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# Geographies of Knowledge: Cultural Diffusion and the Regulation of Heritage and Traditional Knowledge/Cultural Expressions in Southeast Asia

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☞ Cross-border disputes; Cultural property; Intellectual property; Migration; South East Asia; Traditional knowledge

## Introduction

Although always concerned with cultural products in the form of literature, visual arts, inventions and symbols for marketing purposes, intellectual property initially did not problematise the concept of culture. It was regarded as more or less universal and not as regionally or locally specific. The early international agreements were concluded largely by European nations that indeed had similar values and practices when it came to rewarding creative endeavours in the fields of arts, science and engineering. Tunisia, then a French protectorate, was the only non-European country among the initial signatory states of the Berne Convention. The only non-European country among the initial signatories of the Paris Convention was Brazil. Of course, there were differences between the United Kingdom and Continental European nations about the importance of moral rights vis-à-vis economic rights, but these were differences about the scope of copyright protection, not about the subject matter of protection as such. Few independent countries from outside Europe joined the international IP system prior to World War II. The really significant expansion of the system occurred with the decolonisation process after the end of the war and again in a most recent wave following the conclusion of the WTO TRIPS Agreement. However, as more and more newly independent countries began to join the international IP system after the end of World War II, it soon became clear that they brought with them different forms of knowledge and of artistic expressions that European derived intellectual property systems found difficult to accommodate.

The clearest expression of this different environment has been with regard to the debate about the use of intellectual property principles to protect what has become known as traditional knowledge and traditional cultural expressions. This article will give a brief overview of this debate and show its inter-dependence with broader notions of cultural heritage protection, as developed in various UNESCO conventions. The mixture of cultural and intellectual property is often a powerful, yet dubious basis for claims. The article will then move on to examine a specific problem for legal regulation of this subject matter, namely the diffusion of cultural material through migration movements and the expansion of nation states. It will show how the national borders and geographical maps of current nation states that define the limits of

\* The research for this article was conducted in the context of the “IP in Asia” project of the ARC Centre of Excellence for Creative Industries and Innovation (CCI). The views expressed herein are those of the author and not necessarily those of the ARC or the CCI.

national law and regulation are different from cultural realms. These differences will be explained using examples from Southeast Asia. Historians have used historical maps and sources to show that the emphasis on the precise delineation of borders arrived with Western style geography and cartography and with colonial powers eager to exploit natural resources and to know exactly on which side of the border such resources were situated. The resulting fixation of relatively fluid borders often cut through the realms of cultural minorities that had traditionally paid little attention to national boundaries. The fact that their cultures continued to be practised on both sides of a border was of little significance for tangible expressions of culture that were either here or there. However, with increasing emphasis on intangible cultural material in national laws inspired by UNESCO conventions for heritage protection and in WIPO discussions about traditional knowledge and traditional cultural expressions, conflicting claims are now becoming more frequent.

### Culture/tradition and intellectual property

“Folklore”, as “traditional cultural expressions” were then called, turned up on the agenda of Berne Convention revision meetings and other WIPO and UNESCO meetings during the 1960s and 1970s.<sup>1</sup> At the time, the topic was approached with strong reliance on established principles of copyright law. A newly introduced art.15.4 of the Berne Convention concerned “unpublished works where the identity of the author is unknown, but where there is every ground to presume that he is a national of a country of the Union”. The article was introduced as a response to calls for protection of folklore by countries such as India.<sup>2</sup> It allowed for the creation of a “competent authority” to represent the author and “to protect and enforce his rights”. The difference to the current commercialisation of often very individual expressions of folklore is striking. Not only does the provision appear in the context of anonymous works, but it is confined to “unpublished works”. For the administration of the rights, it simply attempts to create a copyright-style collecting society. Although many developing countries at the time adopted a similar formula in their copyright acts, it is perhaps telling that India was the only country to designate the “competent authority” in communication with WIPO.<sup>3</sup>

The subsequent folklore provisions of the Tunis Model Law on Copyright for developing countries, drafted in 1976 by a group of Tunisian Governmental Experts with assistance from WIPO and UNESCO again saw relevant rights exercised by a “competent authority” with regard to “works of national folklore”.<sup>4</sup> The nationalist focus of the Tunis Model Law with regard to folklore was probably in accordance with the spirit of the time, when the governments of still relatively young countries were shaping a national identity for their often very diverse populations. The difficulties to put such policies into practice led to the joint drafting by UNESCO and WIPO Model Provisions for National Laws on the Protection of Expressions of Folklore Against Illicit Exploitation and Other Prejudicial Actions, adopted in 1982 and published in 1985.<sup>5</sup> The Model Provisions shifted away from the focus on copyright to recommend sui generis protection and, as a consequence, also shifted the terminology from “works” to “expressions” of folklore. However, copyright inspired approaches remained, resulting in the development of copyright-style exceptions in photographs, film or television broadcasting—for example, for education, “incidental utilization”, or current events reporting purposes. Authorisation was only required for utilisations “with gainful intent and outside their traditional or customary context”. In comparison with the Tunis Model

<sup>1</sup> Christoph Beat Graber, “Institutionalization of Creativity in Traditional Societies and in International Trade Law” in Shubha Ghosh and Robin P. Malloy (eds), *Creativity, Law and Entrepreneurship* (Cheltenham: Edward Elgar, 2011), pp.240–242.

<sup>2</sup> WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, “Final Report on National Experiences with the Legal Protection of Expressions of Folklore”, March 25, 2002, WIPO/GRTKF/IC/3/10, 2002, p.9. See also WIPO, *Guide to the Berne Convention* (Geneva, 1978), pp.95–96.

<sup>3</sup> WIPO, *Guide to the Berne Convention* (1978), p.9, fn.5.

<sup>4</sup> Janice Weiner, “Protection of Folklore: A Political and Legal Challenge” (1987) 18 *International Review of Industrial Property and Copyright Law* 56.

<sup>5</sup> UNESCO/WIPO Model Provisions for National Laws on the Protection of Folklore Against Illicit Exploitation and Other Prejudicial Actions 1985.

Law, the Model Provisions give communities a much greater role in dealing with national heritage and agencies. For authorisation and collection of fees, they leave a choice between a “competent authority” at national level and authorisation by the communities themselves.<sup>6</sup>

The current negotiations in the WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) began in 2001, after provisions on traditional knowledge in the Convention on Biological Diversity had renewed the interest in intellectual property aspects. The IGC’s mandate was renewed in 2009 and again in 2011 for biannual periods with the obligation to undertake text-based negotiations. These negotiations have meanwhile produced draft texts for the three subject areas under negotiation of genetic resources, traditional knowledge and expressions of folklore (or traditional cultural expressions).<sup>7</sup> Negotiations in these subject areas have progressed at varying pace. “The Protection of Traditional Cultural Expressions: Draft Articles” is now the most advanced of the three documents, while substantial differences and many alternatively worded options remain in the “Consolidated Document Relating to Intellectual Property and Genetic Resources”.

The focus of this article is, however, on the identification of the cultures and people(s) that, as beneficiaries, form the departure point for any form of protection. Several different views of culture are presented that are difficult to protect under a common umbrella and that make it difficult to find compromises. The first view sees culture as an essentially local phenomenon and as emerging from indigenous and local communities. Such communities see their interests at times represented by their governments, while at other times they criticise that they have only observer status in these international negotiations and have to seek support from national delegations for their proposals to be considered.<sup>8</sup> Indigenous and local communities and the NGOs representing them at the IGC would like the discussions to remain focused on the local origins of traditional knowledge and cultural expressions, and they are wary of attempts by national governments to widen the definition of the protectable material to knowledge and expressions that have long entered mainstream culture and become widely spread at national level. Some national delegations, on the other hand, explain that an encompassing definition of traditional knowledge and expressions must include also knowledge and expressions that are traditional, but widely practised across a nation.<sup>9</sup> Several national delegations have expressed broad support for the concerns of indigenous peoples, but at the same time pointed out that the concept of “indigenous peoples” did not apply within their own national context.<sup>10</sup>

Because of the implications of the discussions for the intellectual property systems, the more familiar division between industrialised countries rich in intellectual property and developing countries rich in genetic resources also continues to play a role. Developing countries are seeking strong and binding agreements that are relatively flexibly worded to achieve coherence with obligations under the Convention on Biological Diversity and the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization.<sup>11</sup> Industrialised nations on the other hand are concerned about the certainty of rights and they seek to keep the intellectual property system relatively free from outside considerations. They are reluctant to accept binding standards<sup>12</sup> and find it important that any type

<sup>6</sup> For details see Christoph Antons, “Intellectual Property Rights in Indigenous Cultural Heritage: Basic Concepts and Continuing Controversies” in Christoph Beat Graber, Karolina Kupprecht and Jessica Lai (eds), *International Trade in Indigenous Cultural Heritage* (Cheltenham: Edward Elgar, 2012), pp.148–151.

<sup>7</sup> WIPO, “Matters Concerning the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC)”, August 1, 2012, WIPO Doc. WO/GA/41/15, Annexes A, B and C.

<sup>8</sup> See, for example, the statements of the representatives of Tupaj Amaru, WIPO Doc. WIPO/GRTKF/IC/21/7 PROV. 2, pp.24, 86, 93, 97; Tin Hinane, p.88; the Comisión Jurídica para el Autodesarrollo de los Pueblos Originarios Andinos (CAPAJ), p.95; and the Foundation for Aboriginal and Islander Research Action (FAIRA), p.101.

<sup>9</sup> See, for example, the statements of the Delegations of China, WIPO/GRTKF/IC/21/7/PROV. 2, p.16; Morocco, pp.16, 22; and Barbados, p.61.

<sup>10</sup> See, for example, the statements of the Delegations of Barbados, China and Morocco, WIPO/GRTKF/IC/21/7 PORV. 2, p.22; Trinidad and Tobago, pp.24, 69; and Barbados, p.68.

<sup>11</sup> See, for example the statements of the Delegation of Brazil on behalf of the Development Agenda Group (DAG), WIPO Doc. WO/GA/41/15, pp.4–5; and of the Delegation of India, p.7.

<sup>12</sup> See the statements of the Delegations of the European Union, WIPO Doc. WO/GA/41/15, p.5; and of the United States, p.7.

of obligation emerging from the negotiation is clearly defined.<sup>13</sup> The organisations representing indigenous and local communities maintain their own positions in the middle of this wider debate. On the one hand, they are seeking strong rights and relatively loose definitions of the subject matter in accordance with the positions of most developing countries. On the other hand, they prefer more restrictive and narrow definitions of beneficiaries than the governments of many developing countries.<sup>14</sup> They also advocate the inclusion of spiritual aspects of the production of the material<sup>15</sup> to a degree that rarely finds support from developing countries.

### Trans-boundary issues and cultural diffusion

It has become increasingly clear that any national laws protecting culturally derived material in the form of traditional knowledge, traditional cultural expressions and genetic resources associated with TK/TCE may trigger trans-boundary conflicts in regions where culture has been widely practised across national boundaries or where migration has contributed to the spread of cultures. Such disputes, often couched in the language of intellectual property, have recently occurred between several Southeast Asian countries about cultural expressions such as batik, songs and dances and about the use of plants in traditional medicine.<sup>16</sup> Apart from the WIPO discussion about intellectual property rights in traditional material, these disputes also have to be seen in the context of the UNESCO listings under the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage. Although the Convention does not concern intellectual property rights and in fact obliges countries to take measures for the conservation of intangible cultural heritage, listings by UNESCO have achieved powerful symbolic value. And although such listings do not prevent neighbouring countries from practising the tradition, it appears that the UNESCO listings are nevertheless seen as an important advantage in the cultural branding of tourism and local products.<sup>17</sup> Inscriptions on the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and on the Representative List of the Intangible Cultural Heritage of Humanity only started in 2008. Since then, many countries in Asia have been very active in inscribing elements on one of the lists. In fact, the most active country in heritage listing has been China. The international listing has been supported by national legal developments. In 2011, the Intangible Cultural Heritage Act of the People's Republic of China came into effect.<sup>18</sup> It followed earlier legislation at provincial and county levels in provinces such as Yunnan, Guizhou, Fujian, Guangxi, Hunan, Hubei and Jiangsu.<sup>19</sup> Media reports about conservation efforts in the provinces include the recording of the knowledge and culture of the *Hmong* in Guizhou province<sup>20</sup> as well as the necessity to stop the unsupervised activities of foreign researchers among the *Miao* in the Southwest region of the same province.<sup>21</sup>

<sup>13</sup> For the example of traditional knowledge protection, see the statements of the Delegations of the European Union, WIPO Doc. WIPO/GRTKF/IC/21/7 PROV. 2, pp.13, 14, 21, 61; the United States, pp.17, 48; Japan, pp.19–20, 23; and the Republic of Korea, p.20.

<sup>14</sup> See, for example, the statement of the representative of Tupaj Amaru, WIPO/GRTKF/IC/21/7 PROV. 2, p.66.

<sup>15</sup> See, for example, the statements of FAIRA and CAPAJ, WIPO/GRTKF/IC/21/7 PROV. 2, pp.18–19.

<sup>16</sup> Stephen Fitzpatrick, "Malaysia 'Steals' Bali Dance", *The Australian*, August 26, 2009; GRAIN and Kalpavriksh, "Traditional Knowledge of Biodiversity in Asia-Pacific: Problems of Piracy and Protection", available at <http://www.grain.org/article/entries/81-traditional-knowledge-of-biodiversity-in-asia-pacific-problems-of-piracy-and-protection> [Accessed November 7, 2012]; "Indonesians Tell Malaysians 'Hands off Our Batik'", *The Telegraph*, October 5, 2009; "Malaysia Urges Indonesia to Drop Plans to Sue over Folk Song", *Jakarta Post*, October 8, 2007; "Thai Gives Cambodia the Finger over Jeebs—Or Get Your Hands of Our Intangible Heritage!", available at <http://ipkitten.blogspot.com/2011/08/thai-gives-cambodia-finger-over-jeebs.html> [Accessed October 28, 2012].

<sup>17</sup> On cultural branding by using geographical indications, see Rosemary Coombe, "Bordering Diversity and Desire: Using Intellectual Property to Mark Place-based Products", (2011) 43 *Environment and Planning A* 2027.

<sup>18</sup> The text is available at [http://www.wipo.int/wipolex/en/text.jsp?file\\_id=215504](http://www.wipo.int/wipolex/en/text.jsp?file_id=215504) [Accessed October 28, 2012].

<sup>19</sup> Ministry of Culture, "Protection of Intangible Cultural Heritage in China", available at <http://chinagate.cn/english/reports/48277.htm> [Accessed October 28, 2012].

<sup>20</sup> Richard Stone, "Chinese Province Crafts Pioneering Law to Thwart Biopiracy", (2008) 320 *Science* 732.

<sup>21</sup> Vinti Vaid, "New Intangible Cultural Heritage Laws to Protect and Preserve China's Vast and Diverse Culture", *Asia-Pacific Business and Technology Report*, July 1, 2011.

*Miao* is a Chinese term grouping together a number of minorities in this part of China, including the *Hmong*.<sup>22</sup> The *Hmong*, however, are widely spread across the borders of several East and Southeast Asian countries. Originally coming largely from Guizhou, Yunnan and Guangxi, the *Hmong* migrated into Vietnam, Laos and Thailand over a period of approximately 300 years.<sup>23</sup> There are many similar groups often referred to by different names in China, Vietnam, Laos, Thailand and Myanmar.<sup>24</sup> With reference to the Akha in China and Thailand, the geographer Janet Sturgeon points out that

“[w]hile I make no claim that Akha in China are ‘the same’ as Akha in Thailand, these people are historically related and share genealogies reaching back fifty-five to sixty-five generations to the first Akha”.<sup>25</sup>

They

“spoke a common dialect of Akha, recited almost identical genealogies, managed forests with many overlapping species, and lived along the Burma border—these peoples and their environments were clearly related”.<sup>26</sup>

In addition, Akha shifted easily across the border into Burma for hunting, herding or wet-rice cultivation, sometimes contacting friends and family there to gain access to land.<sup>27</sup>

Historians explain the relative permissiveness of Southeast Asian borders by pointing to the particular circumstances, in which the Southeast Asian kingdoms emerged. Southeast Asia was a geographically difficult terrain with dense forests and prior to the 18th century only sparsely populated. The feudal rulers of the region were in constant need of manpower for their armies and for the building of temples and monuments. As a result, slave raiding was common and victorious armies in warfare would capture as many enemies as possible to replenish the population at home.<sup>28</sup> With scarce manpower at their disposal, Southeast Asian rulers had to rely on the loyalty of tribute paying vassals. Historians have used the Sanskrit term *mandala* for this network of governance. O.W. Wolters has defined the *mandala* as

“a particular and often unstable political situation in a vaguely definable geographical area without fixed boundaries and where small centers tended to look in all directions for security. *Mandalas* would expand and contract in concertina-like fashion. Each one contained several tributary rulers, some of whom would repudiate their vassal status when the opportunity arose and try to build up their own network of vassals”.<sup>29</sup>

Thongchai Winichakul has described the coming of a new geography and of modern cartographic techniques to Siam in the 19th century. He shows the initial lack of understanding between the Siamese court and their new British neighbours in Colonial Burma, who were interested in a precise delineation of a particular part of the border that was rich in tin and other minerals.<sup>30</sup> While local rulers saw the British and other

<sup>22</sup> Erik Cohen, *The Commercialized Crafts of Thailand: Hill Tribes and Lowland Villages* (Honolulu: University of Hawai'i Press, 2000), p.130; Janet Sturgeon, *Border Landscapes: The Politics of Akha Land Use in China and Thailand* (Chiang Mai: Silkworm Books, 2005), p.45.

<sup>23</sup> Nguyen Van Thang, *Ambiguity of Identity: The Mieu in North Vietnam* (Chiang Mai: Silkworm Books, 2007), pp.15–19. Jan Ovesen, “All Lao? Minorities in the Lao People's Democratic Republic” in Christopher R. Duncan (ed.), *Civilizing the Margins: Southeast Asian Government Policies for the Development of Minorities* (Ithaca: Cornell University Press, 2004), pp.225–226, believes that migration out of China started as late as in the mid-19th century.

<sup>24</sup> David Bradley, “Language and Culture of Minority Groups” in Yves Goudineau (ed.), *Laos and Ethnic Minority Cultures: Promoting Heritage* (Paris: UNESCO Publishing, 2003), p.46.

<sup>25</sup> Sturgeon, *Border Landscapes* (2005), p.15.

<sup>26</sup> Sturgeon, *Border Landscapes* (2005), p.16.

<sup>27</sup> Sturgeon, *Border Landscapes* (2005), p.161.

<sup>28</sup> Anthony Reid, “Economic and Social Change, c. 1400–1800” in Nicholas Tarling (ed.), *The Cambridge History of Southeast Asia, Volume One: From Early Times to c. 1800* (Cambridge: Cambridge University Press, 1992), pp.460–463.

<sup>29</sup> O.W. Wolters, *History, Culture and Region in Southeast Asian Perspectives* (Ithaca: Southeast Asia Program Publications/Institute of Southeast Asian Studies, 1999), pp.27–28.

<sup>30</sup> Thong'chai Winichakul, *Siam Mapped: A History of the Geo-Body of a Nation* (Honolulu: University of Hawai'i Press, 1994), pp.62–80.

colonial powers simply as new elements in their existing tributary system of power relations, European concepts of power were based on territorial conquest and not on multi-layered hierarchical relationships.

The delineation of borders suited the interests of the new powers in the region in raw materials. However, to understand the spread of cultural expressions across the region and to better appreciate current claims to “ownership”, the history of boundaries in the region remains important. The relatively loose borders at the margins of Southeast Asian kingdoms were also buffer zones, “regions of refuge” as James Scott has called them, which the ruling administration found difficult to reach and where minority groups could escape from taxation, military service and forced labour.<sup>31</sup> When territorial borders finally became more strictly enforced, they cut through the cultural realms of communities living along the borders.

Although most research on such Asian borderlands has focused on the uplands of Southeast Asia and on the territorial borders between South and Southeast Asian nations,<sup>32</sup> there are similar examples from maritime Southeast Asia. The *Orang Laut* or *Orang Suku Laut*, are “Sea Nomads” in the Straits of Malacca and the Indonesian Riau archipelago of over 3,200 islands, who travel along the East coast of Sumatra, the coasts of the Malay Peninsula and as far as to the Isthmus of Kra and the West coast of Kalimantan.<sup>33</sup> Related groups can be found on the north-eastern coast of Borneo, the Sulu archipelago, in Sulawesi, around the Lesser Sunda Islands, Maluku and along the northern entrance of the straits bordering Malaysia, Thailand and Burma.<sup>34</sup> Feared as pirates, they played an important role in pre-colonial Malay kingdoms around the Straits of Malacca and were held in high esteem by rulers because of their knowledge of the sea and its resources, their capability to defend the kingdom, patrol and secure the sea lanes and to force passing vessels to frequent the port of the ruler and to pay their dues.<sup>35</sup> Today, their areas happen to overlap with the so-called “growth triangles” fostered in various forms by Indonesia, Malaysia, Thailand and the Philippines.<sup>36</sup> They also happen to stretch what has become known as the “Malay world”, a somewhat ambiguous term that goes back many centuries and refers to the region influenced by Malay culture and centred on Sumatra and Malacca. Geoffrey Benjamin, quoting Anthony Milner,<sup>37</sup> has defined it as “areas currently or formerly falling under *kerajaan Melayu*, the rule of a Malay king” and distinguishes it from a usage of the term as referring to either insular Southeast Asia as a whole or to the much larger world of Austronesian (Malayo-Polynesian) languages.<sup>38</sup>

Apart from historically rather permissive borders and loosely defined empires, another contributing factor to cultural diffusion in Southeast Asia has been, as elsewhere in the world, large scale migration. The matrilineal *Minangkabau*, for example, spread from their heartland in the interior of West Sumatra, to other areas of Sumatra and across the Straits of Malacca to the Malay Peninsula.<sup>39</sup> Fostered in particular by the colonial powers, there was also the large scale migration of minorities from elsewhere in Asia, such as Chinese, Indians and Arabs. These communities became essential links for the interior and exterior trade or, where the population was sparse, worked in the mines and on the plantations of the colonies. Legally, they were sometimes treated differently from the local population,<sup>40</sup> but their better access to

<sup>31</sup> James C. Scott, *The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia* (New Haven: Yale University Press, 2009).

<sup>32</sup> See for example Noburo Ishikawa, *Between Frontiers: Nation and Identity in a Southeast Asian Borderland* (Singapore: NUS Press, 2010); Scott, *The Art of Not Being Governed* (2009); Sturgeon, *Border Landscapes* (2005).

<sup>33</sup> Cynthia Chou and Vivienne Wee, “Tribality and Globalization: The Orang Suku Laut and the ‘Growth Triangle’ in a Contested Environment” in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World: Historical, Cultural and Social Perspectives* (Singapore/Leiden: Institute for Southeast Asian Studies/International Institute for Asian Studies, 2002), pp.334–335.

<sup>34</sup> Leonard Y. Andaya, *Leaves of the Same Tree: Trade and Ethnicity in the Straits of Melaka* (Singapore: NUS Press, 2010), pp.173–174.

<sup>35</sup> Barbara Watson Andaya and Leonard Y. Andaya, *A History of Malaysia*, 2nd edn (Basingstoke: Palgrave Macmillan, 2001), pp.26, 29–30, 48; Chou and Wee, “Tribality and Globalization” in Geoffrey Benjamin and Cynthia Chou (eds), *Tribal Communities in the Malay World* (2002), pp.328–329; Andaya, *Leaves of the Same Tree* (2010), pp.184–201.

<sup>36</sup> Chou and Wee, “Tribality and Globalization” in Benjamin and Chou (eds), *Tribal Communities in the Malay World* (2002).

<sup>37</sup> Anthony Milner, *Kerajaan: Malay Political Culture on the Eve of Colonial Rule* (Tucson: University of Arizona Press, 1982).

<sup>38</sup> Geoffrey Benjamin, “On Being Tribal in the Malay World” in Benjamin and Chou (eds), *Tribal Communities in the Malay World* (2002), p.7.

<sup>39</sup> Andaya, *Leaves of the Same Tree* (2010), pp.82–107.

<sup>40</sup> Christoph Antons, “Ethnicity, Law and Development in Southeast Asia” in Frans Hüsken and Dick van der Meij (eds), *Reading Asia: New Research in Asian Studies* (Richmond: Curzon, 2001), pp.3–28.

commercial law and trade sometimes also meant that they were able to play an important role in the early commercialisation of local traditional knowledge.<sup>41</sup>

## Cultural and intellectual property in international and national discourses

In view of the large scale cultural diffusion described above, it seems that one should approach claims to exclusive “ownership” of cultural material with some caution. Further, given the possibility for intangible knowledge, skills and expressions to be held by various people in various places at the same time, it is understandable that scholars interested in the legal protection of cultural heritage have long advocated a move away from the language of property.<sup>42</sup> Although the term “cultural property” was used in the 1954 Hague Convention for the Protection of Cultural Property and in the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, there was a shift away from this terminology in later conventions. In the 2003 UNESCO Convention for the Safeguarding of Intangible Cultural Heritage, the term “cultural property” is not used. As a consequence, the Convention is able to cover a wider range of material related to heritage (such as cultural spaces, languages, social practices, rituals and festive events) that would be a difficult fit for conventional categories of “property”. Perhaps mindful of the trans-boundary nature of much of the material, international co-operation and assistance is emphasised and parties undertake to cooperate at the bilateral, subregional, regional and international levels (art.19). There is also the possibility of a joint request to the Intergovernmental Committee for the Safeguarding of the Intangible Cultural Heritage by two or more parties related to intangible cultural heritage present in their territories (art.23).

If one examines the current intangible heritage lists,<sup>43</sup> there are only relatively few elements inscribed by two or more parties jointly. Where countries with similar cultural material are competing for tourists and consumers of handicrafts, music and other cultural expressions, they may in fact rather seek an exclusive listing. While this does not prevent others from using the material, it may provide recognition of the authenticity and the length of the local tradition, and this may give the registering party a competitive edge in the fierce competition for attention in a crowded market.

There is potential for conflict with regard to more widely dispersed material, however, where national laws continue to use the language of cultural property and, especially, where national intellectual property laws incorporate elements of heritage protection. The National Cultural Heritage Act of 2009 of the Philippines, for example, uses the terms “cultural heritage” and “cultural property” side by side, whereby “cultural property” also extends to intangible cultural heritage.<sup>44</sup> It creates restrictive conditions in particular for “important cultural property” and “national cultural treasures”. Important cultural property shall be protected against exportation, modification or demolition, for example, if it concerns works of “national living treasures” (Manlilikha ng Bayan) of traditional Filipino folk art,<sup>45</sup> works by a national artist or works of national heroes. More generally, “no cultural property shall be sold, resold, or taken out of the country without first securing a clearance from the cultural agency concerned” (s.11).

Laos protects so-called “artistic works and folklore” under the Copyright part of its Intellectual Property Law of 2008. “Artistic work and folklore” is defined in s.3(32) as “a result of compilation of the creations traditionally created in community or group reflecting the ways of life of such communities”. Section 87

<sup>41</sup> Christoph Antons and Rosy Antons-Sutanto, “Traditional Medicine and Intellectual Property Rights: A Case Study of the Indonesian Jamu Industry” in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Alphen aan den Rijn: Kluwer Law International), pp.372–373; Christoph Antons, “From Magic Charms to Symbols of Wealth: Well-Known Trade Marks in Indonesia” in Andrew T. Kenyon, Ng-Loy Wee Loon and Megan Richardson (eds), *The Law of Reputation and Brands in the Asia Pacific* (Cambridge: Cambridge University Press, 2012), pp.144–145.

<sup>42</sup> Lyndel V. Prott and Patrick J. O’Keefe, “‘Cultural Heritage’ or ‘Cultural Property’?” (1992) 1 *International Journal of Cultural Property* 307.

<sup>43</sup> The Committee maintains two lists: the List of Intangible Cultural Heritage in Need of Urgent Safeguarding and the Representative List of the Intangible Cultural Heritage of Humanity.

<sup>44</sup> See the definition of terms in s.3.

<sup>45</sup> See also the Republic Act No.7355, the Manlilikha ng Bayan Act.



lists examples and provides that users of the material must state the source and preserve the original value of such works. Beyond this, the arrangements remain a little unclear. Section 83 specifies types of copyright owners and includes here the owner of artistic works and folklore of the community in the locality. Section 82 clarifies that such ownership can be exercised by authors, joint authors, persons or organisations hiring the author, assignees of rights, successors in rights and/or by the state. The Law on National Heritage of 2005 provides further information about cases, in which the state will step in and assert copyright ownership. The Law protects intangible cultural heritage as cultural heritage (art.9) and as historical heritage (art.12). The state asserts copyright ownership to Lao national cultural and historical heritage<sup>46</sup> outside of Laos, in the illegitimate possession of other countries or in respect of which foreign countries have illegitimately asserted copyright (art.27). The state will also “consider” copyright ownership in “national heritage items at national level which have high value, are rare and are of unique national character” and propose them for “registration of ownership and copyright in the name of the nation with international organisations” (art.28).

A further example of a regulation of cultural expressions mixing copyright and heritage protection comes from Indonesia. Part Three of the Indonesian Copyright Act, originally introduced in 1982 and revised in 1987, 1997 and 2002, bears the heading “Copyright to Works of Unknown Authors”. The provisions in this part mix elements from art.15.4 of the Berne Convention with the “national folklore” approach of the Tunis Model Law. Article 11 deals with unpublished (as well as published) works of unknown authors, in which case the state shall be the holder of the copyright. There has been, however, no designation of a competent authority to represent the author’s interest as required by art.15.4 of the Berne Convention. The rather unusual art.10(1) declares the state to be the holder of copyright in prehistoric and historic relics and “other national cultural objects”. The Indonesian text uses the term of the Copyright Act for a copyright protected “work” (*karya*) in combination with “relics” (*peninggalan*), although this would normally be material for heritage rather than copyright protection. According to art.10(2), the state holds also the copyright to various expressions of folklore and “products of popular culture”. Foreigners will need a licence to use such material (art.10(3)). Article 10 requires further implementation via a Government Regulation (art.10(4)), which has never been issued. If adopted, a Draft Law on the Intellectual Property Use of Traditional Knowledge and Traditional Cultural Expressions would regulate such licensing as well as benefit sharing with local custodians in the future. The Copyright Act is also being revised and it remains to be seen whether it will continue to include expressions of folklore or leave the subject matter to the sui generis law.

## Conclusion

Intellectual property law used to be concerned with incentives for the creation of cultural material rather than with its content. With cultural branding becoming more important for tourism and through the use of geographical indications, intellectual property now has to deal with locally specific expressions of culture. As the discussion about traditional knowledge in the IGC shows, the underlying cultures are no longer confined to Europe or to national cultures. The examples from Southeast Asia in this article show further how cultural material has been diffused across neighbouring countries through processes of migration and the drawing of borders during the colonial period that divided cultural communities. As a consequence, the UNESCO Convention for the Safeguarding of Intangible Cultural Heritage of 2003 urges international collaboration rather than competition in this field. At the national level, however, many countries employ strong cultural property concepts, sometimes in combination with intellectual property laws, to control the trade in and use of material derived from heritage. There are important lessons to be

<sup>46</sup>That is heritage of “outstanding national value located in any area of the Lao PDR and which have become the heritage of the national community” (art.18).

learnt for the current debate about traditional knowledge from the discussion about cultural heritage and cultural property more broadly. In view of recent cross-border conflicts about intangible heritage, any instrument for the future regulation of traditional knowledge and traditional cultural expressions at international level should include mechanisms for trans-boundary cooperation and arbitration. At the IGC, trans-boundary issues are currently still overshadowed by the discussions about the definition of the subject matter and the beneficiaries and the scope of protection. Nevertheless, draft provisions aiming at trans-boundary cooperation have been included in all three draft texts. The effective regulation of such cooperation and of the arbitration of disputes will be important for the implementation of any type of traditional knowledge protection and deserve further attention.