 47.

44 Waitangi Tribunal *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity* (Wai 262, 2011) especially at ch 1 [Wai 262 Report].

45 ICESCR, above n 42, art 15.

### 3.2 Reinforcing the Existing Incompatibilities

Further global or regional harmonisation allows copyright to assert itself in indigenous communities where cultural expressions and the knowledge that accompanies them are not traditionally viewed as commodities that can be financially exploited. Protection and exploitation of TCEs and TCE-derived works through copyright law is therefore bound to create tensions.

Indigenous communities have similarities but also differences, and those differences in creation, exploitation and conservation of indigenous works are closely tied to indigenous artists and their communities' identities and ways of life.

Harmonisation should be evaluated and addressed on its own merits and in the cultural context of the countries of the region. Simply following existing copyright law or merely adopting new legislation or policy is not appropriate because it not only reinforces a system that is ineffective in protecting TCEs from misappropriation but it also imposes the same ineffective system on indigenous communities with diverse and varying cultural heritage and worldviews. The provisions of the draft Asian Pacific Copyright Code do not acknowledge this and currently reflect the international copyright law and its shortcomings in protection of indigenous TCEs that have been repeated and reinforced through ongoing harmonisation.<sup>46</sup>

Expressions of diverse knowledge structures of indigenous communities should not be subjected to the same copyright rules and principles as non-indigenous works. A certain country's indigenous communities differ not only from those in other countries but also from one another. For instance, indigenous communities may have differing views as to what can be freely used, used upon seeking permission and what cannot be used and should not form part of the public domain.<sup>47</sup>

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<sup>46</sup> Sterling, above n 2.

<sup>47</sup> See Jessica C Lai *Indigenous Cultural Heritage and Intellectual Property Rights: Learning from the New Zealand Experience?* (Springer, Cham, 2014) at 69.

The application and enforcement of IPRs is not going to be simple and straightforward where there are local institutions, traditional ideas and social values in place that resist or complicate such application.<sup>48</sup> Transplanting laws is problematic to begin with, let alone when that law would treat very different subject matters in the same way.<sup>49</sup>

Doris Long argues that ‘indigenization’ of IPR protection is an example of the rejection of the harmonisation of western IPRs.<sup>50</sup> While this ‘indigenization’ offers some solutions for protection of TCEs, it does not solve the problem of conflict of laws or adoption of initiatives for protection of TCEs.

Furthermore, one of the fundamental differences between indigenous worldviews and the IP system is the holistic view of indigenous communities regarding culture and knowledge and their indivisibility. Peter Drahos describes the holistic indigenous worldviews as ‘a set of doctrines, precepts or directions left by ancestors for finding the correct path in the world’.<sup>51</sup> TCEs are linked to other concepts such as TK that form part of the now recognised ‘cultural heritage’ of indigenous peoples.<sup>52</sup> As Michael Blakeney argues, international debates often start with acknowledging the holistic nature of TK and TCEs but the negotiators’ ‘industrial property and copyright influenced habits of mind’ cause them to try to fit indigenous concepts into ‘familiar categories with tight definitions’.<sup>53</sup> Harmonising an area of law that affects TCEs will undoubtedly affect other aspects of indigenous cultural heritage and should be carefully considered.<sup>54</sup>

48 Elain Gin ‘International Copyright Law: Beyond WIPO and TRIPS Debate’ (2004) 86 JPTOS 771.

49 See for an overview of the impact of transplanting IP laws in the Asian Pacific Pham Duy Nghia ‘Transplanted Law – An Ideological Cultural Analysis of Industrial Property Law in Vietnam’ in Christoph Antons, Michael Blakeney and Christopher Heath (eds) *Intellectual Property Harmonisation within ASEAN and APEC* (Kluwer Law International, The Hague, 2004) at 125.

50 Doris Long ‘“Democratizing” Globalization: Practicing the Policies of Cultural Inclusion’ (2002) 10 Cardozo J International and Comp L 217.

51 Peter Drahos *Intellectual Property, Indigenous Peoples and their Knowledge* (Cambridge University Press, Cambridge, 2014) at 18–19.

52 Christoph Antons ‘Intellectual property rights in indigenous cultural heritage: Basic concepts and continuing controversies’ in Christoph Graber, Karolina Kuprecht and Jessica Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012) at 154.

53 Michael Blakeney ‘The negotiations in WIPO for international conventions on traditional knowledge and traditional cultural expressions’ in Jessica C Lai and Antoinette Maget Dominicé *Intellectual Property and Access to Im/material Goods* (Edward Elgar, Cheltenham, 2016) at 254.

54 See Debora Halbert *The State of Copyright: The Complex Relationships of Cultural Creation in a Globalized World* (Routledge, London, 2014) at 14, which states ‘indigenous communities see traditional cultural expressions and knowledge as part of the larger struggle for autonomy, sovereignty, and self-governance’.

Further harmonisation of copyright law in the absence of a well-established and binding international legal framework for the protection of TCEs could create more problems, unless the impact of copyright on TCEs is accounted for in the harmonisation framework.

### 3.3 Potential Conflict of Copyright and Sui Generis Systems

Copyright harmonisation would be particularly problematic in the absence of mechanisms, such as sui generis systems, for the protection of TCEs. In that scenario, the same copyright rules and regulations would apply to TCEs and their custodians, which have diverse customs in different countries.

However, even in the presence of protection mechanisms that would limit the application of copyright law, there would still be an issue of conflict between local laws on protection of TCEs and the country's obligations under international or regional copyright laws that apply to instances of TCEs or works derived from them. As Susy Frankel argues, conflict between IP and other systems of protecting traditional knowledge and culture 'will inevitably arise'.<sup>55</sup> For instance, what happens when a country member to the main international copyright treaties does not join initiatives protecting TCEs and does not pass protective domestic legislation either?

The WIPO Draft Articles for Protection of Traditional Cultural Expressions (WIPO Draft Articles),<sup>56</sup> if and when adopted, will form an international sui generis system for the protection of cultural heritage from misappropriation. However, the legal nature of the final outcome of the negotiations at WIPO is still unclear and, similar to other international agreements, its effectiveness will rely on its adoption by countries. Even when adopted, it will be up to its contracting parties to create appropriate domestic policy and legislation to implement the principles of such a sui generis system. Therefore, it is crucial to ensure that copyright law does not conflict with the operation of existing or future sui generis systems that protect national interests.

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55 Susy Frankel 'A New Zealand perspective on the protection of mātauranga Māori' in Christoph Graber, Karolina Kuprecht and Jessica C Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012) at 441.

56 WIPO Draft Articles, above n 30.

## 4 Copyright Harmonisation and TCEs: Looking Ahead

Amending the existing IP framework is a rather cumbersome, if not impossible, task. However, future harmonisation attempts can provide an opportunity to address some of the existing difficulties instead of reinforcing them.

Long argues that ‘international IP harmonisation threatens to exacerbate further the division between North and South by continuing to marginalise the participation of developing and non-industrialised countries’.<sup>57</sup> Therefore, a regional copyright code would be an opportunity to bridge this gap by giving developing countries, particularly those with indigenous communities, a seat at the table.

International regulation of indigenous interests in TCEs has proven difficult. Regional harmonisation of copyright on the other hand, provided it is limited to setting minimum standards, can provide an opportunity for overcoming the disagreements that are slowing down the international process. Fewer actors and more common ground, due to geographical similarities, give countries the chance to innovate and adopt norms based on local effective practices. While leaving sufficient policy manoeuvre space for countries to incorporate their national needs, a regional harmonising instrument can incorporate successful national practices instead of imposing an absolute top-down approach.

Generally, harmonisation can offer certainty for creators and users of TCEs, and authors of derivative works with indigenous origin. Harmonising copyright can also particularly help address the issue of protection of cross-border TCEs that span over multiple jurisdictions.<sup>58</sup> It can address the disputes in Asia over multiple claims over IPRs in cross-border TCEs through a dispute resolution mechanism.<sup>59</sup>

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57 Long, above n 50, at 224.

58 See for some examples of such TCEs in relation to copyright (discussed in the context of geographical indications in the article) Mohammad Towhidul Islam and Ahsan Habib ‘Introducing Geographical Indications in Bangladesh’ (2013) 24(1) Dhaka University Law Journal 51 at 62–66. One example is the production of Nakshi Kantha (a type of embroidered quilt) in Bangladesh and India where the patterns are claimed by both countries to belong to their indigenous peoples.

59 See for an overview of cross-border disputes concerning TCEs Christoph Antons ‘At the Crossroads: The Relationship Between Heritage and Intellectual Property in Traditional Knowledge Protection in Southeast Asia’, above n 9, at 92–94.

## 4.1 Recognition and Acknowledgement of Human Rights

Any initiative that further harmonises copyright globally or regionally needs to be in line with the obligations of states under the existing international treaties on the protection of copyright. Even if considered incompatible with the protection of TCEs, amending the existing international copyright instruments is rather politically, even if not legally, unrealistic or impracticable. However, the interpretation of existing laws or adoption of new IP law and policy, whether in IP or trade platforms, can be subjected to broad international law principles and rules, including human rights law. Therefore, harmonising copyright without due consideration of its impact on TCEs and indigenous rights, be it for instance through imposing limited terms of protection or individual authorship and ownership requirements, would violate human rights entrenched in international law.<sup>60</sup>

The function of recognising the human rights of indigenous people that are related to their TCEs, in regional or international instruments that harmonise copyright, is twofold. First, it highlights the social and cultural purpose and object of IP as partly identified in the Preamble to the TRIPS Agreement and its arts 7 and 8 regarding the balancing of rights and interests in the IP regime.<sup>61</sup> Second, it underlines the interconnectedness of copyright and states' obligations under international human rights law. The presence of human rights principles in harmonisation frameworks goes beyond semantics and is an acknowledgement of the potential effects of the latter on the former. It can also act as a reminder of the need for equilibrium between human rights and copyright when implementing the latter.<sup>62</sup>

Therefore, when incorporating the adopted norms into their domestic law, the signatories to a regional or international instrument should observe this balance and set of obligations. This is especially important

60 See above n 42.

61 TRIPS, above n 4, Preamble and arts 7 and 8.

62 See Human Rights Commission *Report of the High Commissioner on the Impact of the Agreement on Trade-Related Aspects of Intellectual Property Rights on Human Rights* E/CN.4/Sub.2/2001/13 (27 June 2001) at [61], which states that 'an important aspect of the human rights approach to IP protection is the express linkage of human rights in relevant legislation. Express reference to the promotion and protection of human rights in the TRIPS Agreement would clearly link States' obligations under international trade law and human rights law . . . . This would assist States to implement the "permitted exceptions" in the TRIPS Agreement in line with their obligations under ICESCR'.

in light of the provisions that leave states with room for flexibility in the way they implement international obligations. Reference to indigenous communities and their rights over TCEs in domestic legislation would acknowledge the position of indigenous people as creators and guardians of cultural expressions, equal in rights, if not similar, to other creators of copyright works.

An overarching and general principle that acknowledges the significance of TCEs that might fall under the definition of copyright subject matter in an instrument harmonising copyright in the region is a good start. Instruments that are too prescriptive in defining contentious concepts such as indigenous peoples, beneficiaries or cultural expressions may defeat the purpose of protecting indigenous interests by excluding certain groups from protection.

Such an instrument could also specifically allow or require member states to provide for measures in their copyright legislation that protect TCEs and are in line with international human rights law principles relevant to rights of indigenous peoples. However, provisions that are too broad and give too much discretion to national states run the risk of not being implemented consistently with the intent of the drafters.

Furthermore, human rights are enforceable through many existing mechanisms. Evaluation of the impact of copyright policy, including harmonisation, on rights of indigenous communities to their TCEs in different countries could be achieved through monitoring mechanisms designed for IP law or human rights law instruments.

In reporting on their compliance with IP agreements, states could be required to include the steps they have taken to guarantee the protection of TCEs from the negative impact of copyright law.<sup>63</sup> Such steps might consist of their innovations within the framework of copyright law, sui generis systems (and their relation to copyright) or both. This could include both attempts at enabling indigenous communities to enjoy copyright protection over their TCEs when desired, as well as stopping the misappropriation of TCEs through copyright protection by third parties such as non-indigenous authors. Protection from misappropriation could also include measures that would stop authors from using indigenous

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63 Human Rights Commission, above n 62, at [61] encouraging states to ‘monitor the implementation of the TRIPS Agreement to ensure that its minimum standards are achieving ... [the] balance between the interests of the general public and those of the authors’.

TCEs for the creation of new works when it is not culturally appropriate. Furthermore, countries could report on specifically designed exceptions they have adopted that lay out the permissible uses of TCEs. Such exceptions separate TCEs from other copyright works and would ensure that they are not subject to the standard built-in flexibilities of copyright law as stipulated under the Berne and TRIPS three-step tests.<sup>64</sup>

For instance, the impact of copyright harmonisation on TCEs could be evaluated under the umbrella of public interest as recognised in the TRIPS Agreement.<sup>65</sup> Under its existing transparency requirements, the World Trade Organization (WTO) requires its Member States to report about their specific measures, policies or laws, and the WTO itself regularly reviews the Members' trade policies.<sup>66</sup> States' performances in terms of safeguarding the public interest could be added to the current revision mechanism. This, however, would first require political will and a paradigm shift regarding rights of indigenous people to their cultural heritage.

Alternatively, human rights reporting mechanisms could be used for the same purpose. Countries that are members of the ICESCR have an obligation to report on the actions they have taken and on their progress with realising of the rights recognised in the Covenant.<sup>67</sup> The Committee on Economic, Social and Cultural Rights has in the past provided guidelines regarding the reporting process.<sup>68</sup> Therefore, the Committee could require the ICESCR Member States to specifically report on the impact of their copyright law and policy on misappropriation of TCEs.

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64 The Berne and TRIPS three-step tests set out the requirements for inclusion of copyright flexibilities in national legislation. Berne Convention, above n 16, art 9(2), and TRIPS, above n 4, art 13.

65 TRIPS, above n 4, arts 7 and 8.

66 Some examples of such reports and reviews are the Reviews of Legislation on Enforcement of Intellectual Property Rights, Checklist of Issues on Enforcement of Intellectual Property, and the Annual Reports submitted to and published by the Council for Trade-Related Aspects of Intellectual Property Rights as well as countries' Trade Policy Reviews produced by the Trade Policy Review Body, available at docs.wto.org.

67 ICESCR, above n 42, art 16(1).

68 TRIPS, above n 4; see ICESCR, above n 42, art 16(2), which assigned the United Nations Economic and Social Council (ECOSOC) the task of monitoring the implementation of the Covenant. See *Review of the composition, organization and administrative arrangements of the Sessional Working Group of Governmental Experts on the Implementation of the International Covenant on Economic, Social and Cultural Rights* ECOSOC Res 1985/17 (1985), which established the Committee on Economic, Social and Cultural Rights to monitor states' reports and provide country-specific and general comments.

Countries that have ratified the United Nations Convention on the Rights of the Child (UNCRC) have to report to the Committee on the Rights of the Child two years after ratification of the Convention and every five years thereafter.<sup>69</sup> The Committee has provided guidelines for state reports and can request further information regarding the implementation of the UNCRC.<sup>70</sup> Articles 30 and 31 of the UNCRC recognise the right of children (particularly indigenous children) to enjoyment of and participation in his or her cultural life.<sup>71</sup> Alternatively, countries' laws and policies on the interface of TCEs and copyright could be evaluated in the UN Special Rapporteur's country reports on the rights of indigenous peoples.<sup>72</sup>

## 4.2 A Pluralistic View of Harmonisation

Many contentious issues still exist regarding protection of TCEs from misappropriation and their relationship with copyright law. The WIPO IGC has been addressing and debating these issues in the framework of the WIPO Draft Articles.<sup>73</sup> It is not expected that international copyright treaties or national legislation will or can fully address these questions or provide answers for them. However, such instruments can highlight that standard copyright rules should not apply to matters such as authorship, ownership, scope, term and exceptions in relation to TCEs. Countries can be required to refer to other international frameworks, such as the WIPO Draft Articles,<sup>74</sup> or to pass national legislation that ensure their copyright laws comply with their human rights obligations towards indigenous rights.

69 CRC, above n 42, arts 44(1) and (2).

70 Article 44(4). See also *General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties under Article 44, paragraph 1 (a), of the Convention* CRC/C/5 (30 October 1991) [CRC, General Guidelines]; and *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1 (b), of the Convention on the Rights of the Child* CRC/C/58/Rev.3 (3 March 2015) [CRC, Treaty-specific guidelines].

71 CRC, above n 42, arts 30 and 31.

72 Special Rapporteur on the rights of indigenous people 'Country reports' OHCHR United Nations Human Rights Office of the High Commissioner [www.ohchr.org](http://www.ohchr.org).

73 WIPO Draft Articles, above n 30.

74 WIPO Draft Articles, above n 30.

As Hannu Wager and Jayashree Watal argued, ‘if we consider the IP system as a tool of public policy, human rights considerations may be helpful in defining the objectives of the policy’.<sup>75</sup> Boundaries of what attracts copyright protection and what does not are not unchangeable. As Frankel noted, what IP protects is a ‘cultural construct’.<sup>76</sup> Countries have been creating new forms of rights or subject matters on an ongoing basis. International copyright instruments harmonise the minimum standards of protection. Therefore, countries may provide for greater protection and may extend the minimum required protection to new categories of works.

In adopting a tiered approach to protection of TCEs from misappropriation, countries need to identify those aspects of indigenous culture for which IP is a suitable means of protection. When harmonising copyright and recognising the rights of indigenous communities to the TCEs, any such initiative should allow states enough flexibility to protect TCEs according to their national needs.

Antony Taubman suggests that three policies can inform the interface of IP and indigenous peoples’ rights: a ‘more effective use of existing mechanisms to protect communities’ interests’; ‘adapting the existing principles of intellectual property law and extending their effect to respect more effectively community interests’; and ‘creating altogether new, stand-alone forms of protection for traditional knowledge and traditional cultural expressions’.<sup>77</sup> In the realm of copyright, countries have used one or a combination of these measures to protect indigenous rights within their national context. For instance, the South African Intellectual Property Law Amendment Act 2013 extends copyright protection to:<sup>78</sup>

a literary, artistic or musical work with an indigenous or traditional origin, including indigenous cultural expressions or knowledge which was created by persons who are or were members, currently or historically, of an indigenous community and which literary, artistic or musical work is regarded as part of the heritage of such indigenous community.

75 Hannu Wager and Jayashree Watal ‘Human rights and intellectual property law’ in Christophe Geiger (ed) *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar Publishing, Cheltenham, 2015) at 159; see also on how copyright can be used to protect indigenous interests Silke von Lewinski (ed) *Indigenous heritage and intellectual property: Genetic resources, traditional knowledge and folklore* (2nd ed, Kluwer Law International, London, 2008) at 350–413; and Daphne Zografos *Intellectual Property and Traditional Cultural Expressions* (Edward Elgar, Cheltenham, 2010) at ch 2.

76 Susy Frankel ‘From Barbie to Renoir: Intellectual property and culture’ (2010) 41 *VUWLR* 1 at 9.

77 Antony Taubman *A Practical Guide to Working with TRIPS* (Oxford University Press, Oxford, 2011) at 185–189.

78 Intellectual Property Laws Amendment Act 2013 (South Africa), s 1(1).

The Act also recognises communal ownership of traditional expressions by considering the author of an indigenous work ‘the indigenous community from which the work originated’.<sup>79</sup>

The WIPO Draft Articles adopt the language of the Berne Convention and TRIPS Agreement three-step tests,<sup>80</sup> when it comes to limitations and exceptions to rights over TCEs, with an additional requirement for treatment of expressions not to be derogatory or offensive.<sup>81</sup> This is an attempt at extending the existing protection of IPRs to TCEs. However, it remains unclear whether this approach can sufficiently respond to the problems caused by applying the existing standards of copyright flexibility to TCEs.

Moral rights present another possible means for extending the protection of IP to TCEs. Article 6bis of the Berne Convention protects the moral rights of the author.<sup>82</sup> The TRIPS Agreement, however, does not explicitly provide for the protection of moral rights.<sup>83</sup>

A few factors deem the existing moral rights ineffective for protection of indigenous TCEs. First, moral rights are personal to the author and authorised persons or institutions after his or her death.<sup>84</sup> However, many indigenous communities do not recognise an individual as the author of a TCE or TCE-derived work. Second, similar to economic rights, moral rights are generally protected for a limited time.<sup>85</sup> This feature can also clash with the cultural significance of existing or future TCEs that requires perpetual protection. Finally, the scope of rights established under the

79 Section 1(1).

80 Berne Convention, above n 16, art 9(2), and TRIPS, above n 4, art 13. See above n 64.

81 WIPO Draft Articles, above n 30, art 5.

82 Berne Convention, above n 16, art 6bis.

83 TRIPS Agreement, above n 4, art 9, which states ‘Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto. However, Members shall not have rights or obligations under this Agreement in respect of the rights conferred under Article 6bis of that Convention or of the rights derived therefrom’; See also Sam Ricketson and Jane Ginsburg *International Copyright and Neighbouring Rights: The Berne Convention and Beyond* (2nd ed, Oxford University Press, Oxford, 2006) vol 1 at 615–619 for a detailed discussion of the moral rights in the TRIPS and its connection with the Berne Convention, arguing that members of TRIPS still have an obligation towards some moral rights that fall outside the scope of art 6bis, such as the right to disclosure or divulgation. The WCT requires its Contracting Parties to comply with arts 1 to 21 of the Berne Convention including art 6bis that confers the moral rights. WCT, above n 25, art 1(4).

84 Berne Convention, above n 16, art 6bis(1).

85 Article 6bis(2) of the Berne Convention prescribes that moral rights should ‘be maintained, at least until the expiry of the economic rights’. Some civil-law jurisdictions, however, have perpetual moral rights, e.g. France’s Code de la propriété intellectuelle, art. Article L121-1.

Berne Convention and further interpreted by case law may not align with the interests of indigenous communities in their TCEs.<sup>86</sup> Article 6bis(1) of the Berne Convention recognises the author's right to:<sup>87</sup>

claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his or her honour or reputation.

This approach fails to reflect that, with respect to certain works of indigenous origin, the mere use of the work without distortion, mutilation or other modification may still be prejudicial to the interest of the indigenous community.<sup>88</sup> Therefore, when further harmonising copyright, countries could include innovative provisions on protection of moral rights of indigenous communities as collective guardians of TCEs.<sup>89</sup>

An approach for further copyright harmonisation, through either international and regional instruments or bilateral and multilateral trade agreements, should take advantage of the combination of policy responses that Taubman proposes.<sup>90</sup>

However, when creating sui generis protection systems, countries should ensure the compatibility of sui generis protection of TCEs and copyrights within the framework of copyright law.<sup>91</sup> As Frankel and Christoph Graber have argued, procedural mechanisms that protect the relationship of indigenous peoples with their culture and knowledge can facilitate the interface of sui generis protection and copyright law.<sup>92</sup>

86 Berne Convention, above n 16.

87 Berne Convention, above n 16, art 6bis(1).

88 See, for example, *Yumbulul v Reserve Bank of Australia* [1991] FCA 332; (1991) 21 IPR 481 where the image of an indigenous artwork was reproduced on a bank note. The indigenous community to which the artist belonged deemed the use inappropriate. However, the Court found the reproduction legitimate under the terms of a licensing agreement between the indigenous artist and an intermediary agency. See also *Zografos*, above n 75, at 48–49.

89 In Australia, the legislature did not pass the proposed Copyright Amendment (Indigenous Communal Moral Rights) Bill 2003. For an analysis of the Bill, see Jane Anderson 'Indigenous Communal Moral Rights: The Utility of an Ineffective Law' (2004) 5(30) ILB 15.

90 Taubman, above n 77, at 185–189.

91 An example is ensuring the compatibility of copyright with sui generis protection of TCEs through geographical indications (GI). A potential benefit of GI protection of TCEs is the perpetual nature of the right. A major problem with GI protection of TCEs is determining the GI holder and the boundary of geographical area.

92 Susy Frankel 'A New Zealand perspective on the protection of mātauranga Māori' in Christoph Graber, Karolina Kuprecht and Jessica C Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012) at 454; Christoph Graber 'Institutionalization of Creativity in Traditional Societies and in International Trade Law' in Shubha Ghosh and Robin Malloy (eds) *Creativity Law and Entrepreneurship* (Edward Elgar, Cheltenham, 2011) 234 at 251–252.

Instruments harmonising copyright law can accommodate overarching principles regarding such procedural mechanisms without interfering with already existing international copyright norms. Countries can retain the freedom to choose the policy approach for the adoption of such mechanisms most suitable to their domestic context.<sup>93</sup>

Frankel explains that in New Zealand, the introduction of the Advisory Committees by the Trade Marks Act 2002 and Patents Act 2013<sup>94</sup> was intended to bridge the gap between the IP system and sui generis methods of protecting traditional knowledge and culture.<sup>95</sup> The Committees advise the Patents and Trade Mark Commissioners regarding any conflict between the interests of Māori and granting of a patent or registration of a trade mark.<sup>96</sup> These measures were designed to ensure that Māori knowledge and culture is not misappropriated under the framework of patents and trade marks legislation.

However, it is not possible to replicate the exact same checks and balances within the copyright law framework. The automatic protection<sup>97</sup> of copyright law means that any TCE-derived work that fits the copyright

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93 See Christoph Graber, Karolina Kuprecht and Jessica C Lai 'The trade and development of indigenous cultural heritage: Completing the picture and a possible way forward' in Christoph Graber, Karolina Kuprecht and Jessica C Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012) at 468–469, which highlights the importance of ensuring that procedural measures facilitate the interface of sui generis systems of protection of indigenous cultural heritage and IP laws.

94 Trade Marks Act 2002; Patents Act 2013; The Trade Marks Māori Advisory Committee was formed as a result of consultations with Māori in the mid-1990s and on the grounds that previous trade marks laws did not protect the interests of Māori sufficiently. Upon the passage of the Geographical Indications (Wine and Spirits) Registration Act 2006, the Committee provides advice regarding the proposed use or registration of a geographical indication likely to be offensive to Māori. The Patents Māori Advisory Committee was part of the broader changes introduced by the Patents Act 2013.

95 Susy Frankel 'A New Zealand perspective on the protection of mātauranga Māori' in Christoph Graber, Karolina Kuprecht and Jessica C Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012).

96 Patents Act 2013, s 226; Trade Marks Act 2002, s 178.

97 The majority of countries have stepped away from subjecting copyright protection to formalities such as registration, notice and deposit after the adoption of the Berne Convention, above n 16. Fixation requirements are, however, a common feature of many national copyright legislations.

subsistence requirements is considered a copyright work.<sup>98</sup> The creation of TCE-derived works by non-indigenous authors and without the consultation of the indigenous community from which the TCE originates raises two sets of overlapping problems. First is the issue of compensation, which, in some instances, may be compared to the violation of the material interests of the author in the absence of licensing schemes. The second is where the creation of derivative works is contrary to the cultural values of the indigenous community.<sup>99</sup>

This second problem may also arise when copyright flexibilities (namely, the three-step test)<sup>100</sup> are applied to copyright works created by indigenous artists based on their heritage. Susan Corbett has dealt with this issue in the context of permissible uses of copyright works by libraries and archives in New Zealand.<sup>101</sup> In the way of exclusion, countries could indicate that the harmonised provisions on fair use or limitations and exceptions to copyright do not apply to subject matters that are TCEs or derivative works of indigenous origin.<sup>102</sup> The copyright legislation should make it clear that the use of TCEs for creation of derivative works will be governed by sui generis systems in place and copyright infringement rules including substantiality and originality should not apply. Adjusting the national copyright flexibilities in light of works of indigenous origin (created

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98 However, as per art 17 of the Berne Convention, above n 16 (and art 9(1) of the TRIPS Agreement, above n 4) countries can control or prohibit the 'circulation, presentation, or exhibition of any work or production' without violating their obligations under these instrument. While this does not stop unauthorised, offensive or culturally inappropriate TCE-derived works from attracting copyright protection, countries can use their discretion to limit the exclusive rights of authors of such works. See for a further discussion of art 17 of the Berne Convention, Lai, above n 47, at 277–278. There is also an ongoing debate on whether certain types of works such as pornography or works generally seen as contrary to public order or morality are copyright protected. See, for example, Ann Bartow 'Copyright Law and Pornography' (2012) 91(1) Oregon Law Review 1, and Yasuto Shirae 'Copyright Protection on Pornography in Japan' (2014) 3(2) NTUT Journal of Intellectual Property Law and Management 213.

99 The balance of the cultural values of the indigenous community and the rights of the public is of significance and discussed within the context of New Zealand in Lai, above n 43.

100 Berne Convention, above n 16, art 9(2), and TRIPS, above n 4, art 13.

101 Corbett has recommended that s 55(3) of the New Zealand Copyright Act 1993 be amended to require libraries and archives to 'consult with Maori before digitising and providing online public accessibility to cultural heritage originating from Maori. An assessment of the balance between the public interest in culture versus the owners' rights in their property should also be required'. Susan Corbett *Archiving our culture in a digital environment: Copyright law and digitisation practices in cultural heritage institutions* (New Zealand Law Foundation, 2011) at 41.

102 On how permitted uses and fair use can impact negatively on indigenous concerns and TCEs, see Natalie P Stoianoff and Evana Wright, and Jonathan Barrett, in this volume.

by both indigenous and non-indigenous authors) would represent one means of protecting TCEs from misappropriation caused by the way the copyright law is set up internationally.

In the absence of consideration for indigenous rights in copyright legislation, claims against misappropriation of TCEs will be either secondary to copyright protection by resorting to *sui generis* methods (e.g. cultural heritage legislation) or hard to defend when such methods do not exist.

Countries should explore their options regarding the interface of *sui generis* measures and copyright law. One way of addressing this issue is establishing a body that provides guidelines on treatment of TCEs as copyright works or creation of new works using TCEs.<sup>103</sup> Alternatively, countries could introduce a registration requirement for copyright subsistence generally or limited to derivative works created using TCEs.

Acknowledgement that nothing in the copyright agreement stops the member states from adopting policy and law that are necessary for management of TCEs within their territory and meeting their obligations under other international human rights law is another option.<sup>104</sup>

Copyright treaties can allow indigenous peoples themselves to decide what TCEs can be subject to copyright protection or flexibilities. However, this in itself does not address the situations where there are no recognised custodians of certain TCEs or alternatively where multiple communities lay a claim to an expression.

An instrument harmonising copyright should also require states to adopt suitable national remedies for when misappropriation of TCEs occurs.

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103 For example, in New Zealand, creation of such a body in the form of a commission was among the Waitangi Tribunal's recommendations for better protection of Māori knowledge and culture. The Waitangi Tribunal hears claims from the Māori regarding their rights under the Treaty of Waitangi. See Wai 262 Report, above n 44, at 92.

104 For instance, New Zealand often includes a clause in its free trade agreements to retain the ability to meet its obligations towards its indigenous population under the Treaty of Waitangi. See Susy Frankel and Megan Richardson 'Limits of Free Trade Agreements: The New Zealand/Australia Experience' in Christoph Antons and Reto M Hilty (eds) *Intellectual Property and Free Trade Agreements in the Asia-Pacific Region* (Springer, Heidelberg, 2015) at 315–333; Susy Frankel 'Attempts to protect indigenous culture through free trade agreements' in Christoph Graber, Karolina Kuprecht and Jessica C Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012) at 118–143.

To benefit from the proposed policy responses, conducting studies or consultations before further harmonisation is essential. To avoid reinforcing the existing problems, harmonising copyright law regionally or globally should be done only after thorough analyses of the existing national customs, values, laws and concepts.

Meaningful and independent representation from indigenous communities in the copyright harmonisation process should also be ensured. Indigenous representation is by no means easy to achieve.<sup>105</sup> The involvement of indigenous communities in negotiating a potential instrument on the protection of TCEs in WIPO, as a primarily IP-focused forum (rather than indigenous rights forum), has further brought this issue to the fore. However, the alternative, meaning representation that is dependent on states acting as messengers, might lead to cherry-picking of interests that states deem important or relevant.<sup>106</sup>

Therefore, to comply with their international human rights obligations,<sup>107</sup> countries need to consult their indigenous communities and have regard for their rights in relation to TCEs when joining regional or international agreements and regulating copyright law domestically. Such obligation is also specifically reflected in some national legal frameworks.

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105 See Christoph Graber, Karolina Kuprecht and Jessica Lai 'The trade and development of indigenous cultural heritage: Completing the picture and a possible way forward' in Christoph Graber, Karolina Kuprecht and Jessica C Lai (eds) *International Trade in Indigenous Cultural Heritage* (Edward Elgar, Cheltenham, 2012) at 469–471.

106 Steps taken by the WIPO in the negotiation process of the WIPO Draft Articles, above n 30, to ensure participation of indigenous peoples can be used as guidelines for similar processes. These steps include the WIPO Voluntary Fund (effective in enabling underprivileged indigenous communities but dependent on states' voluntary contribution), experts selected by indigenous communities themselves, Indigenous Panels and a WIPO-funded secretariat for indigenous and local community participants. See, for example, UN Permanent Forum on Indigenous Issues 'Compilation of information received from agencies, funds and programmes of the United Nations System and other intergovernmental bodies on progress in the implementation of the recommendations of the Permanent Forum' E/C.19/2017/8 (13 February 2017) at [16] and 'Information Note from the Secretariat of the World Intellectual Property Organization to the Fourteenth Session of UN Permanent Forum on Indigenous Issues' (20 April – 1 May 2015). These can be seen as WIPO's ongoing attempts to respect the UNDRIP, above n 11, as the UN Permanent Forum on Indigenous Issues has called on WIPO to improve its implementation of the UNDRIP. See, for example, UN Permanent Forum on Indigenous Issues *Report of the Eleventh Session (7–18 May 2012)* E/2012/43-E/C.19/2012/13, at [47] stating that 'the Permanent Forum demands that WIPO recognize and respect the applicability and relevance of the Declaration as a significant international human rights instrument that must inform the Intergovernmental Committee process and the overall work of WIPO. The minimum standards reflected in the Declaration must either be exceeded or directly incorporated into any and all WIPO instruments that directly or indirectly impact the human rights of indigenous peoples'.

107 See UNDRIP, above n 11, art 18.

In New Zealand, for instance, the Waitangi Tribunal has stated that the Crown has to ensure the engagement of Māori in negotiation of international agreements that might affect their rights and interests in their culture and TK. The Tribunal states that normally ‘Māori must have a say in identifying [their interests] and devising the protection’.<sup>108</sup> Additionally, the Tribunal went further by requiring the ‘Māori voice’ to be placed as the ‘New Zealand voice’ in international negotiations when Māori interests are overwhelming and other interests narrow or limited.<sup>109</sup>

## 5 Conclusion

Current copyright laws are mostly ineffective in protecting indigenous TCEs. This is due to the underlying mismatch between copyright law and the worldviews of indigenous peoples towards their cultural heritage and TK.

Further global or regional harmonisation of copyright reinforces the existing difficulties that arise at the intersection of copyright and TCEs. It does so by extending the reach of copyright law into communities where knowledge and cultural expressions are created and treated differently compared to regular copyright works. By adding to the IP obligations of countries, harmonisation also worsens the identified conflicts between copyright and sui generis mechanisms for the protection of TCEs.

The proposed Asian Pacific Copyright Code,<sup>110</sup> a regional copyright harmonisation initiative that inspired the writing of this chapter, does not currently address the impact of copyright on TCEs and indigenous interests in them. While regional harmonisation of copyright has benefits, such as establishing regional representation in global fora, giving a voice to developing countries and accommodating regional similarities, it should be approached with caution. This chapter has argued that further harmonisation of copyright law that does not take the mismatch between copyright and TCEs and its consequences into account can negatively impact the rights of indigenous peoples.

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108 Wai 262 Report, above n 44, at 681.

109 At 685.

110 Sterling, above n 2.

In order to avoid the negative consequences of copyright harmonisation discussed in this chapter, and to comply with their obligations under human rights law, countries should consider the protection of TCEs when further harmonising copyright. This applies to all countries in general and to Asian Pacific countries interested in the proposed Copyright Code in particular.<sup>111</sup> The potential effects of harmonisation on TCEs should be examined in the local context of each country before going forth with such initiatives. A pluralistic approach to copyright harmonisation that gives countries the chance to choose policy measures that suit the interests of their indigenous communities best is preferred. Finally, indigenous communities should be directly involved in the process of harmonisation.

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111 Sterling, above n 2.

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