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# What Is “Traditional Cultural Expression”? International Definitions and Their Application in Developing Asia<sup>\*</sup>

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 Asia; Cultural property; Developing countries; Intellectual property; Traditional knowledge

## The WIPO Intergovernmental Committee and its agenda

The WIPO Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore (IGC) began its deliberations in 2001. Eight years later in July 2009, it reached a temporary standstill. At its 14th session, held in Geneva from June 29 to July 3, 2009, representatives of Members States, inter-governmental and non-governmental organisations agreed to disagree on the agenda item related to “Future Work” that attempted to specify ways in which the work of the Committee should be carried forward during the 2010–11 biennium.<sup>1</sup> Representatives of many developing countries and non-governmental organisations voiced their dissatisfaction with the slow progress in the IGC. A proposal from the African Group of countries sought to speed up the agenda during the 2010–11 biennium by requiring

<sup>\*</sup> This article is a completely revised and updated version of a paper originally presented in the Symposium on “Traditional Cultural Expression and International Law”, Monash University, Melbourne, December 14, 2008.

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<sup>1</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Fourteenth Session, Geneva, June 29–July, 3, 2009, *Initial Draft Report*, WIPO/GRTKF/IC/14/12 Provisions of July 31, 2009. See also “WIPO Committee Reaches Standstill on Traditional Knowledge”, (2009) 13(25) *Bridges Weekly Trade News Digest*.

"text-based negotiations" for "an internationally binding instrument/instruments" with a "clearly defined work programme and timeframe, including the holding of intersessional work sessions".<sup>2</sup> While this proposal was supported by a large number of developing country representatives, others such as the representatives of the United States, Japan or Germany, speaking on behalf of the B Group of developed countries, found still much "unfinished analytical work" and the necessity to further a "common understanding" of the issues.<sup>3</sup> Thus, while members were clearly in favour of renewing the mandate of the IGC, there were differing views on the precise scope and aims of its work during the next biennium. The idea of intersessional work sessions and of a partial shift of forum to expert working groups as well as the composition of such groups was also disputed. At their Annual Assemblies from September 22 to October 1, 2009, WIPO member states finally renewed the mandate of the IGC with the objective of reaching agreement on a text of an international legal instrument (or instruments) and with a provision for three inter-sessional meetings of working groups.<sup>4</sup>

One of the ongoing discussions concerns definitions of "traditional cultural expressions", which will be the focus of the first part of this article. IGC members in fact also disagreed on whether more consensus on fundamental concepts and "broad, non-exhaustive and non-exclusive, definitions" was necessary<sup>5</sup> or whether it was possible to start with more loosely worded terminology in order not to get "stuck in working on ideal definitions that could take years to adopt".<sup>6</sup> The article will then examine the approach to TCE protection in Indonesia and a few disputes between Indonesia and Malaysia about TCEs.

### **Attempts at defining "traditional cultural expression" (TCE)**

What are the definitions, descriptive or otherwise, that have been discussed thus far? Article 1 of the WIPO Revised Objectives and Principles for the Protection of Traditional Cultural Expressions and Expressions of Folklore defines the subject matter as "any forms, whether tangible and intangible, in which traditional culture and knowledge are expressed, appear or are manifested".<sup>7</sup> The provision continues to provide examples of verbal expressions, words, signs and symbols, musical expressions, expressions by action (such as dances, plays, ceremonies, rituals and other "performances") and tangible expressions, such as productions of art and including handicrafts, musical instruments and architectural forms. In a final part, the provision

<sup>2</sup> See the text of the proposal and various proposals for amendments on pp.38–42 of WIPO/GRTKF/IC/12 Provisions of July 31, 2009.

<sup>3</sup> See for example WIPO/GRTKF/IC/12 Provisions of July 31, 2009, pp.8–9, 20–21 and 24.

<sup>4</sup> "WIPO Assemblies Provide Direction for Next Biennium", at [http://wipo.int/portal/en/news/2009/article\\_0038.html](http://wipo.int/portal/en/news/2009/article_0038.html) [Accessed October 19, 2009].

<sup>5</sup> See for example the interventions of the representatives of New Zealand and Singapore on pp.21–23.

<sup>6</sup> See the intervention of the representative of Nigeria, on p.17.

<sup>7</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Twelfth Session, Geneva, February 25 to 29, 2008, *Reproduction of Document WIPO/GRTKF/IC/94 "The Protection of Traditional Cultural Expressions/Expressions of Folklore: Revised Objectives and Principles"*, WIPO/GRTKF/IC/12/4(c) of December 6, 2007, p.11.

links the expression to requirements of creativity and continuing “authenticity” of the material. Thus, the expression must be the product of creative intellectual activity (of an individual or communal nature), characteristic of a community’s cultural and social identity and cultural heritage and maintained, used or developed by such community, or by individuals having the right or responsibility to do so in accordance with the customary law and practices of the community. The provision concludes by clarifying that the specific choice of terms should be determined at national and regional levels.

It has been pointed out that this current definition used by WIPO is a departure from earlier WIPO working definitions, which saw traditional cultural expressions as a subset of the wider definition of “traditional knowledge”, which encompasses also knowledge related to the environment and biodiversity, traditional medicinal knowledge and traditional agricultural knowledge.<sup>8</sup> Still in 2001, in its original report on “Intellectual Property Needs and Expectations of Traditional Knowledge Holders”, WIPO represented the relationship between traditional knowledge and traditional cultural expressions in a picture of overlapping circles starting with heritage as the broadest term, which incorporated traditional knowledge, which in turn incorporated the smaller subsets of the again overlapping circles of expressions of folklore and indigenous knowledge.<sup>9</sup> However, when it became clear that this picture was difficult to bring into line with the relatively neat categories of intellectual property rights, WIPO began to distinguish between traditional knowledge “in the strict sense”, which became henceforth defined as “technical traditional knowledge” (and in legal terms relates to industrial property rights such as patents) and “traditional cultural expressions” (which relate in particular to copyright).<sup>10</sup>

Many analysts have regretted this bifurcation of the analysis by pointing out that the distinction between TK and TCE is an artificial one in the eyes of indigenous peoples and local communities and from the perspective of traditional creators.<sup>11</sup> Traditional cultural expressions such as textiles, music or ceremonial paintings often source the ingredients or instruments from the natural surroundings, and this requires as much technical knowledge as it requires artistic skills.<sup>12</sup> One need not be familiar with the oft-quoted holistic worldview of indigenous and local people to understand the technical knowledge involved in the creation of headbands and skirts made from

<sup>8</sup> Christoph Antons, “Introduction” 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, 2009), pp.2–3.

<sup>9</sup> WIPO, *Intellectual Property Needs and Expectations of Traditional Knowledge Holders—WIPO Report on Fact-Finding Missions on Intellectual Property and Traditional Knowledge (1998-1999)* (Geneva: WIPO 2001), p.26.

<sup>10</sup> WIPO/GRTKF/IC/6/4 of December 12, 2003, Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Sixth Session, Geneva, March 15–19, 2004, *Traditional Knowledge: Policy and Legal Options* p.5.

<sup>11</sup> Darrell A. Posey, “Can Cultural Rights Protect Traditional Cultural Knowledge and Biodiversity?” in Halina Niéc (ed.), *Cultural Rights and Wrongs*, (Paris: UNESCO and London: Institute of Art and Law, 1998), p.43.

<sup>12</sup> Michael Blakeney, “Protection of Traditional Knowledge by Geographical Indications” in Christoph Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, (2009), pp.105–107.

paperbark by Dayak groups in the interior of Borneo<sup>13</sup> or in the complicated designs and weaving techniques for silk textiles, *batik*, brocade weaving and embroidery in countries like Thailand and Indonesia.<sup>14</sup> Coming back to this issue in its “draft gap analysis” document of October 2008,<sup>15</sup> the IGC acknowledged this problem. The document in defining protection of TCEs distinguishes between “(i) the creative and distinctive expressions themselves; and/or (ii) the reputation or distinctive character associated with them; and/or (iii) their method of manufacture (such as in the case of handicrafts, musical instruments and textiles, for example).” As far as TCEs relate to the manufacture of crafts, musical instruments and textiles, the document regards this as referring more to what is treated as “traditional knowledge *stricto sensu*” (“in the strict sense”) in the Committee’s work. The “Revised Objectives and Principles” document equally recognised “the often inseparable quality of the content or substance of traditional knowledge *stricto sensu* (TK) and TCEs/EoF [expressions of folklore] for many communities” and regarded the parallel but separate consideration of the issues as “compatible with and respectful of the traditional context in which TCEs/EoF and TK are often perceived as integral parts of an holistic cultural identity.”<sup>16</sup>

However, the link between traditional knowledge and traditional cultural expressions is not only to be found in the traditional manner of manufacture of the material. Traditional cultural expressions also play an important role in the transmission of traditional knowledge. Especially in societies with few written sources of tradition, cultural expressions such as songs, legends or even paintings are often used to transmit to the next generation what WIPO would refer to as “traditional knowledge in the strict sense”.<sup>17</sup> In parts of Asia as well, the transmission of traditional forms of knowledge, for example related to medicine, may well be in a form that would be most appropriately defined as traditional cultural expression.<sup>18</sup> While these various purposes of traditional cultural expressions are not always satisfactorily covered by the

<sup>13</sup> Roy W. Hamilton, “Barkcloth Skirts from Southwestern Borneo” in Jane Puranananda, *The Secrets of Southeast Asian Textiles: Myth, Status and the Supernatural* (Bangkok: James H.W. Thompson Foundation/River Books, 2007), pp.58–71.

<sup>14</sup> Susan Conway, *Thai Textiles* (Bangkok: River Books Press, 1992); Susan Conway, *Silken Threads Lacquer Thrones: Lan Na Court Textiles* (Bangkok: River Books, 2002); Anne Richter, *Arts and Crafts of Indonesia* (San Francisco: Chronicle Books), pp.89–96; Sativa Sutan Aswar, *Antakesuma Suji dalam Adat Minangkabau—Antakesuma Embroidery in the Minangkabau Adat* (Jakarta: Penerbit Djambatan, 1999).

<sup>15</sup> Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore, Thirteenth Session, Geneva, October 13 to 17, 2008, *The Protection of Traditional Cultural Expressions: Draft Gap Analysis*, WIPO/GRTKF/IC/13/4(b) Review of October 11, 2008, Annex I, p.5.

<sup>16</sup> IGC, WIPO/GRTKF/IC/12/4 (c), p.9.

<sup>17</sup> On the relationship between Australian Aboriginal mythology, art and landscape see Howard Morphy, *Aboriginal Art* (London: Phaidon Press, 1998), in particular Ch.4.

<sup>18</sup> On various Southeast Asian “manuals” transferring medical and other knowledge see C. Reynolds, *Seditious Histories: Contesting Thai and Southeast Asian Pasts* (Seattle–Singapore: University of Washington Press/Singapore University Press, 2006), pp.214–242; Soewito Santoso, *The Centhini Story: The Javanese Journey of Life* (Singapore: Marshall Cavendish, 2006), pp.138–139. See also Christoph Antons and Rosy Antons-Sutanto, “Traditional Medicine and Intellectual Property Rights: A Case Study of the Indonesian *jamu* Industry”, in: C. Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region* (Alphen aan den Rijn: Kluwer Law International, 2009), pp.363–384.

current WIPO draft provisions, the distinction between TK and TCE nevertheless has been accepted among the participants in the WIPO discussions and seems to be fairly well established by now.

### **Authenticity requirements and “modern” interpretations of TCE**

Beyond such agreement on the basics, however, much else needs to be worked out. Anthropologists and social scientists have warned, on the one hand, of the dangers of essentialising cultures<sup>19</sup> and of constructing romantic notions of tribal people that have little to do with reality.<sup>20</sup> On the other hand, they have spoken of “oppressive authenticity”, because of the need for indigenous people to fulfil the expectations of lawyers and administrators with regards to “tradition” and “traditional life styles”.<sup>21</sup> In view of such arguments, the delegation of Colombia, for example, objected to the requirement in art.1 that a TCE must be “characteristic of a community’s distinctive cultural identity and traditional heritage developed and maintained by it”, a requirement which the Colombians found imposed a too onerous burden of proof on communities.<sup>22</sup>

In the “draft gap analysis” document, the IGC Secretariat attempts to distinguish further within the category of TCEs between what they call “pre-existing TCEs” or “TCEs *stricto sensu*”, on the one hand, and contemporary interpretations and adaptations of them, on the other hand.<sup>23</sup> TCEs in this latest document are characterised by creative intellectual activity, have been handed down from one generation to another, reflect a community’s cultural and social identity, consist of characteristic elements of a community’s heritage, are made by authors unknown and/or unlocatable and/or by communities, are often primarily created for spiritual and religious purposes, make often use of natural resources in their creation and reproduction and are constantly evolving, developing and being recreated within the community.<sup>24</sup> Further down in the latest document, the IGC secretariat outlines a very useful “conceptual divide” between the role of copyright and other IP rights in protecting, on the one hand, TCEs for which the commercial exploitation in as fair and balanced a manner as possible is intended, and on the other hand, TCEs that are created primarily for spiritual and religious purposes and not meant to reach as broad a public as possible. In the latter case, the document finds more appropriate the development of a *sui generis* IP system

<sup>19</sup> Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson, “Introduction” in Jane K. Cowan, Marie-Bénédicte Dembour and Richard A. Wilson (eds), *Culture and Rights: Anthropological Perspectives* (Cambridge: Cambridge University Press, 2001), pp.10–11, 19 and 21; Sonia Smallacombe, “On Display for its Aesthetic Beauty: How Western Institutions Fabricate Knowledge about Aboriginal Cultural Heritage” in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous Peoples* (Cambridge: Cambridge University Press, 2000), p.155.

<sup>20</sup> Claire Smith, Heather Burke and Graeme K. Ward, “Globalisation and Indigenous Peoples: Threat or Empowerment?” in Claire Smith and Graeme K. Ward (eds), *Indigenous Cultures in an Interconnected World* (Vancouver: UBC Press, 2000), pp.7–10.

<sup>21</sup> Jeffrey Sissons, *First Peoples: Indigenous Cultures and Their Futures* (London: Reaktion Books, 2005), pp.37–59.

<sup>22</sup> IGC, WIPO/GRTKF/IC/12/4 (c), Annex, p.14.

<sup>23</sup> IGC, WIPO/GRTKF/IC/13/4(b) Rev., Annex I, p.4.

<sup>24</sup> IGC, WIPO/GRTKF/IC/13/4(b) Rev., Annex I, p.4.

or non-IP mechanisms such as laws dealing with “blasphemy, cultural and other human rights, dignity, cultural heritage preservation, defamation, rights of publicity, and privacy”.<sup>25</sup>

This actually points to a stronger distinction again between IP protection regarding material for commercialisation and non-IP protection for sacred and secret aspects of cultural heritage. Such a distinction between the interests of the public, national governments and the public administration in heritage protection and the interests of private parties and communities in intellectual property protection for commercialisation is indeed important. The increasing use of intellectual property and other private property rights for the fulfilment of public purposes such as biodiversity protection and heritage protection in the context of a shift from “top down” to “bottom up” policy approaches has led in recent years to a blurring of the distinction between the interests of national governments, communities and private parties.<sup>26</sup> WIPO as a United Nations organisation is of course typically involved with state parties and national governments rather than communities at the grassroots level. Although NGOs and representatives of local and indigenous communities are meanwhile included in the deliberations of the Intergovernmental Committee, any implementation of new legislation or the conclusion of international treaties in TCE protection remains a matter for national governments. Many of the practical measures such as the establishment of royalty collection agencies and support funds equally depend on the intermediary role of national governments.<sup>27</sup> If the distinction between private IP rights and public heritage protection laws is blurred, then the ultimate benefactor of such newly created rights may often, at least initially, be the nation state and the national government rather than the community or the individuals within a community responsible for creating the expressions.

### **TCE protection in the Indonesian Copyright Act**

An example for the blurring of heritage and copyright protection comes from Indonesia. In 1982, Indonesia adopted its first national Copyright Act, and it repealed the previous Dutch colonial legislation of 1912.<sup>28</sup> Indonesia was just one of several developing countries to replace its colonial copyright act and to introduce national copyright protection for the first time during the 1970s or 1980s. To facilitate this step, both WIPO and UNESCO had drafted sets of model provisions in 1976 (the Tunis Model Copyright Law for Developing Countries) and in 1982 (the WIPO/UNESCO Model Provisions on Copyright). In accordance with the state centred development

<sup>25</sup> IGC, WIPO/GRTKF/IC/13/4(b) Rev., Annex I, p.11.

<sup>26</sup> For a critique of this development in the field of environmental governance see Peter Newell, “The Marketization of Global Environmental Governance: Manifestations and Implementations” in Jacob Park, Ken Conca and Matthias Finger (eds), *The Crisis of Global Environmental Governance: Towards a New Political Economy of Sustainability* (London and New York: Routledge, 2008), pp.84–86.

<sup>27</sup> Christoph Antons, “Traditional Cultural Expressions and Their Significance for Development in a Digital Environment: Examples from Australia and Southeast Asia” in Christoph Beat Graber and Mira Burri-Nenova (eds), *Intellectual Property and Traditional Cultural Expressions in a Digital Environment* (Cheltenham, UK–Northampton, MA: Edward Elgar Publishing, 2008), p.299.

<sup>28</sup> Christoph Antons, *Intellectual Property Law in Indonesia* (London: Kluwer Law International, 2000), pp.53–54.

models of the 1960s and 1970s, the Tunis Model Law introduced a folklore protection provision, which left the administration of royalty collection for folkloristic expressions exclusively in the hands of a “competent authority” at the national level. The model provisions of 1982, on the other hand, foresaw royalty collection by a “competent authority” of the state or by the “community concerned”.<sup>29</sup> Indonesia adopted in 1982 the model of the 1976 Tunis Model Law and introduced art.10 of the Copyright Act, which has now with few modifications been taken over into the Copyright Act of 2002. The provision is to be found in a part of the Copyright Act, which bears the heading “Copyright related to works whose author is not known”.<sup>30</sup> This is a reference to art.15.4 of the Berne Convention introduced in 1967 to provide protection to TCEs with no identifiable authors again via a “competent authority” to represent the authors and protect and enforce their rights.<sup>31</sup> Article 10(1) declares categorically that the state holds the copyright to prehistorical and historical works and to “other national cultural objects”. The Indonesian state also holds the copyright according to art.10(2) to folklore and to the so-called “products of popular culture which become common property”. The provision continues with a list of examples of such folkloristic expressions, such as “stories, tales, fairy tales, legends, chronicles, songs, handicrafts, choreographies, dances, calligraphies and other works of art”. Article 10(3) then stipulates that non-Indonesians must obtain a licence from a “relevant agency” if they want to publish or multiply such material. The provision of art.15.4 Berne Convention seems to have inspired art.11 of the Indonesian Copyright Act, which at first sight could also be relevant for TCEs and EoF that are not claimed by specific communities. According to art.11(1), the state holds the copyright in the interest of the author, if the work is unpublished and the author unknown. If such works have been published, the unknown author will be represented by the publisher or again by the state, if both author and publisher are unknown (art. 11(2), (3)). However, apart from the absence of a “competent authority”, whose designation is required by art.15.4 Berne Convention, the provisions on time limitation in the Indonesian Copyright Act make it plain that art.11 in its current form is unsuitable and apparently not meant to apply to expressions of folklore. For while the folkloristic expressions mentioned in art.10(2) enjoy protection without any time limit (art.31(1)a.), time-limits of 50 years after publication or after a work becomes known apply to the works of unknown authors regulated in art.11 (see art.31(1) b. and (2)). Nevertheless, the fact that these various regulations appear together in the same part of the Act as “works of unknown authors” means that there is potential of conflict with regards to expressions of folklore of unknown authors that are not claimed by specific communities and that could also be claimed under art.11. In this case, such “works” would in fact enter the public domain after the end of the limitation period. However, while the wording of art.11 allows for such an

<sup>29</sup> Janice G. Weiner, “Protection of Folklore: A Political and Legal Challenge” (1987) 18 IIC 86–87.

<sup>30</sup> For an Indonesian language version of the legislation see Tim Redaksi Tatanusa (ed.), 7 *Undang-Undang: Rahasia Dagang, Desain Industri, Desain Tata Letak Sirkuit Terpadu, Paten, Merek, Hak Cipta, Perlindungan Varietas Tanaman* (Jakarta: PT Tatanusa, 2005). For an English language version see Yasmon (Rangkayo Sati), *Indonesian Intellectual Property Directory* (Jakarta: Shortcut, 2006) and the website of the Indonesian Directorate General of Intellectual Property Rights at <http://www.dgip.go.id/ebscript/publicportal.cgi?.ucid=2662&ctid=77&type=0> [Accessed September 10, 2009].

<sup>31</sup> WIPO/GRTKF/IC/13/4(b) Rev., Annex I, p.14.

interpretation, it will be more appropriate to regard art.10(2) and (3) as specifically addressing TCEs and, therefore, as the more suitable provision in this context.

Regarding this current “folklore” protection provision of art.10(2) and (3), several aspects are remarkable. First, art.10(4) requires a government regulation for the scheme to become operative and this has never been issued. Secondly, it works with the fiction that folkloristic expressions and pre-historical and archaeological heritage material all constitute “works”, a term which in copyright protection is usually reserved for original expressions of an individual author or of a collective of authors. The Indonesian language knows two terms to refer to a “work”, in the copyright sense, and both are used in the Copyright Act. *Karya* is the more literal translation of “work” and is often used to refer to the works of an author or a composer in ordinary language, whereas *ciptaan* (literally the “creation”) expresses a work of greater individuality and is used in the Copyright Act as the equivalent of the legal concept of “work”. Nevertheless, both terms are used in art.10(2) and (3) with regards to expressions of folklore, so that it can safely be concluded that they are also regarded as works in a copyright sense. Thirdly, the folklore protection provision of art.10(2) mixes material commonly associated with collectively developed folkloristic expressions such as fairy tales and legends with potentially quite individualist expressions that are more often associated with individual copyright for artistic works such as choreographies and calligraphy. This could lead to a potential overlap with individual copyright protection, so that a distinction would have to be made (presumably by the “relevant agency”) as to whether a particular choreography or calligraphy is “modern” or “traditional”.<sup>32</sup> The same would presumably apply to handicrafts, especially to traditional versions of *batik*, which in its modern version of “batik art” is mentioned in art.12(1) of the Copyright Act as an example for individual works. Fourthly, once all of this heritage and folkloristic material has been declared to constitute “works” in a copyright sense and to qualify for copyright protection, the Act puts the Indonesian state as represented by the national government into the position of the copyright holder and administrator of any rights and benefits that may derive from this construct.

### **The distribution of rights and responsibilities between the national government and communities**

When the provision was introduced in the early 1980s, it unsurprisingly raised concerns among those regional communities in Indonesia which actually produce the material. However, the original wording of the provision in the Copyright Act of 1982 declared that the Indonesian state would exercise the copyright in the material “with regards to foreign countries”. This led copyright experts and interested authors at the time to the conclusion that the state’s copyright in this case was restricted to foreigners,

<sup>32</sup> Christoph Antons, “Traditional Knowledge and Intellectual Property Rights in Australia and Southeast Asia” in Christopher Heath and Anselm Kamperman Sanders (eds), *New Frontiers of Intellectual Property Law: IP and Cultural Heritage, Geographical Indications, Enforcement and Over-protection* (Oxford and Portland, Oregon: Hart Publishing, 2005), p.48.

whereas Indonesian citizens would be free to use the material.<sup>33</sup> If one enters one of the large arts and crafts centres in Indonesia’s capital Jakarta, one finds a huge variety of *batik* clothing from Java, paintings from Bali, embroidery from Sumatra, *ikat* weavings from islands such as Flores or Timor and masks and totemic poles from the province of West Papua. At the time of the introduction of the Copyright Act, these many different communities were apparently concerned that the copyright of the state to this material could lead to restrictions for their own traditional uses. According to the writer Ajip Rosidi, the specific wording of the folklore provision and its reference to foreign countries was introduced as a compromise between the government and critics of the draft to alleviate the concerns of local communities.<sup>34</sup> Presumably these concerns extended also to the manner in which traditional material was to be identified, royalties to be collected and how benefits were to be distributed to the producer communities.<sup>35</sup> Under the previous law, the interpretation that Indonesians were generally free to use traditional material could also be collected from an explanatory memorandum to the 1997 revision of the Copyright Act concerning *batik*, which confirmed that traditional *batik* was only protected vis-à-vis foreign countries.

If anything, the discussion about benefit distribution has intensified since the end of the Suharto government in 1998. Indonesia has since then embarked on a policy of administrative and legal decentralisation and the responsibility for many areas of tax collection and financial administration has been delegated from the central government to regional administrators.<sup>36</sup> It is interesting to note that at a time of such widespread decentralisation, the centralised administration of copyright to folkloristic expressions by the national government was reaffirmed and in fact further strengthened in the Copyright Act of 2002. Whereas the Copyright Act of 1982 stated that the Indonesian state would hold the copyright “with regards to foreign countries”, this qualification disappeared with the 2002 amendment. If one wants to speculate about the reasons for this trend, the following propositions could be put forward: first, the Indonesian Government perceives the potential for abuse and rip off of folkloristic material largely as a threat from outside and from foreigners, such as tourists and collectors of traditional art from the industrialised world. As a consequence, the explanatory memorandum to art.10(2) mentions that the provision is intended to “prevent actions by foreign parties which could damage the relevant cultural values”. Thus, a centralised approach is regarded as the most practical step to defend Indonesian culture against misuse by foreigners and to collect royalties on behalf of Indonesia from Western tourists and collectors interested in the material. Potential conflicts between various Indonesian communities or between Indonesian communities and individuals are left unregulated. The role of the state as defender of national

<sup>33</sup> A. Rosidi, *Undang-Undang Hak Cipta—Pandangan Seorang Awam* (Jakarta: Djambatan, 1984), pp.79–80; J.C.T. Simorangkir, *Undang-Undang Hak Cipta 1982*, (Jakarta: UHC, 1982), p.136.

<sup>34</sup> A. Rosidi, *Undang-Undang Hak Cipta—Pandangan Seorang Awam* (Jakarta: Djambatan, 1984).

<sup>35</sup> Antons, *Intellectual Property Law in Indonesia*, 2000, pp.87–88.

<sup>36</sup> On Indonesia’s decentralisation policies see Franz von Benda-Beckmann and Keeber von Benda-Beckmann, “Between Global Forces and Local Politics: Reorganisation of Village Government in Indonesia” in Christoph Antons and Volkmar Gessner (eds), *Globalisation and Resistance: Law Reform in Asia Since the Crisis* (Oxford and Portland, Oregon: Hart, 2007), pp.211–252; Mark Turner and Owen Podger with Maria Sumardjono and Wayan K. Tirthayasa, *Decentralisation in Indonesia: Redesigning the State* (Canberra: Asia Pacific Press, 2003).

culture is also to be found in art.32(1) of the Indonesian Constitution, which requires that:

“the state shall advance the national culture of Indonesia among the civilisations of the world by assuring the freedom of society to preserve and develop cultural values.”

A second reason is the still pressing need for relatively young nation states like Indonesia to consolidate the unity of the nation against separatist tendencies. In many ways it is a tragedy for young Asian nation states that they have to consolidate a still precarious national unity at a time when older nation states in Europe and North America are beginning to move towards larger regional arrangements and at a time when the forces of globalisation provide smaller nations and regions with commercial opportunities of their own.<sup>37</sup> National symbolism is important in this context and traditional cultural expressions play an important role in such national symbolism.

Thirdly, and following on from this, in Indonesia as in many other countries, local and regional cultural expressions are also used to create national culture and national identity symbols. In Indonesia, these are used in politics, but also in tourism campaigns. Of course, the state control of the expressions facilitates their use for such purposes and it may in the long run transform originally local and regional expressions into national heritage.

Interesting to note further is that Indonesia recently introduced protection for geographical indications (GIs), which allows groups of individual users and communities to register GIs related to TCEs such as handicraft. Although the acquisition of such GI protection requires the taking of many bureaucratic hurdles and approval by various government authorities,<sup>38</sup> it is not entirely clear how such individual and community rights stemming from GI protection relate to the government administered copyright scheme, if that would ever become implemented. Four products have meanwhile been registered for GI protection, including the famous Jepara furniture.<sup>39</sup> However, the different and conflicting interests mentioned above have meant that 27 years after the provision was first introduced, a necessary government regulation required in art.10(4) to implement the folklore protection and specify the details has still to be issued. In any case, it seems that the developments have finally overtaken the copyright approach to TCE in Indonesia. The government is working on a draft law to protect TK and TCE in a comprehensive manner. At the same time, other intellectual property laws such as the Copyright Act are being reviewed. The outcome may well be that the folklore protection provision will be deleted in the Copyright Act and that the subject matter will become exclusively regulated via the *sui generis* TK/TCE law.

<sup>37</sup> Antons, “Traditional Cultural Expressions and Their Significance for Development in a Digital Environment: Examples from Australia and Southeast Asia” in *Intellectual Property and Traditional Cultural Expressions in a Digital Environment*, 2008, p.289.

<sup>38</sup> Christoph Antons, “Traditional Knowledge and Approaches in the Asia-Pacific Region” in Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, 2009, pp.58–59.

<sup>39</sup> “Jepara bentuk lembaga verifikasi merek”, August 25, 2009, available on the website of the Directorate General of Intellectual Property Rights, [www.dgip.go.id/ebscript/publicportal.cgi?.ucid=23&id=2407&type=2](http://www.dgip.go.id/ebscript/publicportal.cgi?.ucid=23&id=2407&type=2) [Accessed August 30, 2009].

## Regional disputes about TCEs

Although the Indonesian version of folklore protection in the Copyright Act has remained as a theoretical option on paper only, various regional disputes over traditional songs, music and *batik* have demonstrated, how problematic the national approach to TCE occasionally can become. In view of a common Malay heritage, it is not surprising that many of these disputes have involved Indonesia's ASEAN neighbour Malaysia. In 2007, for example, the use of the folk song "Rasa sayang" for a Malaysian tourism campaign sparked a diplomatic row between the two ASEAN countries, after a member of the Indonesian Parliament urged the Government to sue the Malaysian Tourism Ministry over the use of the song, which in his view was appropriation of Indonesian heritage. He also thought that the Malaysians had appropriated other elements of the Indonesian culture related to *Batik* art and the shadow puppet theatre (*wayang*) in the past.<sup>40</sup> The Indonesian Tourism and Cultural Minister equally wanted to investigate how far Indonesia could claim copyright to the song. The Indonesians believe that the song originated in the Moluccan islands. The Malaysian Tourism Ministry responded on the other hand that the song was widely used throughout the Malay archipelago and was therefore heritage of the Malay islands rather than Indonesia.<sup>41</sup> A heated debate developed on the internet, and both sides attempted to provide evidence for their claims using, among other things, films and other historical material, which was posted on YouTube.

In August 2009, a similar dispute developed over the use of a typical Balinese dance created originally for temple ceremonies as part of a tourism promotion series "Enigmatic Malaysia" on the Discovery Channel.<sup>42</sup> This most recent dispute highlights the importance of traditional culture for tourism, which explains the relevance of TCEs beyond the purely regional context. Like Malaysia, Indonesia also wants to extend cultural tourism and provide opportunities for traditional artists<sup>43</sup> by using its cultural diversity and its heritage of world famous temples and monuments such as for example the Borobudur temple complex in Central Java. The Indonesian Minister for Culture and Tourism sent a letter to his Malaysian counterpart protesting the use of the Balinese dance for the series "Enigmatic Malaysia".<sup>44</sup> Indonesia's President Susilo Bambang Yudhoyono asked the Malaysian Government to respect the sensitivities of the Indonesian people and pointed out that this was not the first incident of this nature.<sup>45</sup> Both he and the Minister for Culture and Tourism thought that such cases

<sup>40</sup> "Malaysia Urges Indonesia to Drop Plans to Sue over Folk Song", *Jakarta Post*, October 8, 2007.

<sup>41</sup> "Rasa Sayang Belongs to all", *The Star Online*, October 3, 2007.

<sup>42</sup> "Indonesian Outrage over a Dance", *Asia Sentinel*, August 25, 2009; Stephen Fitzpatrick, "Malaysia 'Steals' Bali Dance", *The Australian*, August 26, 2009.

<sup>43</sup> "Pemberdayaan Masyarakat Seni Tradisi dalam Industri Pariwisata Budaya", available from the website of the Indonesian Ministry for Culture and Tourism, <http://www.budpar.go.id/page.php?ic=541&id=150> [Accessed August 30, 2009]. See also "Jero Wacik: Daftarkan Karya Budaya ke Hak Intelektual", *Suara Pembaruan*, October 22, 2007, available at <http://www.cabiklunik.blogspot.com/2007/10/jero-wacik-daftarkan-karya-budaya-ke.html> [Accessed August 30, 2009].

<sup>44</sup> "Soal Tari Pendet, Menbudpar Kirim Surat Teguran Keras ke Malaysia", August 24, 2009. <http://www.budpar.go.id/page.php?ic=511&id=5075> [Accessed August 30, 2009].

<sup>45</sup> "Presiden Minta Malaysia Proporsional Terkait Tari Pendet", August 25, 2009, <http://www.budpar.go.id/page.php?ic=511&id=5078> [Accessed August 30, 2009].

could in the future be referred to an Eminent Persons Group formed a few years earlier to mediate in conflicts between the two countries. The Minister also mentioned an informal bilateral agreement concluded in 2008 for similar purposes.<sup>46</sup> Discovery Channel removed the promotional film and issued an apology, while the Malaysian Government pointed out that the film clip was produced by a private company and not by the Malaysian Government.<sup>47</sup>

In the wake of this latest incident, the Minister, other government officials and academics called on the Indonesians to register their cultural expressions. They pointed in this context to a Memorandum of Understanding between the Ministry of Culture and Tourism and the Ministry of Justice and Human Rights. These two departments had together created a registration facility, which since 2007 had registered approximately 600 cultural expressions within the Ministry of Culture and Tourism and approximately 2000 within the Ministry of Justice and Human Rights.<sup>48</sup> This is apparently meant as a preliminary defensive mechanism against claims to the material from outside of Indonesia and as preparation for intellectual property protection, once the relevant mechanisms are in place.<sup>49</sup> In the province of West Kalimantan, the provincial government asked in particular for the registration of TCEs of unknown authorship.<sup>50</sup> As mentioned above, when intellectual property protection for TCEs finally becomes established in Indonesia, it may well be via a new *sui generis* legislation rather than the Copyright Act. A Draft Law on the Protection of Traditional Knowledge and Traditional Cultural Expressions is currently in preparation. Under discussion since 2001, the draft law is expected to be finalised and submitted to the Indonesian parliament in 2010.<sup>51</sup> The new law is expected to cover among other things copyright and patent protection for TCEs and TK and the distribution of benefits between TK/TCE providers and users of the system. According to press reports, it is envisaged at this stage that much of the financial benefits will be for regional government institutions with customary law councils (*dewan adat*) as the first reference point.<sup>52</sup> If a customary law council does not exist, the benefits are supposed to flow to

<sup>46</sup> "RI-Malaysia Punya Perjanjian Tak Formal untuk Selesaikan Sengketa Karya Budaya", August 24, 2009, <http://www.budpar.go.id/page.php?ic=511&id=5075> [Accessed August 30, 2009].

<sup>47</sup> Fitzpatrick, "Malaysia 'Steals' Bali Dance", *The Australian*, August 26, 2009; "Indonesian Outrage over a Dance", *Asia Sentinel*, August 25, 2009.

<sup>48</sup> "Asal Tidak Diklaim, Tari Pendet Dapat Ditayangkan untuk Promosi Pariwisata", August 21, 2009, <http://www.budpar.go.id/page.php?ic=511&id=5072> [Accessed August 30, 2009]; "Menbudpar Kembali Ingatkan Agar Karya Budaya Segera Didaftarkan", August 25, 2009, <http://www.budpar.go.id/page.php?ic=511&id=5077> [Accessed August 30, 2009]; A.S. Nugroho, "Surat Malaysia diperkirakan pekan depan", *Waspada Online*, August 28, 2009, available at <http://www.waspada.co.id/index.php?view=article&catid=17%3Anasional&id=48312> [Accessed August 30, 2009].

<sup>49</sup> "Seniman Bali Desak Pemerintah Pertahankan Tari Pendet", August 24, 2009, available from the website of the Directorate General of Intellectual Property Rights, <http://www.dgip.go.id/ebscript/publicportal.cgi?.ucid=376&ctid=23&id=2403&type=2> [Accessed August 30, 2009].

<sup>50</sup> "Kalbar daftarkan HaKI local", August 28, 2009, <http://www.dgip.go.id/ebscript/publicportal.cgi?.ucid=376&ctid=23&id=2409&type=2> [Accessed August 30, 2009].

<sup>51</sup> "Surat Malaysia diperkirakan pekan depan", *Waspada Online*, August 28, 2009, available at <http://www.waspada.co.id/index.php?view=article&catid=17%3Anasional&id=48312> [Accessed August 30, 2009].

<sup>52</sup> "Hak Cipta dan Paten Budaya Diatur dalam UU Baru", *Republika Online*, December 2, 2008, <http://www.republika.co.id/print/17772> [Accessed August 30, 2009]; T.A. Ryadi, "Lindungi Pengetahuan dan Ekspresi Budaya Bangsa", *Jurnal Nasional*, December 3, 2008, available at [http://www.forumbudaya.org/index.php?option=com\\_content&task=view&id=228&Itemid=61](http://www.forumbudaya.org/index.php?option=com_content&task=view&id=228&Itemid=61) [Accessed August 30, 2009].

the regional government and to the national government, if it concerns TK or TCEs used across the boundaries of various provinces.

## Conclusion

In view of the high expectations when the IGC began its work in 2001, the immediate results have perhaps been somewhat disappointing. However, the Committee had to grapple with extremely complex issues discussed by stakeholders with often very diverging interests such as countries at different levels of development, national governments with an interest in furthering national development objectives and local and indigenous producers and holders of TK/TCEs seeking to obtain an equitable share of the benefits from the use of their knowledge and cultural expressions. From this perspective, much progress has been made in identifying the problems and in creating a much greater awareness of the complexities. The experience with Indonesia's unimplemented copyright provision shows that these complexities continue at the national and regional level. The shift in governance towards “bottom up” models with significant involvement of local communities is laudable, but often not easy to implement in practice. Colonial policies and many years of internal migration in post-colonial nation states often mean that boundaries of communities are difficult to draw, and customary institutions for local government, where they still exist, would have to be resurrected from a long period of decline.<sup>53</sup> The link to land so typical of customary law institutions may be broken and sometimes attempts to re-establish it can lead to significant conflicts over land and resources.<sup>54</sup> It will be interesting to see how the proposed Indonesian *sui generis* legislation will deal with these issues and how it will be accepted by local stakeholders with significant expectations with regards to their future benefits.

What is also becoming increasingly clear is the attractiveness of TCEs as symbols of national unity in diversity, to increase cultural tourism in local and regional settings and to participate in an emerging trade with upmarket, “modern” interpretations and adaptations of traditional cultural material. Here, the IGC's “draft gap analysis” proposal to distinguish more strongly between various TCEs depending on whether commercialisation or the safeguarding of sacred and/or secret material is intended appears as a step in the right direction. Finally, the regional disputes about TCEs show that heritage protection is a serious matter in Asia, as such heritage is still sometimes used to symbolise nation states, political legitimacy and sometimes even to define

<sup>53</sup> M. Chanock, “Branding Identity and Copyrighting Culture: Orientation towards the Customary in Traditional Knowledge Discourse” in Antons (ed.), *Traditional Knowledge, Traditional Cultural Expressions and Intellectual Property Law in the Asia-Pacific Region*, 2009, pp.177–193.

<sup>54</sup> For a critical study of such problems encountered during fieldwork in Indonesia's Central Sulawesi Highlands see T. Murray Li, *The Will to Improve: Governmentality, Development and the Practice of Politics* (Durham & London: Duke University Press, 2007). For a different assessment from fieldwork in West Sumatra see von Benda-Beckmann and von Benda-Beckmann, “Between Global Forces and Local Politics: Reorganisation of Village Government in Indonesia” in *Globalisation and Resistance: Law Reform in Asia Since the Crisis*, 2007, p.212 which found “highly diverse and contested processes with as yet uncertain outcomes that do not correspond with the optimistic picture associated with decentralisation policies, nor with the pessimistic expectations of the critics”.

territorial borders.<sup>55</sup> As more national laws for TCE protection become enacted, dispute resolution mechanisms at the bilateral and regional levels will be important, especially to deal with those TCEs that have been widely spread across various borders.

<sup>55</sup> UNESCO's approval of a world heritage application by Cambodia for a disputed temple complex recently led to a serious border conflict between Thailand and Cambodia, see "Thailand and Cambodia Agree to Cool Things Off", *Asia Sentinel*, October 17, 2008.